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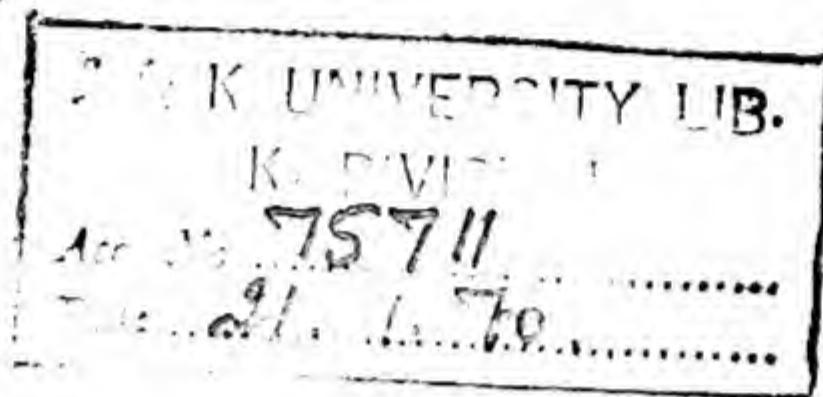
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MADRAS HIGH COURT

1914

Advocate High Court
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" " John Edward Power Wallis, Kt., M.A., Bar-at-Law.

Puisne Judges :

The Hon'ble Sir John Edward Power Wallis, Kt., M.A., Bar-at-Law.

" " Leslie Creery Miller, I. C. S.

" " Chittoor Sankaran Nair, Kt., B.A., B.L., C. I. E.

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" " Charles Frideric Napier, Bar-at-Law.

Temporary Additional Judges :

The Hon'ble Mr. James Herbert Bakewell, LL.B., Bar-at-Law.

" " T. V. Seshagiri Ayyar, B.A., B.L.

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* Indicates Cases of Great Importance.

* * Indicate Cases of Very Great Importance.

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THE ALL INDIA REPORTER

1914 MADRAS COMPARATIVE TABLES

(PARALLEL REFERENCES)

Hints for the use of the following Tables

Table No. I—This Table shows serially the pages of INDIAN LAW REPORTS, for the year 1914 with corresponding references of the ALL INDIA REPORTER.

Table No. II—This Table shows serially the pages of other REPORTS and JOURNALS for the year 1914 with corresponding references of the ALL INDIA REPORTER.

Table No. III—This Table is the converse of the **First** and **Second Tables**. It shows serially the pages of the ALL INDIA REPORTER for 1914 with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I

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N. B.—Column No. 1 denotes pages of I. L. R. 37 MADRAS.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

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N. B.—Column No. 1 denotes pages of others JOURNALS.

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443	1915 " 226	573	1915 M 314	687	" " 656	824	" " 550	952	" " 405
446	" " 683	574	" " 310	695	1914 PC 86	827	" " 554	959	1914 PC 95
451	" " 265	575	" " 321	697	" " 33	831	1914 PC 1	963	" " 137
461	1914 PC 116	577	1914 " 171	699	1915 M 447	847	1915 M 315	965	" " 63
483	" " 66	584	1915 " 590	704	" " 63	849	" " 742	969	1915 M 392
486	1915 M 21	585	" " 355	715	" " 43	853	" " 74	977	" " 599
490	" " 626	587	" " 502	724	" " 116	855	" " 48	981	" " 90
492	" " 50	592	" " 545	726	" " 480	858	" " 717	983	" " 414
493	1914 " 78	595	" " 256	729	1914 PC 65	863	1914 PC 76	989	1914 PC 155
500	" " 55	607	1914 PC 31	731	" " 149	874	1915 M 129	1004	1915 M 417
503	1915 " 33	610	" " 48	733	" " 48	875	" " 483	1007	" " 542
505	1914 " 446	612	1915 M 344	754	1915 M 573	877	" " 719	1012	" " 589
511	" " 77	613	" " 339	758	" " 308	879	" " 37	1015	1914 PC 105
513	1915 " 594	619	1914 PC 140	762	1914 PC 60	881	" " 397	1025	1915 M 370
517	" " 534	635	1915 M 535	767	1915 M 592	882	" " 69	1028	" " 400
519	" " 320	641	" " 654	771	" " 588	887	" " 486	1032	" " 588
520	1914 PC 41	643	" " 330	772	" " 463	900	" " 725	1033	" " 150
528	1915 M 270	645	1914 PC 136	775	" " 335	903	" " 529	1047	" " 358
529	" " 101	648	" " 44	777	" " 33	905	" " 744	1050	1914 PC 67
533	1914 PC 128	649	1915 M 614	779	1914 PC 87	908	" " 236	1059	" " 111
537	1915 M 492	657	" " 88	785	1915 M 133	911	" " 73	1068	1915 M 652
540	" " 307	662	" " 479	794	1914 PC 38	914	1914 PC 97	1070	" " 688
541	" " 322	665	" " 337	799	1915 M 645	928	1915 M 130	1074	" " 659
544	" " 6	667	" " 20	805	1914 " 686	932	" " 386		

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MWN)	A. I. R.	MWN)	A. I. R.	MWN)	A. I. R.	MWN)	A. I. R.	MWN)	A. I. R.
1sup	1915 M 157	106	1914 M 286	231	1914 M 290	352b	1915 M 10	500	1915 M 587
2	Too old	107	" " 297	236	" " 272	354	1914 " 668	501a	" " 319
11	...	108	" " 673	240	" " 210	356	" " 440	501b	1914 " 333
13	...	112	Too old	247	1915 " 107	363	" " 323	502	1915 " 316
16	1914 M 9	118	...	250	1914 " 369	367	" " 464	506	1914 PC 116
24	" " 669	124	1914 M 196	251a	" " 632	368	" " 301	521	" M 341
27	" " 41	131	" " 371	251b	" " 15	372	" " 632	563	" " 384
28	" " 30	137	Too old	253	" " 216	373	" " 285	565	1914 PC 140
38	Too old	142	1914 M 675	256	1915 " 210	374	" " 457	581	" M 708
42	...	144	1915 " 254	264	1914 " 4	376	1915 " 708	585	1914 PC 41
45	1914 M 677	147	1914 " 46	270	" " 306	379	" " 597	593	" " 136
46a	" " 676	149	1915 " 696	273	" " 628	382	" " 312	595	1915 M 519
46b	" " 261	152	1914 " 170	278	" " 192	385	" " 311	606	1914 " 171
52a	" " 280	153	" " 334	282	" " 226	387	1914 " 428	610	1915 " 535
52b	1915 " 770	154	" " 157	286	1915 " 561	388	1915 " 237	614	" " 391
53	1914 " 659	155	" " 369	299	Too old	394	1914 " 712	616	" " 55
55a	" " 657	157	" " 663	309	1914 M 641	396	1915 " 504	618	1914 " 317
55b	" " 253	159	" " 1	310	" " 418	397	1914 PC 111	619	1915 " 534
57	1915 " 689	160	" " 225	314	1915 " 342	405	" " 38	620	1914 " 77
58	1914 " 657	162	" " 140	316	1914 " 251	411	" " 36	622	" " 365
61	" " 170	163	Too old	317	1915 " 446	417	" M 334	623	" " 332
62	" " 209	168	1914 M 453	318	1914 " 368	426	" " 206	624	" PC 149
63	" " 153	169	" " 150	319	" " 470	430	1914 PC 128	631	" " 45
64	1915 " 423	170	Too old	322	" " 366	437	" " 65	636	" " 72
66	1914 " 20	171	1915 M 582	323a	" " 387	441	" " 60	642	1915 M 110
67	Too old	174	1914 " 640	323b	" " 637	449	" " 97	646	" " 23
75	1914 M 714	175	Too old	324	" " 330	462	" " 67	648	" " 481
79a	" " 640	178	1914 M 639	327	" " 362	472	" " 105	651	" " 88
79b	" " 159	179	" " 669	329	" " 256	481	1915 M 571	654	1914 PC 48
81	" " 42	184	Too old	333	1915 " 117	483	1914 " 61	671	1915 M 344
85	" " 2	197	1914 M 429	339	1914 " 469	484	" " 376	672	" " 63
88	" " 21	198	" " 661	340	" " 200	485	" PC 66	679	1914 PC 92
90a	" " 15	200	" " 465	344	1915 " 16	488	" M 113	684	1915 M 387
90b	" " 141	205	" " 162	345	1914 " 639	490	1915 " 12	689	" " 723
92	" " 18	216	" " 287	346	" " 360	496	1914 " 144	692	" " 517
95	" " 382	220	" " 222	347	" " 370	497a	1915 " 35	695	1914 PC 87
97	" " 206	221	" " 351	348	" " 126	497b	" " 414	703	1915 M 380
98	" " 17	222	" " 37	351	" " 352	498	" " 225	705	" " 425
99	1915 " 95	228	" " 377	352a	" " 637	499	1914 " 120		

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MWN) A. I. R.	MWN) A. I. R.	MWN) A. I. R.	MWN) A. I. R.	MWN) A. I. R.
706 1915 M 528	763 1915 M 685	795a 1915 M 588	864 1915 M 762	900 1915 M 639
708 " " 447	766 " " 722	795b " " 27	865 " " 484	903 " " 637
711 " " 308	767 " " 386	796 " " 61	867 1914 " 139	906 " " 651
713 " " 613	768 " " 573	797 " " 321	870 1915 " 613	909 " " 90
714 " " 653	771 " " 193	798a " " 356	871 " " 541	910a " " 726
715 " " 71	776 " " 234	798b 1914 " 78	873 " " 750	910b " " 591
717 " " 33	778 " " 756	803 " " 311	874 1914 " 686	911 " " 759
718 " " 627	779 " " 746	804 " " 694	875a 1915 " 749	912 " " 584
728 " " 345	782a " " 618	807 1914 PC 76	875b " " 83	915 " " 85
733 1914 " 68	782b " " 357	817 1915 M 642	876 1914 PC 33	916 " " 760
735 1915 " 656	784 " " 74	821 " " 50	883 1915 M 770	919a " " 79
738 " " 547	785 " " 552	822 " " 363	889 " " 414	919b " " 725
740 " " 461	788 " " 548	831 " " 360	891 " " 382	921 " " 150
742 1914 " 328	790 " " 92	832 " " 480	894 " " 600	934 " " 762
745 1915 " 554	791 " " 506	833 " " 463	896 " " 602	936 " " 606
747 1914 PC 129	792 " " 307	834 " " 419	897 " " 586	939 " " 575
754 " " 137	793 " " 508	835 1914 PC 1	899 " " 589	948 1914 PC 31
757 " " 82	794 " " 735			

15 Cr. L. J. & 22 to 25 Indian Cases=All India Reporter.

Cr.L.J. & I.C.	A. I. R.	Cr.L.J. & I.C.	A. I. R.	Cr.L.J. & I.C.	A. I. R.	Cr.L.J. & I.C.	A. I. R.	Cr.L.J. & I.C.	A. I. R.
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Please refer to COMPARATIVE TABLE No. II in A. I. R. 1914 Lahore.

TABLE No. III

Showing seriatim the pages of ALL INDIA REPORTER, 1914 MADRAS with corresponding references of other REPORTS, JOURNALS AND PERIODICALS including the INDIAN LAW REPORTS.

N. B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1914 MADRAS. Column No. 2 denotes corresponding references of other REPORTS and JOURNALS.

A. I. R. 1914 Madras=Other Journals

A.I.R.) Other Journals	A.I.R.) Other Journals	A.I.R.) Other Journals	A.I.R.) Other Journals
1 22 I C 76	21 26 M L J 72	42 14 M L T 547	61 (1) 24 I C 176
15 M L T 100	14 M L T 589	1914 M W N 81	1914 M W N 483
1914 M W N 159	1914 M W N 88	22 I C 157	15 Cr L J 440
2 22 I C 73	23 22 I C 17	38 Mad 302	61 (2) 24 I C 845
1 M L W 8	1 M L W 55	15 Cr L J 13	26 M L J 352
1914 M W N 85	24 (1) 22 I C 25	14 M L T 453	15 Cr L J 533
4 22 I C 60	24 (2) 22 I C 14	22 I C 193	64 24 I C 796
1914 M W N 264	26 22 I C 9	38 Mad 775	26 M L J 616
8 22 I C 53	26 M L J 66	15 M L T 98	66 24 I C 622
9 22 I C 44	14 M L T 591	1914 M W N 147	67 4 M L W 399
14 M L T 537	1913 M W N 1047	1 M L W 59	24 I C 413
1 M L W 65	30 22 I C 18	22 I C 144	68 16 M L T 123
1914 M W N 16	37 Mad 286	22 I C 168	1914 M W N 733
15 (1) 22 I C 41	26 M L J 10	36 Mad 453	24 I C 667
1914 M W N 90	14 M L T 596	15 Cr L J 24	70 24 I C 491
15 (2) 22 I C 40	1 M L W 11	24 I C 145	77 1 M L W 511
1914 M W N 251	1914 M W N 28	26 M L J 511	1914 M W N 620
16 22 I C 89	37 22 I C 4	15 M L T 403	24 I C 257
38 Mad 553	14 M L T 579	15 Cr L J 409	78 15 Cr L J 559
1 M L W 19	1 M L W 80	24 J C 852	24 I C 967
17 22 I C 39	1914 M W N 222	37 Mad 175	1 M L W 493
14 M L T 588	41 22 I C 1	24 I C 175	16 M L T 52
1914 M W N 98	38 Mad 680	1 M L W 500	1914 M W N 798
18 22 I C 37	26 M L J 113	15 Cr L J 439	81 24 I C 803
1914 M W N 92	14 M L T 559	24 I C 849	84 24 I C 790
20 (1) 22 I C 35	1914 M W N 27	24 I C 676	85 24 I C 825
20 (2) 22 I C 34	42 22 I C 54	58 (1) 24 I C 143	86 24 I C 766
1914 M W N 66	38 Mad 667	58 (2) 24 I O 611	1 M L W 206
21 22 I C 39	26 M L J 47	59 24 I C 822	

A. I. R. 1914 Madras—Other Journals—(Contd.)

A.I.R.) Other Journals				A.I.R.) Other Journals				A.I.R.) Other Journals				A.I.R.) Other Journals			
86	23	I C	951	135	24	I C	754	171	1	M L W	577	252	24	I C	722
87	24	I C	786		38	Mad	655		16	M L T	199	253	15	Cr L J	29
	1	M L W	245		1	M L W	89		1914	M W N	606		1914	M W N	55
88	24	I C	895	137	22	I C	324	174	38	Mad	997		22	I C	285
	26	M L J	567		15	Cr L J	52		14	M L T	454	256	26	M L J	343
	15	M L T	411		1	M L W	156		1913	M W N	937		1914	M W N	329
91	24	I C	696	138 (1)	24	I C	879		22	I C	107		23	I C	82
	26	M L J	460		1	M L W	371	191	23	I C	859	258	37	Mad	119
95	24	I C	943	138 (2)	22	I C	174	192	26	M L J	260		15	Cr L J	180
	38	Mad	788		15	Cr L J	30		15	M L T	107		22	I C	756
96	24	I C	784	139	24	I C	957		1914	M W N	278	261	38	Mad	766
	1	M L W	236		38	Mad	797		22	I C	697		26	M L J	275
97	24	I C	1007		1914	M W N	867	196	15	Cr L J	225		15	M L T	151
98	38	Mad	795		15	Cr L J	549		1914	M W N	124		1	M L W	22
	24	I C	374	140	22	I C	390		23	I C	177		1914	M W N	46
	26	M L J	573		1914	M W N	162	200	26	M L J	269		22	I C	99
99	24	I C	283	141 (1)	24	I C	974		1914	M W N	340	264	23	I C	547
	1	M L W	298		15	Cr L J	566		22	I C	834	267FB	38	Mad	589
100 (1)	24	I C	764	141 (2)	22	I C	404	203	15	M L T	339		26	M L J	523
	1	M L W	180		1913	M W N	1019		23	I C	522		15	M L T	356
100 (2)	15	Cr L J	472		14	M L T	545	204	22	I C	661		1	M L W	433
	24	I C	352		26	M L J	37	206 (1)	15	M L T	148		24	I C	106
101	27	M L J	66		1914	M W N	90		1914	M W N	97	269	15	Cr L J	192
	24	I C	39	143 (1)	24	I C	878		22	I C	275		22	I C	768
105	26	M L J	310	143 (2)	24	I C	976	206 (2)	28	M L J	75	270	15	M L T	224
	24	I C	134		15	Cr L J	568		1914	M W N	426		22	I C	953
106	1	M L W	350	144 (1)	24	I C	865		23	I C	576	271	23	I C	564
	24	I C	383		1914	M W N	496	209	14	M L T	534	272	38	Mad	837
107	1	M L W	369	144 (2)	24	I C	976		1914	M W N	62		26	M L J	238
	24	I C	940		15	Cr L J	568		22	I C	291		1	M L W	212
108 (1)	26	M L J	363	145	22	I C	597	210 (1)	23	I C	542		1914	M W N	236
	24	I C	380		1	M L W	181	210 (2)	1	M L W	136		22	I C	826
108 (2)	26	M L J	373	149 (1)	24	I C	872		1914	M W N	240	275	22	I C	941
	24	I C	375	149 (2)	22	I C	764		22	I C	627	277	38	Mad	773
109	28	M L J	297		38	Mad	552	216	26	M L J	368		15	M L T	124
	24	I C	741		15	Cr L J	188		15	M L T	217		1	M L W	132
111	1	M L W	329	150 (1)	24	I C	871		1914	M W N	253		15	Cr L J	171
	24	I C	377	150 (2)	22	I C	721		23	I C	14		22	I C	747
113 (1)	24	I C	724		1914	M W N	169	218	22	I C	551	278	15	M L T	121
113 (2)	24	I C	534		15	Cr L J	145	219	23	I C	828		23	I C	371
	1914	M W N	488		28	M L J	132	222 (1)	15	M L T	162	280 (1)	1914	M W N	52
114	24	I C	372	151 (1)	24	I C	870		1914	M W N	220		22	I C	548
	26	M L J	514	151 (2)	22	I C	635		22	I C	277	280 (2)	15	Cr L J	192
116 (1)	24	I C	781		15	M L T	374	222 (2)	38	Mad	832		22	I C	768
	1	M L W	232	153	22	I C	302		26	M L J	185	281	38	Mad	500
116 (2)	24	I C	353		1914	M W N	63		15	M L T	143		22	I C	566
117 (1)	24	I C	864	154	22	I C	687		23	I C	235	285	1	M L W	333
117 (2)	24	I C	512	155	22	I C	692	225	26	M L J	348		1914	M W N	373
118 (1)	24	I C	320		26	M L J	210		22	I C	515		22	I C	972
	26	M L J	517		1	M L W	191		15	M L T	160	286 (1)	1	M L W	178
118 (2)	24	I C	709	157	22	I C	411		1914	M W N	160		15	Cr L J	186
	1	M L W	100		1914	M W N	154	226	15	M L T	307		1914	M W N	106
119 (1)	24	I C	806	158	22	I C	500		1913	M W N	1034		22	I C	762
119 (2)	24	I C	703	159 (1)	22	I C	498		1914	M W N	282	286 (2)	15	M L T	146
120	24	I C	688		1	M L W	1		23	I C	264		22	I C	831
	1914	M W N	499		1914	M W N	79	233	22	I C	271	287FB	38	Mad	823
121 (1)	24	I C	351	159 (2)	22	I C	423	239	15	Cr L J	291		26	M L J	227
	26	M L J	598		15	Cr L J	71		23	I C	499		15	M L T	156
	15	Cr L J	471	160	22	I C	931	240	15	M L T	418		1	M L W	172
121 (2)	24	I C	771		1	M L W	225		23	I C	528		1914	M W N	216
	1	M L W	31	162	37	Mad	462		26	M L J	508		22	I C	775
	15	M L T	163		22	I C	899	241	15	Cr L J	285	290	22	I C	609
126FB	22	I C	870		26	M L J	189		22	I C	493		1	M L W	102
	38	Mad	972		1	M L W	251	244	15	M L T	372		1914	M W N	231
	26	M L J	166		1914	M W N	205		23	I C	248	293	38	Mad	550
	1	M L W	162	170 (1)	22	I C	293	246	22	I C	306		15	Cr L J	161
	1914	M W N	348		1914	M W N	152	250	22	I C	572		22	I C	737
128	24	I C	363	170 (2)	38	Mad	643	251	26	M L J	375	295	26	M L J	221
	38	Mad	1036		14	M L T	485		15	M L T	235		22	I C	947
	26	M L J	532		1914	M W N	61		1	M L W	294	296	37	Mad	281
131	22	I C	769		22	I C	260		1914	M W N	316		22	I C	789
	36	Mad	533	171	22	I C	936		23	I C	544	297 (1)	15	M L T	102

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A. I. R. 1914 Madras = Other Journals (Contd.)

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A.I.R.) Other Journals	A.I.R.) Other Journals	A.I.R.) Other Journals	A.I.R.) Other Journals
297 (1) 1914M W N 107 22 I C 774	351FB 38 Mad 954 26 M L J 183	380 (2) 15 Cr L J 283 23 I C 491	432FB 12 M L T 292 17 I C 308
297 (2) 23 I C 251 26 M L J 267	1 M L W 160 15 M L T 149	381 (1) 23 I C 810 26 M L J 509	433 16 M L T 33 15 Cr L J 371
298 1 M L W 230 24 I C 779	1914M W N 221 23 I C 321	381 (2) 1 M L W 428 23 I C 519	435 23 I C 739 37 Mad 231
299 24 I C 56 300 (1) 24 I C 95	15 Cr L J 337 1914M W N 351	382 (1) 1 M L W 239 15 Cr L J 281	23 M L J 236 1912M W N 721
300 (2) 24 I C 939 301 26 M L J 467	23 I C 725 15 M L T 198	382 (2) 1914M W N 95 22 I C 279	12 M L T 119 15 I C 738
1914M W N 368 23 I C 572	23 I C 129 355 (1) 23 I C 597	384 38 Mad 695 1 M L W 271	437 1 M L W 234 23 I C 422
303 24 I C 86 304 39 Mad 476	355 (2) 23 I C 124 15 M L T 203	438 (1) 22 I C 689 438 (2) 26 M L J 217	23 I C 619 37 Mad 418
24 I C 96 305 26 M L J 225	358 23 I C 110 359 (1) 23 I C 545	439 15 M L T 305 23 I C 533	15 I C 334 440 (1) 26 M L J 224
1 M L W 203 15 M L T 214	359 (2) 1 M L W 296 15 M L T 220	385 23 I C 815 16 M L T 58	440 (2) 38 Mad 684 26 M L J 576
22 I C 799 306 1 M L W 96	360 23 I C 336 15 M L T 338	386 23 I C 946 1 M L W 440	23 I C 612 15 M L T 186
1914M W N 270 22 I C 524	1914M W N 346 23 I C 530	387 (1) 27 M L J 617 15 Cr L J 299	1914M W N 356 22 I C 555
308 26 M L J 435 24 I C 726	1 M L W 208 23 I C 1	387 (2) 1914M W N 323 23 I C 753	37 Mad 420 13 M L T 118
311 1914M W N 803 24 I C 423	38 Mad 883 15 M L T 237	388 26 M L J 638 15 M L T 78	15 I C 587 1 M L W 505
312 (1) 26 M L J 215 22 I C 351	1914M W N 327 23 I C 102	445 22 I C 604 22 I C 283	23 I C 802 37 Mad 408
312 (2) 22 I C 780 317 1914M W N 618	26 M L J 255 15 M L T 246	446 22 I C 283 23 I C 815	22 M L J 447 1912M W N 393
24 I C 127 318 1 M L W 412	1914M W N 622 23 I C 390	392 23 I C 984 395 (1) 23 I C 813	11 M L T 209 15 I C 378
24 I C 445 319 36 Mad 585	366 (1) 1 M L W 300 1914M W N 322	395 (2) 23 I C 852 23 I C 824	15 M L T 95 23 I C 413
15 Cr L J 197 22 I C 981	366 (2) 1 M L W 394 15 M L T 377	396 15 Cr L J 295 23 I C 503	15 Cr L J 77 1914M W N 168
22 I C 241 322 15 Cr L J 417	23 I C 377 26 M L J 258	451 23 I C 1008 37 Mad 70	22 I C 429 26 M L J 406
323 1914M W N 363 24 I C 153	368 1 M L W 241 1914M W N 318	453 23 I C 408 399 (1) 23 I C 1008	1 M L W 403 23 I C 909
327 26 M L J 479 22 I C 399	369 (1) 26 M L J 257 15 M L T 205	454 37 Mad 70 23 M L J 593	37 Mad 387 14 M L T 199
328 38 Mad 1120 27 M L J 112	369 (2) 1 M L W 243 1914M W N 250	456 12 M L T 500 17 I C 445	15 I C 623 26 M L J 205
1914M W N 742 24 I C 474	23 I C 464 1914M W N 155	457 26 M L J 356 15 M L T 263	1914M W N 374 23 I C 831
330 38 Mad 779 26 M L J 235	1 M L W 302 1914M W N 324	459 22 I C 919 37 Mad 275	22 I C 852 37 Mad 529
15 Cr L J 207 22 I C 991	370 15 Cr L J 359 23 I C 727	460 24 M L J 62 1912M W N 1176	23 M L J 189 15 I C 299
332 1914M W N 623 22 I C 976	371 26 M L J 74 1914M W N 131	462 13 M L T 110 17 I C 508	26 M L J 518 23 I C 560
338 27 M L J 58 1914M W N 501	424 14 M L T 478 22 I C 253	464 15 Cr L J 373 23 I C 741	1914M W N 367 23 I C 553
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MADRAS HIGH COURT

A. I. R. 1914 Madras 1

SADASIVA AIYAR AND SPENCER, JJ.

Palaniandi Pillai and another—Plaintiffs—Appellants.

v.

Papathi Ammal and others—Defendants—Respondents.

Appeal No. 229 of 1912 Decided on 21st November 1913, against order of Dist., Judge, Trichinopoly, D/- 2nd July 1912 in Execution Petn. Revn. 8 of 1912.

(a) Limitation Act S. 7—Decree in favour of joint Hindu family—Major managing member in position to give discharge—Minority of other members cannot extend period of limitation.

Where a decree was in favour of a joint Hindu family and the managing member, a major, was in a position to give a discharge without the concurrence of the other members, the minority of the latter will not extend the period of limitation allowed for the execution of the decree : 25 Mad. 431 (F.B.), Dist.

[P 1 C 2]

(b) Civil P. C., O. 23, R. 1 (3)—R. 1 (3) is inapplicable to execution proceedings.

Order XXIII, rule 1 (3) Civil P. C., does not apply to execution proceedings. [P 1 C 1]

T. Narasimha Aiyangar—for Appellant.

M. Govinda Rajulu—for Respondents.

Judgment.—The learned District Judge's view that the present execution application is barred by the petitioners' having withdrawn their previous application without liberty is erroneous. [See Order XXIII rule 4, of the Code of the Civil Procedure, which shows that Order XXIII, rule 1, clause (3), of the Code of the Civil Procedure does not apply to proceedings in execution.]

As regards the question of limitation, *Periasami v. Krishna Ayyan* (1), relied on by the learned District Judge, was decided on the wording of sections 7 and 8 of the old Indian Limitation Act (XV of 1877). The new Indian Limi-

tation Act (IX of 1908), section 7, which corresponds to the old Limitation Act, section 8, enacts that when one of several persons jointly entitled to make an application for execution is under disability and when a discharge can be given without his concurrence, time will run against all. But it would be otherwise if such discharge could not be given without his concurrence. The old section 8 did not apply to execution petitions, and hence the observation in *Periasawmi v. Krishna Ayyan* (1), based on the absence of any reference to execution applications in section 8 of the old Act, are no longer relevant in considering the question of limitation as applicable to execution applications.

In the present case, if the eldest son (the eldest brother of the appellants) was the managing member of an undivided family consisting of himself and his minor brothers, he could give such discharge without their concurrence. But the execution application seems to allege, that he and the minors and their father had all become divided, and hence that the minors are entitled to a two-thirds share apart from their divided eldest brother. It may be (as the respondents' Vakil contends) that this allegation is an after-thought, intended to get over the bar of limitation, the previous execution application having been withdrawn after the plea of limitation was put forward against it. But the District Judge ought to have inquired into the question whether the eldest brother could have given a discharge in respect of the interest of the appellants also and then arrived at a decision on the question of limitation.

We, therefore, set aside the order of the learned District Judge and remand the case for fresh disposal with reference

(1) [1902] 25 Mad. 431 (F.B.).

to the above observations. We would suggest that the lower Court might, before the inquiry, call for a written statement from the petitioners as to the dates and details of the alleged partition between themselves and their father and how the appellants are entitled to a two-thirds share and whether they are entitled to that two-thirds share jointly or in equal moieties separately, whether the division was by metes and bounds and so on.

Costs hitherto incurred will be costs in the cause.

V.S./R.K.

Case remanded.

* A. I. R. 1914 Madras 2

WHITE, C.J. AND OLDFIELD, J.

C. Rukmani Ammal—Appellant.

v.

C. Seethammal—Respondent.

Original Side Appeal No. 20 of 1913, Decided on 30th October 1913 from the Judgment of Bakewell, J., D/- 10th December 1912.

*(a) Civil P. C., O. 21, R. 18—To constitute cross-decrees parties need not be arrayed as plaintiffs or defendants and vice versa—Essential feature is both should have decrees in their favour.

In order to constitute cross-decrees, it is not necessary that the parties should be arrayed as plaintiffs and defendants and *vice versa* in both suits. It is sufficient if they are plaintiffs and defendants in both, provided both have decrees in their favour, though in one case, it may be a decree for payment of money, and in the other, a mere order as to costs.

[P 2 C 1, P 3 O 1]

(b) Civil P. C., O. 21, R. 18—Cross-decrees—Application for execution of decree in one suit—Order passed upon it but execution stayed till other party's application for execution—Application made by other party within the period allowed—Lower Court ordering satisfaction of cross-decrees—Per *White, C. J.* (Order held to be right—Per *Oldfield, J.*, contra).

A held a decree against B. who held a cross-decree against A. On an application for the execution of his decree by A., an order was passed giving liberty to A. to execute his decree but directing that execution of the order should be stayed for three days to enable B. to apply for execution of the cross-decrees. B. put in the application for his cross-decree within three days. The Court thereupon ordered that satisfaction be entered of the larger decree to the extent of the small decree.

Held. (Per *White, C. J.*)

that the order was right as these were applications for execution of the cross-decrees made to the Court.

[P 3 C 1]

(Per *Oldfield, J.*, dissenting).

that the order was passed without jurisdiction as A.'s application had been finally disposed of before B.'s application was put in: 13 I. A. 106 (P. C.), 24 All. 481, *Foll.*

[P 3 C 2]

V. K. Venugopal Naidu—for Judgment-creditor.

White, C. J.—In this case, the appellant brought a suit in 1894 (No. 187 of 1894) against the husband of the respondent and obtained a decree. The husband died before the appellant applied for execution of this decree, leaving one Seethammal, the respondent, as his legal representative. In 1909, the husband of the respondent being dead, the appellant brought another suit (No. 333 of 1909) against the respondent as the legal representative of her deceased husband. That suit was dismissed and a decree was given against the appellant for costs. In October 1912, an application was made by the appellant for liberty to execute the decree which she had obtained in the Suit of 1894, the application being against Seethammal, who is described as the widow and legal representative of the deceased defendant in the Suit of 1894. An order was made on the 8th of October giving liberty to the plaintiff in the suit of 1894 (the appellant) to execute the decree in that suit. The order directed that execution of the order should be stayed until the 11th October 1912; to enable Seethammal to apply for execution of the decree for costs in her favour in the suit which had been brought against her in 1909. On the 11th October 1912, an application was put in by Seethammal for the execution of her decree for costs. This application was heard in December 1912, and the order then made by the learned Judge was that satisfaction of the decree in the Suit of 1894 should be entered up to the extent of the amount due to the judgment-creditor in the Suit of 1909 (the respondent), and that execution in the suit of 1894 should issue for the balance only.

It has been argued that the learned Judge had no jurisdiction to make this order. It was said that this was not a case "where applications were made to the Court for the execution of cross-decrees in separate suits etc." within the meaning of Order XXI, rule 18 (1). It was also argued that in the Suits of 1894 and 1909, each party did not fill

the same character and that, consequently, the rule by reason of provision of sub-rule 3 (a) did not apply. It is, no doubt, the case that, when the application by the respondent for the execution of the decree in the Suit No. 333 of 1909 was made, an order had already been made on the application by the appellant in the Suit of 1894. Execution of the order in the Suit of 1894 had, however, been stayed for the express purpose of enabling the respondent to apply for leave to execute her decree for costs in the Suit of 1909. In these circumstances, I think the two applications are "applications made to the Court for the execution of cross-decrees in separate suits etc," within the meaning of rule 18, sub-rule 1.

Then, as to the question whether each party fills the same character in both suits, it seems clear that the class of cases contemplated by Order XXI, rule 18, sub-rule 3 (a) is where A. sues B. and gets a decree and B. sues A. and gets a decree. In the case now before us, both suits were brought by the appellant. She was successful in the first suit and obtained a decree. She was unsuccessful in the second suit and an order for costs was made against her. In the first suit, she sued the respondent's husband, but her application for leave to issue execution was against the respondent (Seethammal) as legal representative of her deceased husband. In the second suit, she sued the respondent as legal representative of her deceased husband. The plaintiff is the same party in both suits. The application for execution in the first suit was against Seethammal, her husband being dead when the application was made. Seethammal was liable to pay money (as legal representative) in execution in first suit. She was entitled to receive money (as legal representative) in execution in the second suit. Thus each party filled the same character so far as execution proceedings were concerned, though the judgment-debtor in the first suit was Seethammal's husband, and the judgment-creditor in the second suit was Seethammal as her deceased husband's legal representative. The Vakil for the appellant has not called our attention to any authority which can assist us, and the respondent does not appear. I am not prepared to

say the order was made without jurisdiction. I would dismiss the appeal.

Oldfield, J.—I agree with the learned Chief Justice that these are cross-decrees and that the present parties to them filled the same character in both suits. Under the earlier decree, the respondent, no doubt, represents the original judgment-debtor, her husband. But both suits were for the same relief, an award of maintenance against the person in possession of the family estate; and it is in virtue of her inheritance of that estate that the respondent is liable under the decree in the one suit, and entitled to recover costs under the decree in the other.

The remaining question is whether Order XXI, rule 18, can be applied to the facts before the learned Judge and can justify his order. It is necessary for the application of the rule that both the decrees in question shall be before the Court for execution. This was recognized in *Rewa Mahton v. Ram Krishen Singh* (1), *Chajmal Doss v. Lal Dharam Singh* (2); and, though these decisions were given when the Code in force required the production of both decrees to the Court, the present wording ("where applications are made.....capable of execution at the same time by such Court") supports the same conclusion. Here when the order under appeal was passed, only one application, that of the respondent, was pending, that of the appellant having been disposed of finally, and it had been in fact so disposed of before the respondent's application was made. The order on the latter application was, therefore, passed without jurisdiction.

It is, no doubt, the case that the appellant's order permitted her to execute only after three days, this suspension being granted to enable the respondent to apply. But the order is in terms of a final grant of execution after that period has expired. It seems to me then impossible to regard the appellant's application as still pending, when the respondent's was made, or to disregard the final manner in which the former was disposed of. To uphold the order under appeal by doing so, it will not merely be necessary to condone a formal irregularity. A decision will be

(1) [1887] 13 I. A. 106; 14 Cal. 18 (P.C.).

(2) [1902] 24 All. 481.

entailed that the learned Judge's first order having become final, he had jurisdiction to modify it by his second, though his powers in review had not been invoked, and though it is not clear that there were valid grounds for invoking them.

The result of interference with the learned Judge's order will be unfortunate, since two sets of proceedings in execution may be necessary and the appellant will have to return the greater part of what she recovers. This could have been avoided, if either the learned Judge had adjourned the disposal of the appellant's application to enable the respondent to file hers or if the respondent had appealed against or obtained a review of the order against her. And if the respondent had appeared in this Court, it might have been possible to give time to enable her to adopt one of these expedients, if necessary, extending the period available for the latter. But it does not seem to me that the hardship of her case, as it comes before us, would justify disregard of the anomaly above referred to. I am, therefore, constrained to differ from the learned Chief Justice. I would allow the appeal, but without costs. No order is necessary as to costs before the learned Judge, since he made none.

By the Court — The result is, the appeal is dismissed.

V.S./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 4

WHITE, C.J. AND OLDFIELD, J.

V. Balakrishnudu—Appellant.

v.

G. Narayanaswami Chetti—Respondent.

Original Side Appeal No. 87 of 1912 Decided on 25th April 1913 from the original order of Wallis, J., D/- 14th October 1912.

(a) Limitation Act Art. 115—Money deposited on condition of its return on happening of future contingent event—Suit for recovery brought after event is suit for compensation within Art. 115—Arts. 60, 66 and 120, are inapplicable — Limitation Act, Arts. 60, 66 and 120.

A suit to recover money deposited with another on condition that he should return the same, on the happening of a future contingent event, and brought after the happening of the event is a suit for "compensation for the breach of any contract not in writing registered" within the meaning of Article 115 of

Schedule 2 of the Limitation Act, and is barred if not instituted within three years from the date on which the event happened. Neither Article 60, nor 66 or 120 governs such a suit. 18 *Mad.* 390; 4 *All.* 3; 10 *Cal.* 1033; 15 *Mad.* 380; *Foll.* [P 6 C 2]

(b) Hindu Law — Will — Will by Hindu widow having life interest in property—Executor cannot sue to recover property.

An executor under a Will executed by a Hindu widow cannot sue to recover property over which she had only a life-interest and had no disposing power. [P 7 C 1]

T. Ethiraja Mudaliar—for Appellant.

S. Sreenivasa Aiyangar and C. P. Ramaswami Aiyar—for Respondent.

White, C. J.—In this case, the plaintiff sues as the executor of one Nagammal under a Will bearing date the 20th December 1903. Nagammal died in the beginning of 1904. Probate was not taken out by the executor till 1910. We have only to consider two of the defences which were raised by the defendant in his written statement and relied upon before the learned Judge. One is the defence of limitation. The other is that the plaintiff is not entitled to sue, as claimed in the plaint. I shall have to refer to some dates in order to make my observations with reference to the question of limitation intelligible.

On the 15th August 1900, three documents were executed, *viz.*, Exhibits B, VII and VIII. The transaction in connection with which these documents were executed, is certainly of a very curious character. Nagammal was the sister of the defendant's father. When the documents were executed it was apprehended that a suit would shortly be instituted by the party who claimed to be the reversioner of Nagammal's son, for the purpose of establishing his claim to the son's estate. It was thought desirable by Nagammal and by the defendant that steps should be taken in order that, if that suit should be successful, the money which might be held to form part of the estate of Nagammal's son should be screened from the plaintiff. Exhibit VII is executed by Nagammal, and in it she purports to give a receipt for the money which is claimed in this suit. The document purports to show that the moneys in the hands of the defendant had been repaid to Nagammal. It is accompanied by a letter (Exhibit VIII) to the same effect. At the same time, the

defendant executed a document, Exhibit B, which we have to consider with some care. The general purport of it is that the receipt was a sham, that Nagammal had never got the money and that the money, notwithstanding the receipt, remained in the possession of the defendant on the terms mentioned in the document. That is what happened on the 15th August 1900. Then on the 25th November 1901, the suit, which had been anticipated when this curious transaction took place, was in fact instituted. In March 1902, the reversioner's suit was dismissed by the District Court. In January 1904, Nagammal died. In December 1904, this Court dismissed an appeal against the decree of the District Court in the reversioner's suit. On the 22nd November 1910, the present suit was instituted.

It seems to me that there are two possible views which may be taken with regard to this question of limitation. I think it may reasonably be said that the defendant ought not, for the purpose of getting the benefit of the law of limitation, be allowed to rely on this Exhibit B, which is part and parcel of a transaction which is admittedly a sham. If that view is adopted, the parties would be relegated to the state of affairs, whatever they were, when the original transaction took place, *i. e.*, when this sum of money changed hands, when it passed out of the hands either of Nagammal or of her husband and passed into the hands of the defendant's father, whose estate has now become vested in the defendant. In that view, if the plaintiff could make out that the original relations between the parties, having regard to the original transaction, brought the case within Article 60 of the 1st Schedule to the Limitation Act, I think it might reasonably be said that the plaintiff was entitled to the benefit of the Article. But then the question arises:—"Is there any evidence, (setting aside Exhibits B, VII and VIII for the moment), of the original transaction which entitles the plaintiff to say that that Article 60 applies?" We have had great assistance from Mr. Ethiraja Mudaliar in this case, and we have examined the evidence very carefully. But, speaking for myself, I have come

to the conclusion that there is really no evidence as to the original transaction which would warrant us in saying that the case comes within Article 60, that is to say, evidence which goes to show that the money was deposited under an agreement that it should be payable on demand. We have been referred to various documents in connection with this part of the case, which are also material with regard to the questions which I will consider afterwards. We have Exhibit II, which is the Will of Nagammal's husband, dated 1879. There is really nothing in the document which throws any light upon the question as to how this sum of money came into the hands of the defendant's father. Then we have the pleadings in a suit brought by Nagammal's husband's father against Nagammal and against the executor appointed by her husband under Exhibit II. I can find nothing in the pleadings in that suit which can be said to throw any light upon the question. So it seems to me that if the plaintiff is to succeed in showing that the present claim is not barred by limitation, he must do so, and can only do so, by virtue of the terms of Exhibit B.

Exhibit B is in the following terms:—"You have given to me a receipt that you have received from me Rs. 10,680-9-9 deposited with me by you till the disposal of your Pangali's suit to come off on the 15th August 1900. But I have not paid you the above said amount. I shall, after the disposal of your Pangali's suit, pay you the above said amount, together with interest thereon at 12 annas per cent per mensem from this date. I shall, in the meantime, pay you for the Court and house, etc., expenses, required by you. After the disposal of the above suit, I shall pay you the amount due to you according to account." Now, if there was any evidence as to the original transaction and the relations between the parties in connection therewith, it might very well be that the provisions of this document would not alter the relations so far as the question of the law of limitation was concerned. But as I have said, there is practically no evidence of the original transaction and, therefore, the plaintiff is driven to rely upon Exhibit B. Now, in that view what is the Article to be applied? The plaintiff contended before Mr. Justice

Wallis and argued before us that the proper Article was Article 145.

The first question is:—Was Mr. Wallis J., right in holding that Article 145 did not apply? If it did apply, the period is no less than 30 years. The very fact that the period of limitation is so long goes some way to indicate, to my mind, that the legislature intended that the transaction to which so unusually a long period of limitation is applicable should not be the sort of transaction which is of every day occurrence. the lending of money and an agreement to pay on demand or on a specific date. I entirely agree with Mr. Justice Wallis in the conclusion at which he has arrived, and for the reasons that he states, that the deposit in this case is not within Article 145. I would only add one other reason and that is that the words are "against a depositary or pawnee to recover moveable property deposited or pawned." The word "pawnee" which occurs in conjunction with the word "depositary" seems to be wholly inappropriate to the case of money.

Then, treating the case with reference to the provisions of Exhibit B, can we say that Article 60 applied? There have been numerous decisions as to the distinction, not a very easy one to state, between money lent within Article 59 and money deposited within Article 60. One thing, I think, is clear, that, where the word 'deposited' is used in Article 60 it is used in a different sense from the word 'depositary' in Article 145. It is used rather in the sense of a deposit account as contra-distinguished from a current account. I think that every case must be decided with reference to the fact of that particular case. That was the rule laid down in the case of *Perundevitayar Ammal v. Nammalvar Chetti* (1), and I think that has been generally accepted. It seems to me, although I was a little doubtful at first, that this cannot be said to be a deposit which is payable on demand. The express words are "deposited with me by you till the disposal of your Pangali's suit." Then there is the provision that the defendant will pay Nagammal for the "Court and house expenses," which I suppose means the law expenses and household expenses required by her.

Then there is a future provision,

(1) [1895] 18 Mad. 390.

"after the disposal of the suit, I shall pay you the amount due to you according to account." It may be that under this agreement, Nagammal was entitled to say:—"I want so much for household expenses and I want so much for law expenses," but I do not think it can be said, on the true construction of Exhibit B, that the money deposited was payable on demand. If this is the right view as to the construction of the document, that rules out Article 60.

The plaintiff then asked us to say that Article 120 applies. There are numerous decisions to the effect that unless it is clear that no other specific Article is applicable, the Courts ought not to apply Article 120; and, as I am not satisfied that Mr. Justice Wallis was wrong in holding that there is a specific Article applicable to this case, my opinion is that we ought not to apply Article 120. Mr. Justice Wallis' view was that either Article 66 or Article 115 applies. Article 66 is "on a single bond, where a day is specified for payment." Now a single bond is a written engagement for payment of money without a penalty [that is the definition adopted by the Allahabad High Court in *Lachman Singh v. Kesri* (2)]. I feel no difficulty in holding that this is a single bond. As to the question "where a day is specified for payment," I should be disposed to hold that here there is a day specified for payment. The day, or the time, specified for the payment is the happening of an event which was in the contemplation of both the parties when the undertaking was given. However that may be, I think that Mr. Justice Wallis was certainly right with regard to Article 115. I think this is a claim for compensation for breach of an agreement 'not in writing registered' and not here specifically provided for. Under Article 115, the period of limitation is three years, from the time "when the contract is broken or when the breach in respect of which the suit is instituted occurs or where the breach is continuing when it ceases". That would make the time three years from the failure to pay by the defendant after the disposal of the suit; and if this Article is applicable, (and I have come to the conclusion that it is), then we

(2) [1882] 4 All. 3.

must support the judgment of Mr. Justice Wallis on this part of the case and hold that the claim is barred by limitation. With regard to Article 115, our attention has been drawn to two authorities, *Vide Rameswar Mandal v. Bam Chand Roy* (3) and *Ramasami v. Muttuswami* (4), which are in accordance with the opinion which I have expressed.

The other defence is raised in the third issue, "Is the plaintiff entitled to sue as claimed in the plaint?" In regard to this defence, the learned Judge says: "I have also come to the conclusion on the third issue that the plaintiff is not entitled to maintain the present suit, because the money sued for belonged to her husband and his son after him and, when she succeeded as heir to her son, she only took a woman's estate for life, and on her death the property passed to the heirs of her son as last male owner and they were the proper persons to sue for it." As regards the question whether the plaintiff is the proper person to sue, I have referred to documents which have been put in evidence in connection with the question of limitation. Nagammal's own Will refers to a sum of Rs. 2,000 which, the Will states, was given to her as *stridhanam* by her mother and she refers to the money in question in the present suit as 'my ready money' but that really takes us very little way as evidence that the money claimed in this suit was money over which Nagammal had disposing power. It may be that there is no presumption against its being her money, but the onus is on the plaintiff to show that this sum of money was money in which she had an absolute interest and not money, as the defendant contends, in which she had only a life-interest. The Will of Nagammal's husband dates so far back as 1879. That Will (Exhibit II) again refers to Rs. 2,000 as the *stridhanam* of Nagammal and it proceeds to appoint his brother-in-law (wife's brother), who is the father of the defendant, as executor of the Will. But there is nothing in that Will which can be relied upon as showing that this money was the absolute property of Nagammal. Then, we have the pleadings in the suit brought by

Nagammal's husband's father against Nagammal and against her husband's executor, the father of the present defendants. In the pleadings in that suit we find references to this Rs. 2,000 but nothing further which assists the plaintiff with regard to this part of the case. We may take it that there is evidence that Nagammal had Rs. 2,000 as *stridhan*, but it seems to me there is no evidence on which we can hold that this sum of Rs. 10,000 or 11,000 was absolutely hers. The learned Judge was satisfied that that was not made out and I am certainly not prepared to differ from him. It seems to me that there is a good deal of force in the observation that, if Nagammal honestly believed that this house was her own property (if it were her own property the reversioner of her son would not touch it), she would not have thought it necessary or desirable to join in a scheme and protect the property by means of false statements, property which under the law would be hers.

Then there is another consideration which weighed with Mr. Justice Wallis, and which also seems to have considerable bearing on the question; that is the delay. Nagammal's Will was in 1903 and her death was in the beginning of 1904. Probate was not taken out until 1910. That to my mind goes a long way to indicate that the executor and those who advised him at any rate were in considerable doubt as to whether this Rs. 11,000 was *stridhanam* or the absolute property (as representing the *stridhanam*) of Nagammal. Then there was another aspect of this part of the case which was presented by Mr. Ethiraja Mudaliar. He contended that it was not open to the defendant to raise the defence that the plaintiff was not entitled to sue as executor, and he suggested that this case was analogous to the case where the defendant seeks to set up a *jus tertii*. It seems to me that there is no analogy between this case and that class of cases. Here the executor is suing on the ground that the estate of Nagammal as regards this Rs. 11,000 has become vested in him. The defence is that the estate could not vest in him because, the estate being only a life-estate, there was no estate to vest in anybody after the death of

(3) [1884] 10 Cal. 1033.

(4) [1892] 15 Mad. 380.

Nagammal. I do not see any ground of estoppel on which the defendant is precluded from saying, "You sue as executor in respect of property which you say vested in you. I say it never vested in you as executor. My title is at least as good as yours and I have the money."

For the reasons which I have stated, I think the learned Judge was right on both points and I think the appeal must be dismissed with costs.

Oldfield, J.—The question whether the amount dealt with in Exhibit B is payable on demand is important and I was at first inclined to hold that it was so repayable. I wish to say that I now adopt the defendant's argument on this point. No doubt, the amount would have been repayable on demand during Nagammal's life-time. Since after her death, however, there was no such demand, the starting point for a suit for its recovery by her legal representatives will presumably be the date of the disposal of the suit by the Pangali, which is contemplated in Exhibit B. With this remark, I concur in the decision of the learned Chief Justice.

V.S./R.K.

Appeal dismissed.

* A. I. R. 1914 Madras 8

TYABJI, J.

Muttathil Krishna Menon and others—
Petitioners.

v.

Collector of Malabar and others—
Respondents.

Civil Revn. Petn. No. 57 of 1912, Decided on 14th November 1913 from order of Dist. Judge, South Malabar in Civil Misc. Appeal No. 23 of 1911.

* Civil P.C., O. 21, R. 89—Deposit of money by judgment-debtors—Application to set aside sale by one judgment-debtor—He can take advantage of sums deposited by other judgment-debtors.

It is not necessary that a judgment-debtor applying to set aside a sale under Order XXI, rule 89 of the Civil Procedure Code, should deposit the entire amount mentioned in the sale proclamation, he can take advantage of the sums deposited by the other judgment-debtors provided that the entire amount mentioned in the sale proclamation is fully made up and the decree-holder is in a position to draw the full amount from Court: 23 Bom. 723, Dist. [P 9 C 1]

*T. R. Ramachandra Aiyar—*for Petitioner.

*J. C. Rozario and -A. Siva Rama Menon—*for Respondents.

Judgment.—The question before me is whether under O. XXI, rule 89, of the Civil Procedure Code, the sale referred to in the petition should be set aside.

With reference to items 2, 3 and 4 it is argued that the sale must be taken to have taken place not on the 20th March 1911, but on the 3rd April, when the sales regarding all the items were completed. I am unable to accede to that argument, and the application with reference to those items was, therefore, barred by limitation.

With reference to the other items, the question is whether the petitioner deposited in Court the sums referred to in clauses (a) and (b) of rule 89. That question again depends upon whether or not the sums deposited by the other judgment-debtors should be added, for the purposes of rule 89, to the sums actually deposited by the petitioners. If all these sums are taken together, they make up the sum that ought to be deposited for setting aside the sale. The lower Courts have decided that the sums deposited in Court to the credit of the decree-holder by the other judgment-debtors cannot be said to have been received by the decree-holder and that, therefore, the sale cannot be set aside. They have held so on the authority of *Trimbak Narayan v. Ramchandra Narasingrao* (1). In that case, the sale was of two properties, for Rs. 420 and Rs. 584 respectively, and the judgment-debtor wished to set aside the sale only of the latter property. He alleged that the lands sold for Rs. 420 had been purchased by the purchaser at the sale as a *benamidar* for himself, viz., the judgment-debtor. The Court in giving its judgment does not allude to this allegation that the purchase had been made *benami* and proceeds on the basis that the Rs. 420 paid as purchase-money were paid on behalf of the purchaser and not the judgment-debtor.

In these circumstances, they held that the decree-holder might under section 315 of the old Code be prevented from drawing out the money so deposited and that, therefore, that sum could not be said to have been received by the decree-holder within the section corresponding to the present rule 89 of Order XXI.

(1) [1899] 23 Bom. 723.

That case is, therefore, distinguishable from the present one in that the deposit here is not by the purchaser but by the judgment-debtors. The decision in Appeal against Order No. 82 of 1911, *Ramanatha Aiyar v. Subramania Aiyar* appears to me to show that Benson and Sundara Aiyar, JJ., were inclined to think, that, if the sum is in Court and though not actually received by the judgment-creditor but entirely at the disposal of the judgment-creditor so that if he wishes he can receive the money immediately, in that case he will be taken to have received it under rule 89. The passage to which I refer is as follows: "Where a party applying under rule 89 to set aside a sale has his money in Court, we think that an application by him to the Court to apply that money for the payments required under Order XXI, rule 89, may be taken to be sufficient to satisfy the requirements of the rule." It is true that in that case, the decree-holder consented to consider the deposit in Court as received by him. In the present case also, the decree-holder does not object to consider the sums deposited already as having been received by him, and the point has been taken before me only on behalf of the purchasers. I am bound by the decision of Mr. Justice Benson and Mr. Justice Sundara Aiyar, and I think I ought to follow it in the present case. The sales therefore, with reference to items other than 2, 3, and 4 will be set aside.

I will not disturb the order as to costs made by the lower Courts and the parties in this Court will bear their own costs.

V.S./R.K.

Sale set aside.

* A. I. R. 1914 Madras 9

SADASIVA AIYAR AND SPENCER, JJ.

Subbaiya Mudaliar — Plaintiff — Appellant.

v.

Thulasi Mudaliar and others — Defendants—Respondents.

Second Appeal No. 602 of 1912, Decided on 5th November 1913, from order of Sub-Judge, Negapatam in Appeal Suit No. 129 of 1911.

(a) **Hindu Law — Partition** — (Per *Spencer, J.*)—In partition suits Courts should adjust equities by taking into consideration properties lying outside British India.

It is one thing to hold that in a suit for partition the Court has no power to order the par-

tition of immovable property lying outside British India and quite another thing that in adjusting the equities prevailing between the parties, the Court should not take into consideration properties lying outside British India.

In adjusting such equities, the Court should proceed on a consideration of the position of the family at the time of alienation, and should act as though partition had taken place before the alienation of the alienor's share: 25 *Mad.* 690; 9 *I.C.* 596, 11 *B. H. C. R.* 76; 23 *Bom.* 597; 18 *Bom.* 389; 1 *Ves. Sen.* 444, *Foll.* [P 14 C 2]

* (b) **Hindu Law—Partition** — (Per *Spencer, J.*)—**Madras School** — Suit to recover share in property improperly alienated without praying for complete division of other properties lies.

A suit by a member of a Hindu family to recover his share in a portion of the family property improperly alienated, without claiming a complete division, will lie in this Presidency. 7 *I.C.* 559 (*F.B.*), *Foll.* [P 15 C 1]

(c) **Hindu Law—Debt — Father — Antecedent debt—Meaning of.**

A debt which was to arise in future, through the failure of the consideration, owing to the plaintiff's objecting to the sale by his father, could not be treated as an antecedent debt due at the time of sale, for the purpose of validating that sale: 16 *I.C.* 835, *Foll.*; 23 *Mad.* 89, *Ref.* [P 11 C 2]

(d) **Hindu Law—Partition** — (Per *Sadasiva Aiyar, J.*)—Plaintiff cannot be compelled in partition suit to include properties in foreign territory.

A plaintiff could not be compelled to include in the suit for partition, properties situated in Foreign Territory, and of which he was in enjoyment for more than 16 years: 23 *Bom.* 597; 20 *I.C.* 958, *Foll.*; 1 *Ves. Sen.* 444, *Dist.*; 29 *Cal.* 315 and 17 *I.C.* 758, *Ref.* [P 13 C 1]

(e) **Hindu Law — Partition** — (Per *Spencer, J.*)—Suit for partition by son against father and alienee of family property dismissed on ground of fraud — (Per *Sadasiva Aiyar, J.*, contra).

Where, in a suit for partition, brought by son against his father and an alienee of the family properties, for his share in such properties, it was found that the father had gifted to the son the whole of the family properties in French Territory, that he had alienated the properties in British Territory for Rs. 800 of which Rs. 350 was held to be for a family purpose and the remainder not:

Held, Per Spencer, J.

(1) that the plaintiff's suit should be dismissed;

(2) that the decree of the lower Court disallowing the plaintiff's claim on the ground of fraud was proper. [P 15 C 1]

(*Sadasiva Aiyar, J.*, dissenting).

C. V. Ananthakrishna Aiyar—for Appellant.

S. Sreenivasa Aiyangar — for Respondents.

Sadasiva Aiyar, J.—The plaintiff is the appellant in this case. The suit

was brought for the partition of the only properties which he and his father, the 1st defendant, owned in British Territory near Negapatam. The plaintiff was born on the 25th of August 1888. At that time, he and his father owned the plaint properties in British Territory worth Rs. 800 and certain immovable properties in Keraikal, French Territory, worth about Rs. 4,000. The plaintiff and his father became joint owners of these properties on the plaintiff's birth. The father, the 1st defendant, had hypothecated the plaint properties in 1881 long before the plaintiff was born and Rs. 350 became due under that hypothecation bond in May 1891. In May 1891, the 1st defendant sold the plaint properties in British Territory for the proper value of such properties, namely, Rs. 800 under the sale-deed, Exhibit II, to the 4th defendant's father. Out of the purchase-money of Rs. 800, Rs. 350 went in discharge of the hypothecation debt due under Exhibit I, while the remaining Rs. 450 was received in cash by the 1st defendant. It is not proved that this Rs. 450 was required for any family necessity or to discharge any antecedent debt of the 1st defendant. These are the facts found by the lower Appellate Court, which finding, of course, is to be accepted in second appeal.

It will be seen from these facts that the sale of the plaint properties took place when the plaintiff was less than three years old. The plaintiff attained majority on the 25th August 1906 and he brought this suit on the 25th August 1909, just within the period of limitation allowed him by law for setting aside his father's alienation.

Two other facts may be noted before we proceed to the question of law argued in this case. In October 1891, the 1st defendant executed a security bond, Exhibit A, in favour of the 4th defendant's father, his vendee, for Rs. 200 as security for the losses to which the 4th defendant's father may be put, if and when the plaintiff, who was, (as I said before) a child of three then, should, after he attained age, "object to the sale" of the plaint lands by his father. This security bond further says that it should have effect for 18 years from the date of that bond i.e., till October 1909,

but that after the said period of 18 years, "the security bond shall cease to have effect by itself and be of no use afterwards."

The other fact I refer to is that, in 1897 when the plaintiff was a boy of about nine, his father, the 1st defendant, made a gift of all his properties in French Territory to his son, the plaintiff, the plaintiff's mother accepting the gift on behalf of the plaintiff (See Exhibit 4). These being the facts, the lower Appellate Court dismissed the plaintiff's suit with costs, and its reasons may be summarised thus :—(a) After transferring all his family properties in French Territory to the plaintiff, the 1st defendant has instigated his son, the plaintiff, to bring this suit to defraud the 4th defendant, the son of the 1st defendant's vendee (and the 5th defendant claiming under the 4th defendant); (b) The gift deed, Exhibit IV of 1897, by the 1st defendant to the plaintiff, was obtained fraudulently by the plaintiff; if the plaintiff had not so fraudulently obtained the gift, the plaint lands could easily be allotted to the share of the 1st defendant by effecting a partition of all the properties both in French Territory and British Territory between the plaintiff and the 1st defendant, and the plaint lands so allotted to the share of the 1st defendant would then belong to the 4th and 5th defendants solely and injustice could be prevented. But the plaintiff "took care to get a gift deed, Exhibit IV, in his favour" and has "brought this suit to defraud" the 1st defendant's vendees (see end of paragraph 9 of the learned Subordinate Judge's judgment). (c) The properties given as a guarantee against the plaintiff's objection to the sale of the plaint lands are situated in French Territory; that security has now become useless as the 18 years' period mentioned in that security bond lapsed during the pendency of this suit, and the security bond is now useless to the defendants Nos. 4 and 5.

The first reason, it seems to me, is irrelevant because the moral guilt of the plaintiff's father in instigating his son cannot deprive the son of his legal rights under the modern Hindu Law, whatever may be the strict view of the ancient Hindu Law and the *Shastras*. As regards the second ground, the learned Subordinate Judge, in paragraph nine of his

judgment, seems to charge the plaintiff himself with fraud in getting the gift deed, Exhibit IV, in 1897 from his father. The plaintiff was a boy less than nine years old, when the gift deed was made of the properties in French Territory by his father to him and I am unable to see how this boy could be convicted of fraud. In short, there is absolutely no evidence that this gift deed, executed more than 12 years before this suit was brought, was tainted with fraud. As regard the third ground, mentioned by the Subordinate Judge, assuming that the security bond, Exhibit A, has now become useless, I do not see that the plaintiff's rights can be affected thereby. The 4th defendant's father was negligent in not having obtained an unconditional security bond instead of a bond which was to remain in force only for 18 years.

Thus, the three reasons given by the Subordinate Judge to support his decision against the plaintiff seem to me to be untenable. The respondent's Vakil, however, urged some new contentions which may be formulated as follows:—

(1) though only Rs. 350 was the antecedent debt which existed on the date of the sale to the 4th defendant's father, the 1st defendant, the father, received Rs. 450 in cash also on that date. If the sale-deed is now set aside in favour of the plaintiff so far as his half share is concerned, there would be a failure of consideration to the extent of Rs. 400 which is the price of the plaintiff's half share. The 1st defendant, the father, would be bound to repay Rs. 400 to the 4th defendant. That debt might be treated as an antecedent debt and the sale of the plaintiff's half share might be validated as made for this antecedent debt. (The respondent's learned Vakil did not put forward this argument in the words and in the order I have above stated it, but so far as I could follow his arguments, this appeared to me to be the gist of that argument). (2) His next argument was that the father, the 1st defendant, was entitled to sell the plaintiff's half share alone to discharge the antecedent debt of Rs. 350 and he might be deemed to have sold under Exhibit II the plaintiff's half share for the antecedent debt of Rs. 350 *plus* Rs. 50 received in cash and to have sold the father's own half

share for the remaining Rs. 400 out of Rs. 50 received in cash on that date. If so, the sale of the plaintiff's half (it was argued) was legally validated and could not be contested by him. (3) It was next contended that, even if there was necessity to pay all the antecedent debt of Rs. 350, a sale of property worth Rs. 800 should be deemed wholly valid on the analogy of cases of alienation by Hindu widows, that is, it was argued that a Hindu widow in order to discharge her husband's debt was not bound to sell exactly that area of property which would fetch the exact sum required to discharge the debt, but could dispose (if it was more convenient to do so) of a larger area of property for a larger amount. As regards the first contention, it seems to me that a debt which was to arise in future through the failure of consideration owing to the plaintiff's objecting to the sale by his father could not be treated as an antecedent debt due at the time of sale for the purpose of validating that sale.

As regards the second contention it seems to me that the answer is that the father, when he sold the entire property for Rs. 800 (made up of the antecedent debt of Rs. 350 and the ready cash payment of Rs. 450) did not purport to divide the transaction into two halves, one transaction being the sale of his own share for Rs. 400 out of the Rs. 450 received in cash and the other transaction being the sale of his minor son's share for the Rs. 350 antecedent debt and Rs. 50 received in cash. Sundara Aiyar, J. and myself held in *Vadivalam Pillay v. Natesam Pillay* (1):—"Where one of two co-parceners of a Hindu joint family sells property belonging to both and half the consideration only is found binding on the family, the consideration for the sale must, in the absence of anything apparent to the contrary, be distributed over the whole property sold in proportion to the value of each part and that "therefore, in a suit by other co-parcener for recovery of his half share from the vendee the plaintiff would be entitled to recover the same only on payment of his share, *i. e.* half of that portion of the purchase money which went towards the discharge of the debts binding on both." [In that case,

(1) [1912] 16 I. C. 835.

we dissented from *Marappa Gounden v. Rangaswami Goundana* (2)]. The respondent's learned Vakil, however, argued that in the case of a father's antecedent debt, the division (of the sale transaction) in the manner contended for by the alienee in *Vadivalam Pillay v. Natesam Pillay* (1) but disallowed by Sundara Aiyar, J., and myself, could be allowed, though, in the case of a debt borrowed by a managing member for family necessity, [which was the case of *Vadivalam Pillay v. Natesam Pillay* (1)], such a division could be allowed. I am unable to make any distinction in principle between the antecedent debt of a father which is treated as equal to a debt contracted for the benefit of the family (so far as the son is concerned) and a debt really contracted for the benefit of the family in respect of the application of the legal principles laid down in *Vadivalam Pillay v. Natesam Pillay* (1). In *Suraj Bunsu Koer v. Sheo Prasad Singh* (3), their Lordships say:— "Hence, right of the coparceners in an undivided Hindu family governed by the law of *Mitakshara*, which consists of a father and his sons, *do not differ* from those of the co-parceners in a like family which consists of undivided brethren, *except* so far as they are affected by the peculiar obligation of paying their father's debts which the Hindu Law imposes upon sons (a question to be hereafter considered), and the fact that the father is in all cases naturally, and, in the cases of infant sons, necessarily, the manager of the joint family estate." I am, therefore, clear that, in this case, the sale of the entire lands for a sum of Rs. 800 of which Rs. 350 only was the father's antecedent debt can be divided (if it can be divided at all) only into the sale of the father's half share for Rs. 175 antecedent debt (as Rs. 175 only was the father's half share of Rs. 350 antecedent debt) and Rs. 225 received in cash and into the sale of the son's share for a like sum of Rs. 175 antecedent debt and a like sum of Rs. 225 received in cash.

Coming to the third contention, reliance was placed by the respondent on the decision in Second Appeal No. 1429

of 1912, recently decided by Miller and Tyabji, JJ., and on some other cases. No doubt, it has been held in several cases that when the greater portion of the money obtained by a widow by sale of a defined block of lands inherited by her from her husband was required to discharge her husband's debt, it is unreasonable to hold that she ought to, and could, have sold that particular large fraction of the block whose proportionate value would have been exactly equal to the debt which had to be discharged, that is, that a purchaser would have been available to purchase that fraction alone, on this view that sale-deed as a whole has been upheld in such cases in favour of the alienee. In Second Appeal No. 1429 of 1912, the widow had to raise more than Rs. 1,000 to discharge her husband's debt and she sold one property for Rs. 700 and another property for Rs. 600 and discharged the debt of Rs. 1,022. It was decided that both sales might be upheld subject to the purchaser under the Rs. 600 sale being asked to pay the reversionary heir on charge of the property sold, the amount of Rs. 200 and odd which was not required by the widow to discharge any debt of her husband. It will be seen that even out of the Rs. 600 purchase-money, the major portion went to discharge the husband's debt in that case. On the other hand, where the amount required to meet a family necessity was only one-half of the value of the property sold, Sundara Aiyar, J., and myself held, in the above case of *Vadivalam Pillay v. Natesam Pillay* (1) that the sale should be set aside so far as the co-parcener, who did not join in the sale, was concerned, he being ordered, however, to pay the proportionate share of the debt really due by both the co-parceners to the alienee.

Having dealt with the three contentions strongly pressed by the respondent's learned Vakil, I may notice shortly one other contention of his, namely, that under the ruling of *Koer Hasmat Rai v. Sundar Das* (4), the plaintiff should pay the whole Rs. 800 purchase-money before recovering even his half share of the property sold. In the first place, the case of *Koer Hasmat Rai v. Sundar Das* (4), though quoted

(2) [1900] 23 Mad. 89.

(3) [1880] 5 Cal. 148 (P. C.).

(4) [1885] 11 Cal. 396.

by the learned District Munsif in the case of *Virahbadra Gowdu v. Gurusvenkata Charlu* (5) in support of his decision, was not followed by Subramania Aiyar and Davies, JJ., in that case; the said learned Judges followed *Sivaganga Zemindar v. Lakshmana* (6), which held that "there was no equity in favour of the purchaser from the father" in respect of that half of the purchase-money which was sought to be made liable on the son's half share. I have also, in considering the first contention, given my reasons for holding that the purchase-money paid in cash cannot be treated as an antecedent debt which could be made a charge on the son's half share of the properties. Lastly, I might state [following *Ramacharya v. Anantacharya* (7), which was approved in *Purushottam v. Atmaram* (8)], that, even if the gift deed, Exhibit IV, be held invalid, a co-parcener's right to get his half-share by partition of the properties belonging to the co-parcenary in British India cannot be affected by the existence of co-parcenary properties out of British India and I do not think that the equity pointed out by their Lordships in the recent Privy Council decision, reported as *Ramkishore Kedarnath v. Jainarayan Ramrachpal*, (9), could enable a Court in British India to enforce division of properties situated outside British India. Besides, their Lordships expressly guard themselves by stating as follows:—"Their Lordships think that on the present pleadings, it is open to Jainarayan to set up such a case, but express no opinion as to its validity either in law or fact." The respondents' learned Vakil suggested rather than relied on the case of *Penn v. Lord Baltimore* (10), during the course of the argument. I do not think that the rights of Courts of Equity in England can be invoked against the strict provisions of section 16 of the Civil Procedure Code. I think it is difficult to argue, for instance, that a suit for possession of immoveable property in Tinnevely could be brought in the Tanjore Court, simply because the

defendant resides in Tanjore and could be arrested in Tanjore if he refuses to obey the decree of the Court directing him to deliver possession of the property in Tinnevely. To borrow the language of Harington, J. in *Hara Lal Banerjee v. Nitambini Debi* (11) "the jurisdiction of Courts in India, it must be borne in mind, is limited by the express terms of the Statute Law; the question, therefore, has to be decided by reference to the words of the Statute Law and not by a consideration of the jurisdiction exercised by Courts of Equity in England." [See also *Aruna Chella Chettiar v. Muhtiah Chettiar* (12)]. The plaintiff again cannot be compelled to sue for the division of properties, the entire interest in which has been enjoyed by him for 16 years adversely to his father from 1897, under the gift-deed, Exhibit IV.

In the result, I would set aside the judgment of the Subordinate Judge and give a preliminary decree for the plaintiff that, on his paying Rs. 175 into the District Munsif's Court within three months of this date, he do recover half share in the plaint properties and direct that a final decree be passed by the District Munsif for the possession of the half share after appointing Commissioners to divide, if necessary, and taking the other usual steps to give effect to the preliminary decree. I would make no order as to costs in any Court, in case the plaintiff is given this final decree for partition on his depositing Rs. 175. If he fails to do so, the suit will stand dismissed with costs in all Courts.

Spencer, J.—The facts of this case may be briefly stated as follows: In 1891, a Hindu father alienated a part of his ancestral family property in British India for a sum of Rs. 800, of which Rs. 350 represented an antecedent debt and Rs. 450 was a fresh advance. All the remaining family property in British India was subsequently conveyed away under sale-deeds about which there were disputes which were settled, before judgment. Six years later, he gifted the remainder of his property worth Rs. 4,000, which was situated in French Territory, to his son, the plaintiff. The plaintiff's father is

(5) [1899] 22 Mad. 312.

(6) [1886] 9 Mad. 188.

(7) [1894] 18 Bom. 389.

(8) [1899] 28 Bom. 597.

(9) [1918] 20 I. C. 958=40 Cal. 966.

(10) 1 Ves. (Sen) 444.

(11) [1902] 29 Cal. 315.

(12) [1913] 17 I. C. 758.

the first defendant in the suit and the 4th and 5th defendants are transferees from the purchaser, Venkatachala Mudali. The son now seeks to set aside the alienation as having been made without necessity; and, though, he was successful in the first Court, the Subordinate Judge on appeal held that this suit had been brought by the son at his father's instigation when the security-bond given by the 1st defendant to Venkatachala Mudali, the father of the 4th defendant, to safeguard the rights of the vendees, was about to expire, and with the intent to defraud the vendees. He dismissed the suit with costs observing that, if the plaintiff had brought a suit for a partition without first obtaining fraudulently a gift of the properties in French Territory, the plaintiff lands could have been allotted to the father's share without disturbing the vendees.

Mr. C. V. Anantha Krishna Aiyar, Vakil for the appellant, contends that the lower Appellate Court erred in taking into calculation the existence of family property in a foreign jurisdiction in an attempt to equalise the shares of parties to a partition, and though this point was not distinctly taken in his grounds of appeal, he quotes the decision of *Purushottam v. Atmaram* (8), which follows *Ramacharya v. Ananthacharya* (7), in support of his view.

Now, it is one thing to hold, as was done in *Ramacharya v. Ananthacharya* (7), that in a suit for partition, the Court had no power to order the partition of immoveable property lying outside British India, though even this position may be open to doubt in view of the leading English case of *Penn v. Baltimore* (10), in which the Court of Chancery enforced an agreement made between parties who were both before the Court, when the agreement related to the boundaries of two Foreign Provinces. It is quite another thing to argue that in adjusting the equities prevailing between the parties to a suit instituted for covering separate possession of one share of family property after division, the Court should not take note of the fact that the father's share outside the jurisdiction of the Court, which has since become the property of the son and is worth Rs. 4,000, was in value far more than enough to satisfy the debt of

Rs. 450 for which the father's share might have been made exclusively liable in a partition, if one had taken place before or at the time of alienation.

Aiyyagari Venkataramayya v. Aiyyagari Rammayya (13) and *Chinnu Pillai v. Kalimuthu Chetti* (14) are the authorities for the view that in working out the equities arising on a partition, the Court should proceed on a consideration of the position of the family at the time of the alienation and should act as though partition had taken place before the alienation of the alienor's share. There can be no doubt that at an entire partition of the family property, the Court can, and should, so marshal the properties among the sharers as to allot the portion upon which an incumbrance not binding on the family has been created by one member of the family to that member's share at partition. [Vide *Udaram Sitaram v. Ranu Panduji* and *Venku Panduji* (15), and Mayne's Hindu Law, 7th Edition, page 487, section 367]. What reason can there be for not observing such an equitable principle in a case where owing to the rights of all the members of the family having become merged in one individual, no partition is necessary and there are no competing equities of other co-parceners?

In *Vadivalam Pillay v. Natesam Pillay* (1), the Judges, of whom my learned brother was one, observed :—"The right of a co-parcener to sell his own property being now well-recognized, the equities as between the vendee and the other co-parceners have to be adjusted by the Court in the best manner possible." That was a case of a sale by one brother of property belonging to himself and another co-parcener for a consideration, only one-half of which was binding on the family. This is a stronger case, being the case of a sale by a father of family property for a consideration nearly one-half of which was binding on the son as being an antecedent debt. [Vide *Venkataramanaya Panthalu v. Venkataramana Doss Pantulu* (16)]. Even as regards the rest of the consideration, an obligation would lie on the son to pay the debt unless it was contracted for an immoral purpose.

(13) [1905] 25 Mad. 690.

(14) [1911] 9 I.C. 596.

(15) 11 B.H.C. 76.

(16) [1906] 29 Mad. 200.

In *Rama Rishore Kedarnath v. Jainarayan Ramrachpal* (9), the Privy Council, in a suit brought by sons against a recipient of a share of the ancestral estate given by a Hindu father to a stranger, held that it was competent to the Court before granting any relief to insist on the sons consenting to a partition so far as regards their father's interest, so as to protect the recipient's rights. *Iburamsa Rowthan v. Thiruvendatasawmy* (17), cited by the appellant's Pleader, is only an authority for the proposition that such a suit as the present brought by a member of a Hindu family for the recovery of his share in a portion of family property improperly alienated, without claiming a complete division, will lie in this Presidency. Reference is made in the course of the judgment of the Full Bench to certain Calcutta decisions which are authorities for the position that the purchaser cannot resist such a claim made by persons not bound by the alienation by pointing to the existence of equities in his favour but he must be left to work out his rights by means of a partition. But these decisions have not much bearing on the present case, where owing to the rights of the family having become merged in the son, it would be too late to refer the purchaser to a suit for a partition.

In my opinion, the Subordinate Judge was right in disallowing the plaintiff's claim on the finding of fraud which he found established on a review of all the circumstances of the present case, and also upon a consideration of the equities existing as between the purchaser and the plaintiff. I, therefore, consider that this second appeal should be dismissed with costs. Under section 98 of the Code of Civil Procedure, the result is that the second appeal is dismissed with costs.

V.S./R.K. *Appeal dismissed.*

(17) [1910] 7 I.C. 559 (F.B.).

* A. I. R. 1914 Madras 15 (1)

SADASIVA AIYAR AND SPENCER, JJ.
Muthusami Odayan—Appellant.

v.

Kplandavelu Odayan and others—Respondents.

Appeal No. 259 of 1912, Decided on 26th November 1913, from order of Dist. Judge, Arcot, D/- 29th July 1912, in Appeal Suit No. 202 of 1911.

* Civil P. C., S. 107 (b)—Remand by consent of parties—Power of appellate Court is wider than given by Civil P. C.—Civil P. C., O. 41, R. 23.

The power of an Appellate Court to pass an order of remand by consent of parties is wider than that given by the Code of Civil Procedure: 28 *Mad.* 437; *Foll.* [P 15 C 2]

T. Pattabhirama Aiyar — for Appellant.

K. Jagannatha Aiyar — for Respondents.

Judgment. — We decided a case yesterday in Civil Miscellaneous Appeal No. 33 of 1912, in which we held that the power of remand possessed by an Appellate Court under the new Code of Civil Procedure is much wider than under the old Code.

In the present case, the remand order was passed by consent of both sides and the power of the Court to pass an order of remand by consent of parties is even more extensive than is allowed by the Code. [See the judgment of Sir S. Subramaniya Aiyar, J., in the *Manager of the Court of Wards, Kalahasti Estate v. Ramasami Reddi* (1)].

The remand order passed by the District Judge in this case is not illegal or improper, and we dismiss this appeal with costs.

V.S./R.K. *Appeal dismissed.*

(1) [1909] 28 *Mad.* 437.

A. I. R. 1914 Madras 15 (2)

SADASIVA AIYAR AND SPENCER, JJ.
(Vemaraju) Ramamma—Plaintiff—Appellant.

v.

(Mygopala) Narayanaswami and others—Defendants—Respondents.

Appeal No. 42 of 1912, Decided on 28th November 1913, from appellate order of Sub-Judge, Masulipatam, in Appeal No. 81 of 1911.

Civil P. C., O. 34, R. 5 (2) — Application for order absolute under T. P. Act, S. 89 barred under Limitation Act (1877), Art. 178 — Decree-holder cannot apply for final decree again under O. 34, R. 5 (2) — Lim. Act (15 of 1877), Art. 178 — T. P. Act, S. 89.

Where an application for an order absolute under section 89 of the Transfer of Property Act, has become barred under Article 178 of Schedule II of the Limitation Act, before 1909, the enactment of rule 5, proviso (2), Order XXXIV, of the present Code of Civil Procedure, does not give the decree-holder a right to apply for a second or final decree. 26 *Mad.* 780 *Ref.*

[P 16 C 1]

K. V. L. Narasimham — for Appellant.
P. Nagabhushanam — for Respondents.

Judgment. — The mortgage decree in this case was passed under the old law in January 1905, following the words of section 88 of the Transfer of Property Act. Under the decree, the judgment-debtor (mortgagor) was directed to pay the mortgage-money due to the decree-holder in July 1905.

According to *Rungiah Goundan and Co. v. Nanjappa Row* (1), there was only one decree under the old law passed in mortgage suits. The order absolute for sale to be passed under section 89 of Act IV of 1882 did not constitute a second or final decree in the suit but was an order passed in execution proceedings as part of the said proceedings, though the application for such an order may not be strictly an execution application. Article 178 of the old Limitation Act was held in that case to be applicable in respect of such an application to obtain an order absolute for sale. If that Article be applied, the plaintiff's right to obtain an order absolute for sale expired in July 1908.

The application by the decree-holder in 1909 for a second decree for sale under the provisions of Order XXXIV, rule 5, clause (2), of the new Civil Procedure Code ought not to have been granted by the Munsif as the decree-holder had lost in July 1908 by limitation (according to the old law) his right to get an order absolute for sale before the new Act came into force in January 1909. The learned Munsif granted such an order by consent of the 1st defendant in January 1910, but that order, though it might be binding on the 1st defendant, cannot bind the 3rd defendant, behind whose back and without notice to whom it was passed. So far as the said order of the 31st January 1910 affected those properties (out of the property mentioned in the decree) which had been sold to 3rd defendant, the lower Courts were right in holding on the 3rd defendant's petition that the sale order ought to be set aside and the sale stopped. We take it that the orders of the lower Court affected only the sale of the third defendant's said properties and not of any other properties mentioned in the schedule to the decree.

With the above observations, we dismiss the appeal with the 3rd defendant's costs.

Appeal dismissed.

(1) [1903] 26 Mad. 780.

A. I. R. 1914 Madras 16

MILLER, J.

Annasami Sastrial and others — Defendants—Petitioners.

v.

Ramasami Sastrial and others — Plaintiffs—Respondents.

Civil Revn. Petn. No. 824 of 1912, Decided on 27th November 1913, from decree of Sub-Judge, Mayavaram, in Sm. C. C. Suit No. 323 of 1912.

Provincial Small Cause Courts Act, Sch. 2, Art. 38—Suit for recovery of value of paddy in lieu of maintenance under partition deed is not within Art. 38.

A suit to recover the value of paddy deliverable by one brother to another, under the terms of a partition deed, for the maintenance of their mother, is not a "suit relating to maintenance" within the meaning of Article 38, Schedule 2, of the Provincial Small Cause Courts Act. Such a suit is cognizable by a Small Cause Court: 14 M. L. J. 480, *Foll.*

G. S. Ramachandra Aiyar—for Petitioners.

T. R. Venktarama Sastri — for Respondents.

Judgment. — The plaintiffs' father and the defendants' father were bound to maintain their mother. By a partition deed between them, the defendants' father undertook to pay certain quantity of paddy to the plaintiffs' father, the consideration being, as I understand it, (the petitioners have not chosen to have the deed translated and printed), that the plaintiffs' father was to maintain the lady. The Subordinate Judge finds that she was maintained by the plaintiffs' father and after him by the plaintiffs till her death, and, though that finding is contested, there is evidence to support it, and I must accept it.

The question of law is whether the suit is cognizable by a Small Cause Court. It is contended that it is not cognizable as being a suit relating to maintenance.

It is, no doubt, a suit for what the defendants would have had to prove for the maintenance of their grandmother, if the plaintiffs had not done it, but the basis of the suit is the agreement between the plaintiffs' father and the defendant's father, neither of whom is the maintenance-holder, and the suit is to recover what cannot be described as maintenance in the hands of the plaintiffs. It is really payment for having provided maintenance for the lady. I have had some doubt on this question,

but I think that the case, *Ramaswamy Panthulu v. Narayanamoorthy Panthulu* (1), though not exactly on all fours, is an analogous authority on the point. There the liability had been fixed by a decree: and here by an agreement, but the reasoning of the learned Judges is applicable here, and on the strength of that decision, I hold that this is not a suit relating to maintenance.

It is contended that it is a suit for specific performance of a contract, and a suit relating to a trust. Neither of these contentions was raised in the lower Court. The latter is based on the partition deed which has not been translated and printed and the former is, I think, untenable. The suit is, no doubt, for payment of money payable under a contract to pay it but I do not think that is what is meant in the schedule to the Small Cause Courts Act by a suit for specific performance.

I dismiss the petition with costs.
V.S./R.K. *Petition dismissed.*

(1) [1904] 14 M. L. J. 480.

A. I. R. 1914 Madras 17

SADASIVA AIYAR AND SPENCER, JJ.

P. Vasantarayudu—Petitioner — Appellant.

v.

Reddi Subbamma and another — Respondents.

Letters Patent Appeal No. 37 of 1913, Decided on 25th November 1913 from judgment of Sankaran Nair, J., D/- 10th February 1913 in Civil Revn. Petn. No. 68 of 1912.

Civil P. C., Ss. 105 (1) and 115—Effective remedy open to party — No interference by High Court under S. 115—Order refusing amendment of plaint can be questioned in appeal under S. 105—Civil P. C., S. 115.

Where a party has another effective remedy against a wrong-doer, the High Court will not interfere under section 115 of the Civil Procedure Code. As an erroneous order refusing to allow the amendment of a plaint, can be questioned by way of an appeal under section 105 (1) of the Code of Civil Procedure, the High Court will not interfere under section 115: 12 I. O. 104; *Foll.* [P 17 C 2]

B. Narasimha Rao—for Appellant.

P. Narayana Murthi and *P. Soma-sundaram*—for Respondents.

Sadasiva Aiyar, J.—We agree with the learned Judge of this Court that the Subordinate Judge ought to have allowed the amendment sought to be made by the plaintiff. The cases of

1914 M/3 & 4

Kisandas Rupchand v. Rachappa Vithoba Shilvant (1) and *Rang Behari Lal v. Rachhya Lal* (2) draw attention to the language of Order 6, R. 17, the latter part of the rule making it imperative on the Court to allow all amendments which are necessary to bring out all the disputes between the parties for the adjudication of the Court.

In *Jothy Mahalinga Iyer v. Rama Chandra Aiyar* (3), Mr. Justice Sundara Aiyar held that the High Court had no power under S. 115 of the Civil Procedure Code to interfere with an order refusing amendment of plaint.

In recent cases, it has been held by the Judges of this Court that, where a party has another effective remedy against a wrong-doer, interference will not be made under section 115 by the High Court. In this case, under section 105 (1) of the Civil Procedure Code, the plaintiff can attack the Subordinate Judge's order refusing the amendment of the plaint by taking objection in the memorandum of appeal to the Appellate Court, if the suit is decided against him by the Subordinate Judge.

The appeal is, therefore, dismissed with costs.

Spencer, J.—I entirely agree with the learned Judge who heard the revision petition in thinking that the Subordinate Judge should have allowed the plaintiff to amend his plaint in the manner desired at the stage which this case has reached.

When a decree has been passed, if the plaintiff decides to appeal against it, so far as it is unfavourable to him, he will be able, under section 105 (1) of the Civil Procedure Code, to take objection in his memorandum of appeal to any erroneous order which has affected the decision of the case. I think we should follow the cases of *Venkatasubbiah v. Seshachallam* (4) and *Jothy Mahalinga Aiyar v. Rama Chandra Aiyar* (3) and dismiss this Letters Patent Appeal with costs.

V.S./R.K.

Appeal dismissed.

(1) [1909] 4 I. O. 726=33 Bom. 644.

(2) [1912] 13 I. O. 128.

(3) [1911] 12 I. O. 104.

(4) [1911] 12 I. O. 173.

A. I. R. 1914 Madras 18

SADASIVA AIYAR AND SPENCER, JJ.

Sheikh Mohidin—Petitioner — Appellant.

v.

Vadivalagianambia Pillai — Respondent.

Appeal No. 119 of 1912, Decided on 27th November 1913, from appellate order of Dist. Judge, Tinnevely, D/- 12th August 1912 in Appeal Suit No. 153 of 1912.

(a) Contract Act, S. 74—Courts have power to relieve against forfeiture or penalty in cases even where decree is based on compromise.

Courts in India which dispense equity possess the power to relieve against forfeiture or penalty even in cases where the terms of the contract of compromise have been made the terms of a decree based on that compromise.

[P 18 C 2]

(b) Contract Act, S. 55—Compromise decree embodying that defendant is to give up possession on his failure to pay plaintiff sum on fixed date—Time is not of the essence of contract and decree is for sale of land.

Where a compromise decree provided that the defendant should give up possession of the land decreed to him on his failure to pay the plaintiff a sum certain on a date fixed, the decree is in effect one for sale of land, and time is not of the essence of the contract. Lapse of twenty days after the date fixed is not such an unreasonably long period as to prevent the Court from exercising its discretion in relieving against such penal provision.

[P 19 C 1, 2]

Judgment.—The case of *Nagappa v. Venkata Rao* (1) lays down that a compromise decree is subject (like a contract between the parties) to the exercise of the powers of a Court of Equity to relieve against forfeitures and penalties, such powers being exercisable just as if a contract between the parties had contained the provisions in respect of forfeiture or penalty. A distinction is sought to be made in the judgment of the learned District Judge between the present case and *Nagappa v. Venkata Rao* (1), on the ground that the case of *Nagappa v. Vaakata Rao* (1) contained a clause of forfeiture as between landlord and tenant and that there is a "special statutory provision" for relief against forfeiture as between landlord and tenant. That distinction cannot be applied in respect of the Privy Council case in *Ram Gopal Mukerjee v. Samuel Masseyk and Thomas J., Kenny* (2), in which a penalty was

(1) [1901] 24 Mad. 265.

(2) 8 M. L. A. 239 (P.C.).

provided for non-payment of moneys on the due dates mentioned in a compromise deed according to which a decree was passed. It was held that the penal clause could be relieved against in such a case. Whether the forfeiture is relieved against owing to a "special statutory provision," (the learned District Judge probably refers to the provisions of the Transfer of Property Act), or according to Rules of Equity established by the decisions of English Courts, we think that the principles of the decision of *Nagappa v. Venkata Rao* (1) are applicable to such cases as the present and the Courts in India which dispense equity have got the power to relieve against forfeiture or penalty even in cases where the terms of the contract of compromise have been made the terms of a decree passed on that compromise.

We are, therefore, unable to accept the view of the learned District Judge that the Court has not got the power to relieve against the penal provisions in the decree, assuming that the provisions in dispute are in the nature of penal provisions.

These provisions (so far as it is necessary to set them out for the purposes of this case) might be thus stated;—

(a) The plaintiffs are owners of item No. 6 of the Compromise Schedule, as the sale by their mother to the 1st defendant of item No. 6 was a colourable transaction.

(b) But, as the 1st defendant had made improvements on the land item No. 6, he shall pay Rs. 500 to the plaintiffs and retain the land item No. 6. The Rs. 500 should be paid as follows:

(1) Rs. 200 on the 15th November 1911.

(2) The remaining Rs. 300 with interest on Rs. 500 till the 15th November 1911 from date of compromise (8th February 1911) at 9 per cent. per annum and interest on Rs. 300 from the 15th November 1911 till the 5th December 1912 at the same rate, all these amounts shall be paid on the 5th December 1912.

(c) If either the Rs. 200 be not paid on the 15th November 1911 or the remaining Rs. 300 (and the interest) payable on the 5th December 1912 be not paid, the plaintiffs were to be entitled to get possession of the land item No. 6 in execution through Court.

(d) If the Rs. 500 and interest be paid up, the 1st defendant to be full owner of item No. 6 (we take it that the compromise means that if the Rs. 500 and interest be paid in two instalments on due dates as provided in clauses 1 and 2, the 1st defendant was to become the owner of the land).

In substance, these provisions provide for a transfer, by agreement between the parties, of the plaintiff's ownership right in item No. 6 to the 1st defendant for a price of Rs. 500 payable with interest in two instalments and for the contract of transfer of rights being avoided by the plaintiff, if default is made by the defendant. The question whether the stipulation that the plaintiff could avoid his contract to transfer his right to the 1st defendant was a penal clause or not, or to put it from the defendant's point of view, whether the clause providing that 1st defendant was to forfeit his right to obtain an ownership right, if he makes default, was a clause of forfeiture or not, depends on the question whether the terms fixed for payment of the Rs. 200 and of the balance of Rs. 300 and interest were intended to be of the essence of the contract. Equity, in cases of contracts of sale of lands, is always inclined to presume that the time for payment of the purchase-money is not of the essence of the contract. In the present case, the fact that the plaintiff was prepared to wait for the larger portion of the Rs. 500 and interest for nearly two years (from the 8th February 1911 till the 5th December 1912) supports the usual presumption that time was not intended to be of the essence of the contract.

The learned District Judge took the view that because the middle of November begins the season for cultivation of paddy, the date (15th November 1911) fixed for payment of Rs. 200 was an essential date. But there is no proof

that cultivation might not be begun even in December and the date (5th December 1912) fixed for the payment of the balance of Rs. 300 shows that the 5th December was not considered a late date for commencing paddy cultivation. The provision that even after payment of the first Rs. 200, a default in payment of the balance of Rs. 300 more than a year after, will enable the plaintiff to get possession of the lands (evidently without liability even to return the Rs. 200) also shows that the provision as to forfeiture was a penal provision and could be relieved against. Where the same disproportionately large right is claimable under a contract by a plaintiff whether a fraction of the obligation or the whole obligation is broken by the defendant, that provision is clearly in the nature of a penalty.

In the present case, we agree with the District Munsif, on a construction of the terms of the compromise decree in the light of the surrounding circumstances, that the provision in the decree as to the first defendant's forfeiting his rights to retain possession of item No. 6 as owner, if he makes default in punctual payment on the 15th November 1911 or the 5th December 1912, is a penal provision and can be relieved against, provided that the judgment-debtor did not make *wilful default* and provided also that the defaulted obligation was performed within a *reasonable time* after the default. In the present case, not only the Rs. 200 was paid into Court on the 5th December 1911 (within 20 days of the date of default) but even the remaining Rs. 300 and interest on the Rs. 500 from February 1911 were paid up into Court by the 1st defendant's vendee (appellant). We think that 20 days is not an unreasonable period to be taken by the appellant to cure his default. As regards the question whether the appellant's default was wilful or was due to an accident, the term "accident" is given a liberal interpretation by Courts of Equity in cases of forfeitures and penalties (see paragraph 79 of Storey's Equity Jurisprudence) and in this case, the accident which caused the appellant's default was the death of his mother on the 14th November 1911.

We, therefore, set aside the order of the learned District Judge and restore

that of the District Munsif with the plaintiff's costs in this Court and in the District Court payable by the respondent to the appellant.

V.S./R.K.

*Appeal allowed.***A. I. R. 1914 Madras 20 (1)**

MILLER AND SPENCER, JJ.

Manikammal—Defendant—Appellant.

v.

Rathnamal—Plaintiff—Respondent.

Second Appeal No. 1306 of 1912, Decided on 25th September 1913 from decree of Dist. Judge, Salem, in Appeal Suit No. 83 of 1911.

Registration Act, S. 17—Compromise petition regarded as pleading — It does not require registration though it leads to disposal of issue in suit.

A compromise petition presented to a Court with the prayer that it be acted on is a pleading, and does not require to be registered even if it leads to the disposal of an issue in the case. In order that such a petition may be regarded as a pleading, it is not necessary to show that it was actually acted upon in the trial of the suit : 20 All. 171 (P. C.) and 3 I. C. 701; *Foll.* [P 20 C 2]

*L. A. Govinda Raghava Aiyar—*for Appellant.

*T. Rangachariar—*for Respondent.

Facts.—This was a suit to compel the execution of a deed of settlement and to recover possession of certain immoveable properties. Plaintiff was the mother-in-law of the 1st defendant. First defendant was a minor when her husband died. Quarrels arose between the plaintiff and the 1st defendant. A suit was instituted by the 1st defendant to recover rents due from certain tenants. The plaintiff disputed her right, and that suit was compromised (but no decree was passed) by filing an agreement in Court by which both parties agreed to live in the family house and that the plaintiff should enjoy properties in the C schedule attached to the petition and the 1st defendant the B schedule properties, and that the 1st defendant should pay plaintiff Rs. 3.8.0 as maintenance per month and a sum of Rs. 150. The 1st defendant failed to act according to the agreement. The present suit is by the plaintiff to recover the immoveable property to which she is entitled under the agreement. In both

the lower Courts, plaintiff got a decree and in both the contention was that the agreement was not admissible in evidence for want of registration and that contention was overruled in both Courts. The present appeal was against that contention.

Judgment.—In our opinion, the compromise petition in this case was a pleading within the meaning of *Bindesri Naik v. Ganga Saran Sahu* (1). It was presented to the Court with a prayer to act on it. How far it was actually acted upon in the trial of the suit is not clear from the present record, but it was clearly not rejected or refused on any ground, and it seems to have led to the disposal of the issue between the plaintiff and the first defendant.

This being so and following *Natesa Chetti v. Vengu Nachiar* (2) and the recent decision in Civil Miscellaneous Appeal No. 305 of 1912, we dismiss the appeal with costs.

We may remark that, as the Courts below have given a decree for specific performance, the soundness of the distinction taken in *Ravula Parti Chelamanna v. Ravula Parti Rama Row* (3) between the admissibility of a compromise as evidence of an agreement, and its use to affect the property concerned need not be considered by us.

V.S./R.K.

Appeal dismissed.

(1) [1898] 20 All. 171 (P. C.).

(2) [1909] 3 I. C. 701=33 Mad. 102.

(3) [1911] 12 I. C. 317=36 Mad. 46.

A. I. R. 1914 Madras 20(2)

OLDFIELD, J.

District Board, Tanjore — Plaintiff—Petitioner.

v.

Ramalinga Thevan and another — Defendants—Respondents.

Civil Revn. Petns. Nos. 50 and 51 of 1912, Decided on 18th November 1913, from decrees of Sub-Judge, Tanjore, in Sm. C.C. Suit Nos. 2953 and 2954 of 1910.

Contract Act, S. 70—Use of water by tenant without paying water rate—Suit for recovery by landlord for water rate paid—Tenant held not liable—Landlord and Tenant.

A, a tenant, used Government water without permission and without paying any water rate. His landlord, B, paid the water rate and brought the present suit to recover it from

A on the ground that he had benefited by the payment :

Held, that A was not liable. The only consequence of the non-payment would be a sale of the proprietary estate of B who alone was liable, A thus did not benefit by the payment : 20 I. C. 445; 9 I. C. 648 and 30 Mad. 277 ; Dist. [P 21 C 2]

L. A. Govinda Raghava Aiyar — for Petitioner.

T. V. Muthukrishna Aiyar — for Respondents.

Judgment.—In these cases the lower Court found that the defendants used the Government water and that the sums, re-payment of which is claimed, were collected by the Government from the plaintiff Board. These are findings of fact and no consideration of their exact meaning is necessary to the disposal of these petitions. The finding, the correctness of which, is disputed and in consequence of which the Small Cause suits were dismissed is that the plaintiff is not entitled to recover the amounts paid from the defendants.

In the lower Court and here the attempt has been made to base the defendant's liability on section 70 of the Indian Contract Act. The lower Court held with reference to *Yogambal Bai Ammani Ammal v. Naina Pillai Marakayar* (1) that the defendants who had for many years used water without payment, did not assent to the payment by the plaintiff to the Government or request the plaintiff to make it and, therefore, did not enjoy the benefit of the plaintiff's act within the meaning of the section. The plaintiff demurs to this on the ground that the effect of the authority cited has since been impaired by the decision of *Gajapathi Kristna Chandra Deo Garu v. Srinavasa Charlu* (2). It is not necessary to pursue this contention or to decide in which authority the law is stated more correctly, because neither, in my opinion, is applicable. In both cases the benefit enjoyed by the defendant consisted in the retention of property after the date of plaintiff's payment which but for that payment he would have lost. And, accordingly in these and the other cases cited the question was of a future benefit, which the defendant could expressly or impliedly accept or refuse, and of his adoption

of it. Here as the Pleader for the defendant argues, different considerations arise. The only act which the plaintiff did was the making of the payment to the Government. By it the defendants did not benefit. For if it had not been made, the only consequence would have been a sale, by which they would not have suffered, of the proprietary interest of the plaintiff who alone was liable. *Kottilinga Settu Reyer v. Sahasranama Iyer* (3). The defendants, no doubt, did benefit by the taking of the water, and the question of adoption might be raised, if at all, in connection with it, and in *Raja of Venkatagiri v. Vudutha Subbarayudu* (4), it was held that such taking is the act of the land-holder, not the tenant. But the full facts of that case do not appear from the judgment and here where the plaintiffs refer to the taking as by the defendants and as unauthorised, I am unable to regard it as by the plaintiff in virtue of any principle of agency or ratification. The same authority is relied on also as generally conclusive in the plaintiff's favour. But the defendants in it paid no rent for their land, whilst here, the defendants hold on the sharing system and the plaintiff will benefit by the increase in value of the crop in consequence of irrigation. This fact will take the case out of section 70, since the plaintiff knowing it, cannot be supposed to have acted gratuitously. It will probably also afford an answer to the argument based on the alleged hardship to the plaintiff from the refusal of relief. In the circumstances, there is no reason for interference. The civil revision petitions fail and are dismissed with costs.

V.S./R.K. *Petitions dismissed.*

(3) [1911] 9 I. C. 643=34 Mad. 520.

(4) [1907] 30 Mad. 277.

* A. I. R. 1914 Madras 21

SANKARAN NAIR AND BAKEWELL, JJ.
Tamluri Venkataramayya and others
—Plaintiffs—Appellants.

v.

Lakshminarasimha Charyulu—Defendant—Respondent.

Second Appeal No. 2278 of 1912, Decided on 14th November 1913 against decree of Temporary Sub-Judge, Masulipatam in Appeal Suit No. 621 of 1911.

(1) [1909] 8 I. C. 10=33 Mad. 15.

(2) [1914] 20 I. C. 445.

(a) Legal Practitioner—Breach of contract—Contract by pleader with tenants to defend in suit against them by *agraharamdar*—Subsequent contract with *agraharamdar* by same pleader suing against other tenants—Same questions raised in both suits—Pleader held liable to pay damages to tenants not sued for breach of contract—Contract Act, S. 73.

A Pleader entered into a contract with certain tenants in an *agraharam*, that he would defend a suit to be filed against them by the *agraharamdar*. Subsequently, he entered into a contract with the *agraharamdar* himself and filed suits against tenants, other than those with whom he had entered into a contract at first.

In these suits, the question raised was the same as in the case of the tenants with whom the Pleader had entered into a contract:

Held, that the Pleader had rendered himself incapable of performing his part of the contract with the tenants and that he was bound to pay them damages, though no suit was brought against them. [P 22 C 2]

* (b) Legal Practitioner—Fee paid to pleader for obtaining opinion from another lawyer—Opinion rendered of no value by long retention—Fees must be returned to principal.

Where a Pleader is paid a fee for obtaining an opinion from another lawyer and, after obtaining that opinion, keeps it sufficiently long to be of any value to his principal he is bound to return the fee paid to him. [P 22 C 2]

Chenegya for T. *Prakasam*—for Appellant.

V. *Ramesam*—for Respondent.

Judgment.—The defendant, a Pleader, was retained by plaintiffs Nos. 1 to 7, who describe themselves "as *ryots* of *Vurtur agharam*," to appear for them in certain suit which they expected would be brought against them by the *agraharamdars* and not to accept *vakalat* from the latter. He received Rs. 500 from them and was entitled to get Rs. 2,000 under the agreement. The agreement between the parties, which was in writing, also provided that the same fee was to be paid to him in other suits which may be brought by the *agraharamdar* against other *ryots* "in a batch along or simultaneously" with suits against themselves. It was clearly intended that he was to appear for all the *ryots* against the landlord in all the suits in which the questions for decision are admitted to be the same. It was urged for the Pleader that the agreement provides that he should appear only in those suits against other *ryots* which may be brought along with the suits against the seven plaintiffs. This may strictly be so, and it may be that, if suits were brought against the others

before or after the suits against these plaintiffs, the agreement does not bind him to appear for them. But there can be no doubt, looking to the terms of the document, that the parties intended that the defendant should undertake to do all he can for the *ryots* in the Court of first instance and the appellate Courts and was not to appear for the *agraharamdar* against any of the *ryots*. The defendant afterwards filed suits on behalf of the *agraharamdar* against plaintiffs Nos. 8 and 9, other *ryots* of the village, the question in issue between them being the same as between the plaintiffs and the *agraharamdar*. We are clearly of opinion that the defendant has thereby disabled himself from performing his part of the contract and he has broken it. He was not in a position to do all in his power for the plaintiffs as he had promised to do. The plaintiffs are, therefore, entitled to set aside the contract and claim damages.

As to the amount of damages, the plaintiffs are entitled to recover all that they have paid under the contract. The Rs. 500 paid to the defendant has been decreed to them by the lower Courts. They claimed here in addition Rs. 260. This amount was paid by the plaintiffs to the defendant to get lawyer's opinion from Madras. It is true he got that opinion. But he kept it himself and without giving it to the plaintiffs, he accepted a *vakalat* from the *agraharamdar*. This is inexcusable. The plaintiffs have not only derived no benefit from their payment, but it may be that their opponent profited by it. Under these circumstances, we do not see why they should not recover this amount also. It was urged upon us that the plaintiffs Nos. 8 and 9 have no cause of action. The question whether the agreement was entered into on behalf of all the villagers has not been decided by the lower Appellate Court, but, as the defendant is not prejudiced, we see no reason to call for a finding on that question.

We dismiss the memorandum of objections with costs. We allow the appeal to the extent of Rs. 260. The plaintiffs will receive proportionate costs throughout.

V.S./R.K.

Appeal allowed.

A. I. R. 1914 Madras 23

AYLING AND OLDFIELD, JJ.

Rasa Gounden—Plaintiff—Appellant.

v.

Sinnappayyan and others — Defendants—Respondents.

Second Appeal No. 2622 of 1912, Decided on 9th December 1913 against decree of Temporary Sub-Judge, Trichinopoly.

Transfer of Property Act, S. 60—Redemption suit—For title reliance placed by plaintiff on sale for arrears of rent—General evidence of sale and subsequent conduct of parties is sufficient to prove valid sale.

Where in a redemption suit a plaintiff relies as his title on a sale for arrears of rent, the burden of proving the validity of the sale lies on the plaintiff, but it is not necessary, in order to discharge that burden, that he should do so in a particular way by meeting each of the specific objections to the sale which his opponent alleges. It is sufficient if he offers general evidence as to sale, and of the subsequent conduct of parties, corroborative of it : 27 *Mad.* 94, *Ref.* [P 23 C 2]

Judgment. — This suit is for redemption of a mortgage, Exhibit II, given by one Shengodam Pillai in 1893 to defendants Nos. 1 and 2. The plaintiff, the appellant, purchased the equity of redemption in 1908 from Palaniandi Gounden who had purchased it at a sale under Act VII of 1865 in 1898. The suit was dismissed by the lower Appellate Court on the sole ground that plaintiff had not established his right to redeem, since he had not discharged the burden of proof regarding the validity of his vendor's purchase at a rent sale regularly held. The 3rd defendant was impleaded as a person in enjoyment of the property. Both he and the 2nd defendant alleged that they had bought the equity of redemption from Shengodam Pillai. They did not deny the mortgage, Exhibit II, and they specifically admitted that a sale at which Palaniandi purchased, was held. Their defence was that this sale was held fraudulently by collusion between the landlord, the plaintiff, and the purchaser, his brother-in-law, and that it was irregular in material respects, no *patta* having been tendered, no arrear being due and the necessary notice not having been given to the defaulter. The question is whether the lower Court was right in dismissing plaintiff's suit, because he produced nothing to support the sale directly on these points and in refusing to consider the evidence, by which he pro-

posed to prove the validity of the sale in another way.

That evidence would have afforded indirect proof only, but it would not have been the less effective on that account. Plaintiff proposed to show that after and in consequence of the sale, *patta* was transferred to, and rent paid continuously by, the purchaser, every incident of ownership passing except possession, which was secured to defendants Nos. 1 and 2 by their mortgage. His argument was that general proof of the validity of the sale and the acquiescence in it of the mortgagor having been given, the burden of proof of particular objections to it would be transferred to those who now dispute it. He relied further on his obligation to redeem as explaining his delay in claiming possession and on that delay, which (he alleged) had prevented his producing documents relating to the arrear and sale, as explaining his adoption of this method of proof. If this case could be established, it clearly might justify a decree in the plaintiff's favour.

The lower Court's refusal to consider this case is based on decisions relating to this Presidency. Others, those referred to in *Dorasamy Pillai v. Muthusamy Mooppan* (1), have been relied on here. In all of them the burden of proof regarding the validity of the sale was, no doubt, held to be on the party who maintained it; and we do not question a principle which has received continuous approval. But the lower Court, in our opinion, erred when it went further and treated these cases as deciding not only that the landlord or purchaser must discharge the burden of proof but also that he must do so in a particular way, by meeting each of the specific objections to the sale which his opponent may raise. These decisions in fact refer to no evidence in favour of the sales dealt with in them except that intended to support them directly, and this is explained by the fact that the suit in each case was brought after a comparatively short interval, within which evidence such as plaintiff here adduced probably could not have been obtained. There is no suggestion that such evidence, if adduced, would have been excluded from consideration or, if believed,

(1) [1904] 27 *Mad.* 94.

would have been refused effect towards discharge of the burden of proof.

In these circumstances, the lower Court's decision must be set aside and the appeal remanded for re-admission and re-hearing in the light of the foregoing remarks.

Costs will be costs in the case.

V.S./R.K.

Appeal allowed.

*** A. I. R. 1914 Madras 24 (1)**

MILLER, J.

Arukasthanath Moideen Kutti—Petitioner.

v.

Parambath Kundi Mamu — Respondent.

Civil Revn. Petn. No. 913 of 1912, Decided on 26th November 1913 from order of Dist. Munsif, Tellicherry.

* Civil P. C., S. 58 (b) (iv), Subsistence allowance sent by money order not reaching officer in time — Such case falls under "omission to pay" within S. 58 (b) (iv)—Payment is not made until officer accepts it.

The words "omission to pay" in section 58 clause (b) (iv) of the Code of Civil Procedure, include also a case where the subsistence is sent by money order, which, though sent sufficiently early to reach the officer in charge of the prison on the first of the month, does not actually reach that officer in time.

A payment cannot be considered to have been made to the officer until the officer actually receives the money. [P 24 C 1]

*B. Govindan Nambiar—*for Petitioner.

*K. Govinda Marar—*for Respondents.

Judgment.—The question is whether the despatch of the monthly allowance by postal money order addressed to the Officer in charge of the Civil Prison in time to reach him in the ordinary course of events before the first day of the following month is a payment in due time to that Officer within the meaning of Order XXI, rule 39 (4).

No authority has been cited. I agree with the District Munsif that payment to the Officer is not made until the Officer receives the money; and it follows that, if he does not receive the money before the 1st day of the month for which it is payable, there has been an "omission to pay" within the meaning of section 58 and from that it follows that the release of the debtor is a release under the section, and that the debtor is not liable to be re-arrested.

I dismiss the petition with costs.

V.S./R.K.

Petition dismissed.

A. I. R. 1914 Madras 24 (2)

WHITE, C. J. AND OLDFIELD, J.

Abdul Rahiman Sahib—Appellant.

v.

Official Assignee Madras—Respondent.

Original Side Appeal No. 57 of 1912, Decided on 5th November 1913 from order of Bakewell, J., D/- 14th August 1912.

(a) Contract Act, S. 240—Absence of ledger page in firm's book—Want of payment of interest—Non-inclusion of unsecured creditors in schedule—All this is evidence of partnership.

In determining whether a person (against whom an application to be declared an insolvent was made along with other parties of a firm), is a mere creditor of, or a partner in, a firm, the facts that he had no ledger page in the firm's book, that he drew no interest on the sums deposited by him, that he was not included in the schedule of unsecured creditors filed along with the petition for insolvency, and that he was described also as an *yejaman*, are clearly indicative of his position as a partner.

[P 25 C 1, 2]

(b) Presidency Towns Insolvency Act, S. 99—Petition to declare that person is partner in firm—Madras Insolvency R. 47 inapplicable—Power is given under S. 99.

Rule 47, Madras Insol. Rules does not apply to a petition to declare that a given person is a partner in a firm against which a petition has been presented. In such a case the power is given by S. 99. But such an order passed under R. 47 is not bad by the irregularity of procedure.

[P 26 C 1]

*R. N. Aiyangar and P. Ramamurthi—*for Appellant.

*Short Bewer & Co.—*for Respondent.

White, C. J.—In this case, on August 25th, 1911, a petition was presented by five creditors against the firm of T.A.S. Abdul Razak Sahib and Co. The petition stated that the partners in the firm were Abdul Karim Sahib and Abdul Razak Sahib, an order of adjudication was made against these partners on September 4th.

On January 30th, 1912, the Official Assignee applied by motion for an order to the appellant, one Abdul Rahiman, to show cause why an order should not be made against him under rule 47 of the Madras Insolvency Rules adjudicating him an insolvent as a member of the firm of T. A. S. Abdul Razak Sahib and Co. The application came on for hearing on July 15th, 1912. The cause of the delay would seem to have been that it was found impossible to effect personal service on the appellant. Bakewell, J., made the order and Abdul Rahiman appeals.

The appellant is the younger brother of Abdul Karim and the nephew of Abdul Razak. He attained his majority in 1909. In 1909, the appellant received from Court a sum of Rupees fourteen thousand. This was paid into the firm. The appellant says it was paid in by way of deposit. The Official Assignee says it was the appellant's contribution towards the capital of the firm in which he was, or became a partner.

There is no evidence of any express agreement of partnership between the appellant and his brother and uncle. The evidence of holding out is meagre. One witness, the skin *dubash* of Shaw Wallace and Co., said he had dealings with the appellant as a member of the firm and that the appellant told him he was a partner in 1910. Another witness, a partner in the firm of Haji Badshaw Sahib and Co., said that he had seen the appellant attending to the business of the firm. In cross-examination, he said he had not seen him do anything as a partner.

There is in evidence a letter written by the appellant to his uncle on June 19th, 1910, (Exhibit K) relating to business matters, in which the appellant describes himself as "Pallavaram Shop T. Abdul Rahiman." I cannot accept the suggestion made on behalf of the appellant that the words 'Pallavaram Shop' were an address, and were not intended to be a description of the writer of the letter. There is also in evidence another letter relating to business matters written by the appellant to his uncle on June 22nd, 1911, (Exhibit L). There are no accounts in evidence (or, if there are, our attention has not been called to them), which show either any drawings by the appellant as a partner, or any credits by way of interests in respect of the sum of Rupees fourteen thousand which the appellant says he deposited with the firm.

There is, however, in evidence an entry in a ledger of the firm's which purports to show the carrying forward from an old account the sum of Rupees thirty six thousand and seven hundred and odd (Exhibit C 1). In the print of this entry, the date is given as June 1911. This appears to be a mistake for June 1910. Then there is a statement of a division of this sum of Rs. 37,000

odd between the appellant's brother and uncle (the admitted partners) his mother and himself. There is no evidence as to the circumstances in which, or the person by whom, this entry was made. The learned Judge states, and it was not said that his statement was incorrect, that the appellant's brother, uncle and mother were partners in the old account of which the balance was carried forward in June 1910. As the learned Judge points out, no distinction is drawn between the appellant and the other three persons. The learned Judge also refers to accounts in which the appellant is described as '*yejaman*.'

It has been pointed out to us that in the original schedule of unsecured creditors of the firm, the name of the appellant does not appear. The schedule was amended and the name of the appellant was added together with that of his mother, as a creditor for a substantial amount, and the names of the two other creditors for trifling sums. I think we are entitled to take this into consideration since the schedule forms part of the record in this insolvency, though Abdul Razak, who was called as a witness, ought, of course, to have been asked about it.

I attach no importance to the oral evidence and very little to the two letters (Exhibit K and L). These letters, to my mind, are quite consistent with the appellant taking part in the business with a view to his subsequently becoming a partner. There is no doubt, some force in the observation of the learned Counsel for the appellant that, although the petition was presented by five petitioning creditors, not one of them was aware that the appellant was a partner in the firm. There does not, however, appear to be any explanation of the entry (Exhibit C) in the firm's books except that put forward on behalf of the Official Assignee, that it was intended to be a statement of the amount of the respective interests of the parties named in the partnership assets at the time the entry was made. Moreover, the fact that the name of the appellant was not included in the original schedule of unsecured creditors seems to me of considerable significance. I have had some doubt in this case, but having regard to the custom, with which one is familiar, of family partnerships which

prevails among Muhammadan merchants as well as among Hindus, I am not prepared to differ from my learned brother who is of opinion that Bakewell, J.'s order is supported by the evidence.

As regards a matter of procedure, the order purports to be made under rule 47 of the Madras Insolvency Rules. This rule, which is taken from rule 264 of the English Bankruptcy Rules, only provides for the form of the adjudication where a petition is presented against a firm and an order of adjudication follows. It does not empower the Court to declare that a given person is a partner in the firm against which a petition has been presented. This power is given by section 99 of the Act, which is taken from section 115 of the English Act. The proper course, as it seems to me (though I do not desire to express any final opinion on the point), would have been for the petitioning creditors to apply for leave to amend their petition. However, it cannot be suggested that the appellant was prejudiced, or embarrassed, or taken by surprise. The point was not taken at the Bar, and he knew the case he was called upon to meet. In these circumstances, I do not feel bound to hold that the order was bad by reason of what appears to me to have been an irregularity in procedure.

I think the appeal should be dismissed with costs.

Oldfield, J.—I am of the same opinion, and I desire to refer to two matters, because I think that they affect the weight of two portions of the evidence materially.

Firstly, as regards the appellant's conduct, he is not, as the learned Judge's judgment describes him, a mere boy. He has been of full age since 1909, when his money was placed in the firm. There was moreover, nothing of value to support either his case that he was still a student at Vaniambadi and only visited the firm's place of business occasionally or the assertion of his uncle, another partner, that his intention was to start a distinct business of his own. In these circumstances, there is no probability in favour of his having been merely learning the business and, in my opinion, no reason for refusing weight to Exhibits K and L. *Secondly*, as regards Exhibit C and the suggestion that the

appellant was a mere depositor, it is material that there is no ledger page in his name in the firm's accounts, such as other creditors of the firm had.

In these circumstances, I concur in dismissing the appeal with costs.

V.S./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 26

MILLER AND SADASIVA AIYAR, JJ.

Muthurakku Maniagan—Plaintiff
—Appellant.

v.

Rakappa Maniagan and another—
Defendants—Respondents.

Appeal No 51 of 1912, Decided on 19th September 1913, from decree of Dist. Judge, Tinnevely in Appeal Suit No. 218 of 1911.

Contract Act, S. 69—*A mortgaging his two items of property in favour of B—One item sold to C free of mortgage—Other item sold to D with condition that he should pay fully mortgage money—Default by D to pay—Suit by B on mortgage decreed—C paying full amount—C can recover whole amount from D.*

A was the owner of two items of property. In 1889, he mortgaged both of them in favour of *B*. On 31st July 1895, he sold one of the items to *C* freeing it entirely from the mortgage in *B*'s favour. The next day, i.e., on August 1, 1895, he sold the other items to *D* directing him to pay up the mortgage in favour of *B* in full. *D* failed to pay as directed; *B* brought a suit on his mortgage, and obtained a decree for sale of both the items of property. *C* was not made personally liable under the decree; but *C*, in order to save his property from sale, paid the full decretal amount, and brought the present suit to recover it from *A* or *D*.

Held, that under section 69 of the Contract Act, *D* was bound to pay *C* the whole decree amount paid by the latter to save his property from sale, and not merely a portion of the decree-debt proportionate to the extent of the mortgaged properties in his possession: 19 I. C. 676; 20 I. C. 630, *Foll.* [P 28 C2 P 29 C 1]

S. Srinivasa Aiyar—for Appellant.

K. N. Aiyar—for Respondents.

Miller, J.—This appeal, I think, must succeed, and I put my decision on section 69 of the Contract Act.

The 2nd defendant bought subject to the whole mortgage and was bound by law to satisfy the mortgagee himself either by payment or by suffering a sale of that part of the mortgaged property which was sold to him. The fact that a portion of the property had the previous day been transferred to the plaintiff did not affect that obligation: the property purchased by the plaintiff was rightly or wrongly ordered to be sold under the decree, and the plaintiff,

to save the sale, paid the whole of the mortgage money. He was, I think, interested in making the payment: and the 2nd defendant was bound by law to pay: there seems to be nothing more required to attract the provisions of section 69.

The District Judge recognises that section 69 would apply to the case, but fails to see that the 2nd defendant was bound by law to pay the whole mortgage money and not only his proportionate part thereof.

I agree in the decree which my learned brother proposes to make.

Sadasiva Aiyar, J. — The learned District Judge has reversed the District Munsif's judgment and remanded the suit to the Court of first instance for the purpose of deciding the suit on the basis that the plaintiff's claim is one for contribution from the 2nd defendant in respect of moneys paid by the plaintiff to a mortgagee of both the 1st and 2nd schedule properties.

The material facts are shortly these. The 1st defendant was the owner of both the schedule properties. He sold the 1st schedule properties to the plaintiff's father on the 31st July 1895, the circumstances showing that it was to be a sale freed from prior encumbrance of 1889 in favour of a Zemindar. On the next day, i.e., the 1st August 1895, he sold the 2nd schedule properties to the 2nd defendant, part of the purchase-money being left with the 2nd defendant in order that he might discharge the Zemindar's mortgage of 1889. The 2nd defendant failed to discharge the Zemindar's mortgage of 1889. The Zemindar brought a suit against the 1st defendant and the plaintiff's father in 1901 for sale of both the 1st and 2nd schedule properties and for personal decrees against the 1st defendant and against the plaintiff's father. The plaintiff's father, however, was dead when the suit was brought and so the decree in that suit of 1901 exonerated the plaintiff's father and his interest (if any) in the properties from all liability, but ordered the sale of both the 1st and 2nd schedule properties and further gave a personal decree against the 1st defendant for the mortgage money due to the Zemindar.

It is clear that a sale under such a decree could not at all affect the title of

the plaintiff's father (or rather of the plaintiff, who had become the heir of his father) in the 1st schedule properties, as his father's rights were expressly exonerated by the decree. But when the 1st schedule property was brought to sale in execution of the Zemindar's decree in the Suit of 1901, the plaintiff paid up the whole amount to save the 1st schedule property from sale and brought the present suit for recovery of the sum so paid on the charge of the 2nd schedule properties and from the 1st defendant personally. The District Munsif dismissed the suit as against the 1st defendant but gave a decree on the charge of the 2nd defendant's 2nd schedule properties for the sum of Rs. 260 with interest at 4 per cent. per annum from the 16th December 1908 till date of decree and at 6 per cent. from the date of decree. The District Munsif's decree seems also to give a personal remedy against the 2nd defendant for the amount decreed.

On appeal by the 2nd defendant to the District Court, the learned District Judge held, that, as there was no privity of contract between the plaintiff's father and the 2nd defendant, though the 2nd defendant had promised to the 1st defendant to discharge the Zemindar's mortgage, the plaintiff cannot recover the whole amount which he paid to the Zemindar (mortgagee-decree-holder) from the 2nd defendant and the 2nd schedule properties, but can only recover contribution from the 2nd defendant in the proportion of the value of the 2nd defendant's property to the value of the 1st and 2nd schedule properties, together. The learned District Judge held that section 69 of the Contract Act could not help the plaintiff.

In second appeal, the plaintiff's learned Vakil contended

- (a) that the District Judge ought to have found that there was privity of contract between the plaintiff's father and the 2nd defendant;
- (b) that under sections 69 and 70 of the Contract Act, the plaintiff was entitled to recover the whole of the Rs. 260 etc. from the 2nd defendant;
- (c) that under the general law, he was so entitled;

(d) that the District Judge should have given a decree against the 1st defendant though the plaintiff had not appealed to the District Court against the Munsif's judgment exonerating the 1st defendant ;

(e) and that, in any event, the order of reversal and remand passed by the District Judge is wrong, as the Munsif had not decided the suit on any preliminary ground.

Taking the last contention first, it is clear from the decision of *Nabin Chandar Tripathi v. Pran Krishna Dey* (1), that the lower Court, even on the view held by it on the facts and the law, could have only called for findings from the Court of first instance as to the contribution which the 2nd defendant and the 2nd schedule properties were liable to make to the plaintiff and could not have reversed the judgment of the Court of first instance and remanded the suit wholly. The lower Court's order, therefore, should be reversed in any event.

As regards the first contention, it is a question of fact whether there was a privity of contract between the plaintiff's father and the 2nd defendant, and I am not prepared to dissent from the finding of the lower Appellate Court that there was no such privity of contract.

Then there remain three questions of law. I shall take the contention (d) first. The District Judge was, no doubt, entitled to give a decree against the 1st defendant though the plaintiff had not appealed against the Munsif's decision exonerating the 1st defendant (see Order XLI, rule 33). But I am not inclined to say in this case that the lower Appellate Court should have given such a decree against the 1st defendant, as it was the default of the 2nd defendant in not paying to the Zemindar (mortgagee) (in accordance with the 2nd defendant's promise given to the 1st defendant) that has caused all this trouble and the 1st defendant was really innocent of any fraud against the plaintiff.

Then we have only to consider the two contentions (b) and (c), which for ready reference might be here re-stated.

(b) That under sections 69 and 70 of the Contract Act, the plaintiff was

entitled to recover the whole money from the 2nd defendant ;

(c) that under the general law, he was so entitled. I think both these contentions ought to prevail. It has been held by the Allahabad High Court, [*Hakim Ali Khan v. Dalip Singh* (2)], that when the plaintiff purchased a property from the mortgagor owner when the defendant had (for consideration) promised to the mortgagor to discharge the mortgage, and had failed to so discharge the mortgage, and when in consequence of such failure the plaintiff was obliged to pay up the mortgage-money to the mortgagee who had obtained a decree on his mortgage, the plaintiff was entitled to recover the money so paid by him from the defendant. The plaintiff's right in such a case is based by the learned Judges on the ground that the plaintiff was entitled to stand in the shoes of the original owner (mortgagor), and as that mortgagor had a right as against the defendant to recover the money which the defendant had failed to pay to the mortgagee and had thus committed a breach of the contract with the mortgagor (owner), the plaintiff, standing in the shoes of the mortgagor, was entitled to recover compensation from the defendant just as the plaintiff's vendor (the original mortgagor) could have recovered it from the defendant. This reasoning appears to me to be in consonance with justice, equity and good conscience. I would, therefore, uphold the contention (c) of the appellants in this case. Again coming to the contention (b), it has been held, in *Deb Narain Dutt v. Ram Sadhan Mandal* (3), that, where a sum was payable by the defendant under a contract with A. for the benefit of B. i. e., where defendant had promised to A. for consideration to pay a sum of money to B., B. could enforce the contract. Lord Hatherley's observations in *Touche v. Metropolitan Railway Warehousing Company* (4), are quoted in support of the said proposition. Applying this principle, it seems to me that the Zemindar, mortgagee, could have obtained a decree against the 2nd defendant for the money which the 2nd defendant agreed with the 1st defendant to pay to the mortgagee at the

(2) [1913] 19 I. C. 676.

(3) [1913] 20 I. C. 630.

(4) [1871] 6 Ch. D. 671.

1) [1913] 20 I. C. 39.

time of the sale by the 1st defendant to the 2nd defendant of the 2nd schedule properties.

The second defendant having been thus bound to pay to the Zemindar (mortgagee) the whole amount of the mortgage money and the plaintiff being interested in the 2nd defendant's payment of such money to the Zemindar (mortgagee) and the plaintiff having paid such money, it seems to me that section 69 of the Contract Act directly applies in the plaintiff's favour. In *Vaikuntam Ammangar v. Kallapiram Aiyangar* (5), Subrahmania Aiyar and Davies, JJ., held that a Hindu widow, who was interested in her daughter's welfare and, therefore, spent money for the marriage expenses of her daughter which her husband's brother was legally bound to incur, could, under section 69, recover the money from the husband's brother. In *Subramania Iyer v. Vengappa Reddy* (6), Benson and Krishnaswami Aiyar, JJ., held that even if the plaintiff had merely an apprehension of any kind of loss or inconvenience or even of any detriment by the non-payment of a debt due by a third person to another, the plaintiff was "interested" in paying that debt of that third person and, if he discharges it, he could rely upon section 69 of the Contract Act. Even if *Vaikuntam Ammangar v. Kallapiram Aiyangar* (5) goes a little too far in considering that an interest other than a pecuniary interest will do to attract the provisions of section 69. *Sabramania Iyer v. Vengappa Reddy* (6) is clear authority for the proposition that pecuniary interest, even in the shape of detriment or inconvenience, will entitle the plaintiff to take advantage of section 69 of the Contract Act. [See also *Tulsha Kunwar v. Jageshar Prasad* (7) and *Acha Ranganaikammal v. Ramanuja Aiyangar* (8)].

In *Bhadra Mohamad v. Gunamoni Pillai* (9), the facts were as follows :—

The plaintiff whose property was about to be sold by the landlord for a sum which was solely due

by the defendant as between the plaintiff and the defendant paid that sum to the landlord. The sum was charged both upon the plaintiff's interest and upon the defendant's interest in certain properties. On these facts, the plaintiff was entitled to recover the whole from the defendant under S. 69 of the Contract Act. The learned Judges further held in that case that, even if section 69 of the Contract Act did not apply, section 70 applied in the plaintiff's favour because the payment was not voluntary, as the plaintiff's property was about to be sold; the payment was a lawful act by the plaintiff and the defendant reaped its benefit as the debt due by him was thereby discharged. [See also *Kanhayya Lal v. The National Bank of India, Limited* (10), as to what is a voluntary payment.) In *Narayana Kutti Goundan v. Pechiammal* (11), Sundara Aiyar and Spencer, JJ., held that even a contingent reversioner after the death of a widow under the Hindu Law, who pays a mortgage-debt to save a property from sale under a mortgage-decree, obtains a lien on the property which was cleared of the mortgage-debt, and section 69 of the Contract Act has also been relied upon by both the learned Judges. In *Jog Narain Singh v. Badri Das* (12), section 70 of the Contract Act is relied upon to establish the right of a mortgagee who paid a decree passed against the mortgagor under section 161 of the Bengal Tenancy Act.

In *Sri Sri Sri Gajapathi Kristna Chendra Deo v. Srinivasa Charlu* (13), decided by my learned brother and myself, I have ventured to make some observations indicating that sections 69 and 70 of the Contract Act should be liberally interpreted to advance substantial justice. In the result, I would hold that not only was the order of remand and reversal unsustainable even on the learned District Judge's view of the law, but that that view of the law is itself unsustainable. The order of the District Judge should, therefore, be set aside and the District Munsif's decree restored with costs in this and in the lower Appellate Court. The 2nd defen-

(5) [1913] 26 Mad. 497.

(6) [1910] 4 I. C. 1083=33 Mad. 232.

(7) [1906] 28 All. 563.

(8) [1911] 11 I. C. 570=35 Mad. 728.

(9) [1911] 11 I. C. 155.

(10) [1913] 18 I. C. 949=40 Cal. 538.

(11) [1912] 36 Mad. 426.

(12) [1912] 18 I. C. 144.

(13) [1913] 20 I. C. 445.

dant is, however, not personally liable for the decree amount, and the District Munsif's decree will be made clear on that point.

V.S./R.K.

Order set aside.

A. I. R. 1914 Madras 30

MILLER AND OLDFIELD, JJ.

Punga Seethai Ammal — Plaintiff—Appellant.

V.

Punga Nachiyar Ammal and others—Defendants—Respondents.

Civil Appeal No. 161 of 1910 and Civil. Misc. Petn. No. 83 of 1911, Decided on 17th November 1913, against decree of Sub-Judge, Kumbakonam.

(a) Hindu Law—Succession—Stepmother—Under Mitakshara step-mother cannot succeed to stepson as gotraja sapinda or bandhu.

Under the Mitakshara School of law, a step-mother is not in the line of heirs at all she is neither a gotraja sapinda nor a bandhu : 8 M. 107, foll. [P 31 C 1, 2]

(b) Hindu Law—Succession—Stepmother—Sourashtra Community—No custom proved to succeed to stepson.

A stepmother may succeed as an heir according to usage in a particular community.

No custom entitling a stepmother to succeed to her stepson has been proved among the Sourashtra community.

T. V. Seshagiri Aiyar and *T. V. Muthukrishna Aiyar*—for Appellant.

T. Rangachariar and *K. Parthasarathi Iyengar*—for Respondents.

Miller, J. — The plaintiff and the 1st defendant are both widows of the father of the last male owner of the property in dispute and they are both step-mother of the last male owners; and the question is whether the plaintiff has any right to share the property in dispute, which has been conveyed to the 1st defendant by certain persons who alleged themselves to be the sons of the grandfather of the last male owner. The question, so far as it turns on Hindu Law, is whether a step-mother is entitled to succeed in any circumstance to the property of her step-son; and it has divided itself practically into two parts in this Court, *first*, whether she should not be given a right to succeed as being in the class of gotraja sapinda, and *secondly*, whether, even if she has no right as a member of that class, still she is a sapinda within the meaning of that term in the Mitakshara and should be allowed to succeed, before the Crown at any rate, as a relation, though not as a

gotraja sapinda. In his opening address Mr. Seshagiri Aiyar suggested—but he did not press the contention—that the step-mother should be allowed to succeed as being equivalent or next door to the mother. I think, it is clear that that contention cannot succeed in the face of the decisions of this and the other High Courts. The contention which he did press then was that as a gotraja sapinda she ought to be allowed to succeed. It seems to me that that question has been decided against him by a Full Bench of this Court in *Mari v. Chinnammal* (1). It is suggested that we should treat that case as merely deciding that the step-mother is to be postponed to the paternal uncle but it seems to me that there is nothing in that case, either in the judgment of the Chief Justice, Sir Charles Turner, or in the judgment of Mr. Justice Muttuswami Ayyar, which suggests that they had in mind the necessity of deciding any question other than whether the step-mother is in the line of heirs at all. Perhaps I am wrong in saying that it is not suggested, because the learned Chief Justice does suggest the question, whether, if she is in the line of heirs, she is not postponed to the paternal uncle. But the decision of the matter did not proceed upon any preference of male sapinda to a female sapinda, except in this sense, that female sapindas unless they are named in the text of the Mitakshara are excluded altogether. That, I think, is what *Mari v. Chinnammal* (1), clearly lays down. No doubt, both the Chief Justice, who spoke for the majority, and Mr. Justice Muttuswami Ayyar, who agreed with him though perhaps on slightly different grounds, both those learned Judges took it that the step-mother was a sapinda within the meaning of that term as defined in the Mitakshara; but they do not base their decision excluding her from inheritance on the ground that, though a sapinda, she must be postponed to the paternal uncle; they distinctly exclude her altogether and not merely postpone her. That is clear from the judgment of both the learned Judges: "The claim of the step-mother as a gotraja sapinda" (that is, her right to succeed in that capacity), says the learned Chief Justice (page 129), "has not been, in

(1) [1885] 8 Mad. 107.

my judgment, established, and " (for that reason) " the claim of the paternal uncle must be allowed "—, not that she might come in if the paternal uncle were not a preferential heir, but that her claim as *gotraja sapinda* had not been established. And Mr. Justice Muttuswami Ayyar says:—" Though I entertain no doubt that she is a *gotraja sapinda* in the *Mitakshara* sense of *sapinda* relationship, I do not think that all female *sapindas* are recognized to be heirs in this Presidency; and then he gives certain instances and he suggests that, if usage were in favour of the step mother's claim, he could not say that the *Mitakshara* actually declared against its legality, but he is not inclined to depart on that ground from the course of decisions upon the point. The result seems to be that the case, we are asked to decide here, has been decided by a Full Bench of this Court, and that decision is clearly binding on us, and I for one am quite content to follow it and am not disposed to question it now. I, therefore, take it that it has been decided, so far as this Court can decide it, that the step-mother is not to be allowed to inherit to her step-son as *gotraja sapinda*.

Then, I come to the second point which Mr. Seshagiri Aiyar raised, that is, whether she should not be allowed to succeed as a relation. Now, it is very difficult for me to find any place in the scheme of succession laid down by the *Mitakshara* for relations who are not either those specially named or *gotrajas* or *bandhus*. No doubt, there is a passage in *Kutti Ammal v. Radhakrishna* (2), which has been relied upon and which is criticised in *Jogdamba Koer v. Secretary of State for India in Council* (3), which might suggest that the learned Judges there considered that all relations, however remote, whether they be *sapindas* or *bandhus* or not, have to be exhausted before the estate can pass to the Crown. The passage might suggest that; but the decision in that case has been explained in this Court to be that a sister was there allowed to succeed as being a *bandhu* and, as has been pointed out in *Lakshmanammal v. Tiruvengada* (4)

it does not necessarily follow from this passage that the learned Judges, who decided the case of *Kutti Ammal v. Radhakrishna* (2), intended to suggest that there were other classes of heirs who were not in any of the classes mentioned in the *Mitakshara*. There is undoubtedly a passage in *Gridhari Lal Roy v. The Government of Bengal* (5) which lends support to the contention of the appellant. Taking a passage in the *Viramitrodaya* as reading that "maternal uncles and the rest" must be comprehended under the term *bandhus*, as otherwise they would be omitted and their sons would be entitled to inherit and after them they themselves, which would be objectionable, their Lordships say that, if that be the correct reading, it would follow that, even if the maternal uncle and others, who are not mentioned in the text of the *Mitakshara* relied upon, were excluded from the list of *bandhus* that is to say, as I understand it, are not *bandhus*, still according to the *Viramitrodaya* they would inherit after the *bandhus*. But in that case it was not decided whether it should be taken to be the law that persons who cannot be classed as *bandhus* but were still relations could succeed after them, their Lordships say:—" It is unnecessary to consider whether the title of any remote relation, who could not be brought within the category of *bandhus* or other class of heirs specified by the *Mitakshara*, would prevail against that of the Crown;" and they held in the case before them that the maternal uncle of the father was a *bandhu* of the father and as such entitled to inherit as a *bandhu*.

Therefore, though that observation as to the construction of the passage in the *Viramitrodaya* certainly does suggest that their Lordships were prepared, if necessary, to consider the question whether there might not be relatives who might succeed though they were not *bandhus*, that case does not decide that there was any such class of persons to be really found. I think it is very difficult, as I said at the outset, to find a place for any such class. The step-mother is certainly not a *bandhu*; if she comes in at all, she must come in as *gotraja sapinda*; it is very difficult

(2) 8 M. H. O. 88.

(3) [1889] 16 Cal. 367.

(4) [1882] 5 Mad. 241.

(5) [1867] 12 M. I. A. 448.

to suggest where she comes, whether after all the *sapindas*; or after the *samanodakas*, or after all the males, *gotrajas* and *bandhus*, as one class or otherwise.

The only other authority, which has been cited to us as suggesting that there may be relatives who are not *bandhus*, is *Sundrammal v. Rangasami Mudaliar* (6), in which there is an observation at page 199. That has been explained in a later case *Venkatasubramaniam Chetty v. Thayarammah* (7), where the learned Judges point out that the same Judges who speak in *Sundrammal v. Rangasami Mudaliar* (6) of the sister's daughter as not being a *bhinnagotra sapinda*, have subsequently in another case reported in the same volume, *Balamma v. Pullayya* (8), said that the sister is admitted on the ground that she may be considered a *bhinnagotra sapinda*, so that that case, as it has been explained in later decisions of this Court, does not afford any authority for the proposition that there is a class of relatives who are not *bandhus* or *gotraja sapindas* who can inherit. The case I have referred to, *Gridhari Lal Roy v. The Government of Bengal* (5), and the cases in this Court which have admitted certain female classes to inherit as *bandhus* do not go farther than this, that the list of *bandhus* as given in the *Mitakshara* is not exhaustive, and that others, who can be brought within the class of *bhinnagotra sapindas* may be allowed to inherit as *bandhus*. That being the state of the authorities, I certainly am not prepared to set up a different view, that there may be another class of relations who are entitled to inherit. There is no suggestion of that, to my mind in the text of the *Mitakshara* laying down that in the absence of *bandhus*, certain strangers can inherit—a text supported by a citation from the work of Apastamba to the effect that in the absence of a male issue, the nearest kinsman is entitled to succeed, and if there are no kindered, strangers can inherit; it has been argued before us that there is something in that text which suggests that there may be persons who are kindred who are not

either *bandhus* or *sapindas* or any of the special heirs described in the opening part of Chapter II, section 2, of the *Mitakshara*. But the text of Apastamba, we are told, relates to the nearest *sapinda*, and whether that is so or not, whether the text distinctly refers to *sapindas* or not, there is no reason that I can see, why we should, in order to arrive at a proper interpretation of the term 'kindered' in the text of Apastamba, go outside those classes of persons who are mentioned as heirs by the *Mitakshara*. No other text has been cited nor any other decision of this Court, I think, which warrants the bringing in of relatives who are not *bandhus*. And there is no case that I know of in the other High Courts which warrants it. On the other hand, in *Jogdamba Koer v. Secretary of State for India in Council* (3), it has been held that the brother's widow who is also a *gotraja sapinda*, is not entitled to succeed in preference to the Crown. I hold then that so far as the *Mitakshara* law goes, and apart from usage, the step-mother is not in the line of heirs at all, and, if it were necessary to decide the point, I should say that the property goes to the Crown in preference to her.

Then a question of *res judicata* was raised on behalf of the respondent, on the ground that, in a former suit, a person alleging himself to be nearer relation of the last male holder than the vendors of the present first defendant preferred a claim to the possession of the property now in question. The present plaintiff was the 1st defendant in that suit, and the present 1st defendant was the 2nd defendant therein, and the present plaintiff alleged that there were no *dayadees* of the last male holder entitled to succeed before her. The only finding in that judgment, as I understand that passage in the judgment, is that the plaintiff in that suit was not so near a relative of the last male holder as the vendors of the present 1st defendant. No doubt, the Subordinate Judge in that case does say that the present 1st defendant's vendors were the nearest legal heirs; but I do not think that by saying so he intended to decide anything which was really in any way in question between the first two defendants. He does not discuss that in his judgment or decide it ex-

(6) [1895] 18 Mad. 193.

(7) [1898] 21 Mad. 263.

(8) [1895] 18 Mad. 168.

pressly, and it was not necessary for him to decide that in order to dispose of that suit. Consequently, I am of opinion that there is no bar by that suit.

Then the lower Court was asked, shortly before disposing of the case, after the first hearing and after the issues were settled, to frame two new issues, one, as to estoppel, and the other, as to the custom of the caste. As to the estoppel, I do not think there is any real ground for such an issue, and the Subordinate Judge was right in not allowing it to be raised.

As to custom, no doubt, what was asked for was an issue as to the custom of the Presidency. This petition runs: "Moreover, according to the custom prevailing in this Presidency, the step-mother is also heir according to Hindu law." Really that does not suggest that the plaintiff was referring to any special caste custom. But I am not clear that we ought, on that ground, to refuse to allow the issue to be raised. It ought, no doubt, to have been presented in the pleadings or at the first hearing; but it was actually presented before the evidence was taken, before anything more had been done than to settle issues and set down the case for argument on the preliminary issue of law. In those circumstances, I am disposed to allow the plaintiff to raise a special issue, viz., whether, "according to the usage of the caste to which she and the 1st defendant belong, the step-mother is entitled to inherit to her step-son." I would ask the Subordinate Judge to take the evidence that may be adduced upon that issue, and return a finding to this Court within a period of two months. If the finding is in the affirmative, that is, if by usage the step-mother is entitled to succeed, the Subordinate Judge will also return a finding on the two following issues:

- (1) Are Rangaswami Chetti and Vasudevan Chetty, mentioned in paragraph No. 3 of the 1st defendant's written statement, heirs of Ramaswami Chetty, the plaintiff's step-son? and
- (2) if so, is the plaintiff, by virtue of the usage established, entitled to succeed in preference to them?

Evidence may be taken on these issues also. Seven days will be allowed for

objections after the return of the finding.

Abdur Rahim, J.—I agree.

In compliance with the above judgment, the Subordinate Judge of Kumbakonam submitted the following:

Finding.—This Court was asked to take the evidence that may be adduced by the parties and to submit a finding on the special issue raised by the High Court, viz.:—

"Whether, according to the usage of the caste to which the plaintiff and the 1st defendant belong, the step-mother is entitled to inherit to her step-son?"

2. In view to the general importance of the question raised to the entire Patnuli or Sourashtra community of this Presidency, the plaintiff applied for an extension of time for the purpose of securing the evidence of witnesses from Madura and other places where the members of the community in question reside. The High Court was pleased to grant a period of full three months in addition to the two months already fixed in the order calling for a finding. In spite of the time so granted, the plaintiff has not been able to place before the Court the evidence of any witness from outside this place and Aiyampet, or, even the best available evidence on the facts attempted to be proved in support of the matter of the issue, the onus of proving which lay on the plaintiff. Even after the close of the arguments in the case this day, the learned Vakils for the plaintiff felt that better evidence could be placed before the Court on the question of the custom of such general importance affecting the Sourashtra community of Southern India and proposed to present a petition asking this Court to move the High Court for further extension of time for taking evidence. I also thought it was the proper thing to do under the circumstances in case the plaintiff wanted to establish the custom. But no such petition having been presented by them, I proceed to discuss the evidence adduced in the case and to record my finding thereon.

3. There are two kinds of evidence attempted to be placed before the Court. The first is that of instances in which a step-mother inherited the properties of a step-son. Attempt is made to prove in-

stances of such succession in Salem, Ramnad, Aiyampet and Kumbakonam.

4. Three such instances are said to have occurred in Salem District. The first of them is the case of Muthulakshmi succeeding to the properties on the death of her step-son. The succession is said to have taken place at Salem about eight or nine years ago. It is spoken to by plaintiff's witnesses Nos. 1 to 3. Plaintiff's 3rd witness is a person that says he had dealings in cloth with Vaidya Ramudu, the husband of Muthulakshmi. He speaks to one tangible fact about the history of Vaidya Ramudu and his estate, viz., that Muthulakshmi sold the family residence in North Street Agraharam in Salem, to Budda Narasimhaier. Neither Budda Narasimhaier has been called to give evidence as to the facts or to produce his sale-deed nor has any Salem witness been called to prove the story. Birth and death registers of Salem would have proved the facts of the deaths beyond doubt. Plaintiff's 3rd witness did not produce any accounts of his to show that he really had dealings with Vaidya Ramudu. I am not prepared to believe plaintiff's 3rd witness as to any of the facts deposed to by him. He did not impress me as speaking to facts which he knew. He first deposed that the facts were put to him by Venkatachalaier (plaintiff's agent) and that he was asked if he knew about them. He subsequently withdrew the statement and swears that he was asked by Venkatachalaier, who had just returned from Salem, about instances of the custom in his knowledge. Plaintiff's agent, Venkatachalaier, has not gone into the witness-box to tell the story of his visit to Salem, his inquiries there, and his reason for pitching upon plaintiff's 3rd witness for his further inquiries after his return from Salem. Plaintiff's 3rd witness pretends to have a Tari of his own, though his son was a cooly till recently. He pays no profession tax and must be a petty weaver if he is one at all. Plaintiff's 2nd witness is a brother of Sarangapani who cremated Muthulakshmi. He did not claim the protection of the estates when Muthulakshmi was wasting her properties. It is extremely doubtful if plaintiff's 2nd witness or his brother was any relation of Muthulakshmi at all. Plaintiff's 1st witness admits that all his knowledge about this instance of succes-

sion was due to the information he had from Muthulakshmi herself. He says;—"I heard that he had a son by his first wife. The second wife took all the properties on the death of that son and came to Aiyampet. She was the daughter of Punga Munisami Chetty at Aiyampet. She died. She left properties in all about Rs. 1,000 or Rs. 1,500. She called me and others and said that her *dayadees* at Aiyampet did not agree and that therefore, she gave all her properties for charity. The properties were entrusted to me. I sent for her *dayadees* after her death and asked them to perform her funerals. Sarangapani Chetti performed the rites on the first day on a promise by me to give him Rs. 130, for the funeral expenses. The money was not paid. He sued us as reversioner to the estate about six or seven years ago. The Court decreed in his favour against us. Sarangapani Chetty was the great-great-grandson of the great-great-grandfather of Ramudu. I do not remember the number or the year of the suit against me by Sarangapani. It was in 1908 or 1907. The widow was living with Manga Lakshmana Chetty. Her name was Muthulakshmi. She was sister of Munga Lakshmana Chetti." This brother of Muthulakshmi, or, Sarangapani, who performed her funerals for Rs. 130 without making any claim to the estate, is not called. Nor are the records of the suit of 1907 or 1908 produced. The pleadings in that case must throw considerable light as to the facts spoken to by plaintiff's 1st witness. I am not prepared to believe plaintiff's 1st witness with regard to the strange story he is telling without corroboration on material particulars which are easily capable of corroboration. I might deal conveniently with an argument advanced on behalf of the plaintiff as regards the evidence of all the witnesses that they have given full details of the instances deposed to by them and that it was not the duty of plaintiff to corroborate or strengthen their evidence by producing the documents and pieces of evidence referred to by them, but that it was for the defendants to contradict the witnesses by producing the documents and pieces of evidence if what they are speaking to is not true. I cannot say that there is no force in such a contention especially in cases where the deponents

as to the instances of succession are men entitled to special credit on account of their position and status in life and the like. But I am not prepared to apply the principle contended for in this case where I saw that the witnesses were petty people who did not impress me as speaking the truth and cannot be relied upon. The defendants could have no idea that the witnesses at Aiyampet and Kumbakonam were going to speak about successions in Salem and other distant places or to any particular successions, and could not be expected to be ready with materials for contradicting them. I consider in a case of this kind the plaintiff should prove the instances relied upon by him to support the custom in question by clear, unequivocal and unimpeachable testimony to the satisfaction of the Court. I do not believe plaintiff's witnesses Nos. 1 to 3 as to the succession of Muthulakshmi to her step-son.

5. The second instance of such a succession in Salem is that of Ponnammal and her co-widow inheriting the properties of her step-son in the absence of *dayadees*. Plaintiffs' 3rd witness alone speaks to the case of succession. For the reasons stated in paragraph 4 above, I am not prepared to place any reliance on his evidence.

6. The third instance is that of the third widow of Taya Sarangapaniaier of Salem taking the inheritance, but it is not clear whether Sarangapaniaier died before his son by his second wife. Plaintiff's Vakils gave up the only evidence directed to proving this instance of succession as establishing little or nothing. No reason is given for the plaintiff being content to leave the case as regards this instance on the uncorroborated testimony of a person who has apparently no property except that of his mother and had run away from Salem two years ago on account of a quarrel with his mother. Plaintiff, if she relied on this instance, might well have examined the widow Parvati who inherited the properties of her step son.

7. One instance of succession of step-mother to her step-son in Ramnad District is attempted to be proved by plaintiff's 7th witness. He says that his paternal uncle's widow Kaveramma inherited properties worth Rs. 600 or Rs. 700 on the death of her step-son, Gopalan. His

cousin-brother, whose name he could not give but who he could designate as only Alagiri's son, is said to have taken the properties now on the death of Kaveramma. It is very doubtful whether the story could be true at all, or whether plaintiff's 7th witness merely draws on his imagination for names and relations. Plaintiff has not called Alagiri's son who could give better evidence if the facts were true. It is strange that plaintiff's 7th witness, who came away on foot to this District 30 or 35 years ago and has no property, did not care to claim his uncle's properties even on the death of Kaveramma, though he was on the same degree a reversioner as Alagiri's son. I cannot accept that there is anything like evidence in support of this instance of succession in Ramnad.

8. The next is a case that is said to have occurred at Aiyampet in the family of plaintiff's 1st witness who claims to be a Nattamaigar. Plaintiff's 1st witness says:—"My uncle, Kumarasami, died three or four months after the birth of son to him. He was divided from his brothers then. Seethai Ammal died three months after her husband's death. Lakshmi was bringing up Viswanada and looked after the properties. Viswanada also died of Mantham (convulsive fits of infants) three months after his mother. The properties were worth in all about Rs. 1,000. Lakshmi took all the properties and maintained herself out of them. I got the properties left by her after her death as reversioner of Viswanada. Lakshmi died about eight or nine years ago. Kumarasami died about 21 or 22 years ago." The inheritance was a house and Rs. 150 or so according to the witness. The devolution to him according to the witness is due to an arrangement made by Lakshmi with the consent of Subbiah who is a cousin of plaintiff's 1st witness and entitled to the estate along with plaintiff's 1st witness. The story is not believable. Subbiah, who is old and blind and has to seek shelter in the house of his daughter after selling away all his properties to plaintiff's 1st witness, would never have agreed to give away the properties of Lakshmi in favour of plaintiff's 1st witness without claiming his share. Subbiah is not called. If such an instance of succession had really occurred in a Nattamaigar's family, it

should be capable of proof by better testimony than that of plaintiff's 1st witness alone. I am not prepared to accept this instance of succession to be proved satisfactorily and beyond doubt.

9. Two cases of such succession of step-mothers are said to have occurred in this place (Kumbakonam) itself. Komalath Ammal (plaintiff's 5th witness) swears that she and her co-widow Sengathayee inherited the properties of her step-son Nannaiah born to her husband by one Mathai about 40 years ago, that she and Sengathayee divided the properties, that she gave her share of the properties to her brother, that Sengathayee gave her share of them to her niece Thulasi, that Sengathayee subsequently cancelled the gift to Thulasi and gave Komalathammal the properties, and that she has sold all the properties now to Aramanai Rangasami Chetti. Witness said that all these transactions were in registered deeds. Plaintiff summoned Aramanai Rangasami Chetti, but he was not examined as a witness. Nor were the title-deeds produced and exhibited. The recitals in the deeds would show how far the witness is speaking the truth. Plaintiff has no satisfactory reason for not examining Aramanai Rangasami Chetti who was present in Court or getting his title-deeds exhibited in the case, if plaintiff's 5th witness was really speaking to facts that occurred. From what I was able to see from plaintiff's 5th witness as she was giving evidence in this Court, I am not prepared to place any reliance on her words.

10. The last instance of a succession of the kind now in question is said to be the inheritance of properties by Veeramma on the death of her step-son. Plaintiff's 6th witness who came to speak to the instance really knows nothing about the family of Veeramma or her husband Krishna Chetty. Defence 1st witness who has bought the house of Krishna Chetti swears that Krishna Chetti had no son by any of his wives. Exhibit IV shows that the house of Krishna Chetti was sold not by Veeramma, but by Kuppammal mother of Krishna Chetti. Defence 3rd witness is the brother of Saraswathi, the first wife of Krishna Chetti. He proves that she had no son, but had an only daughter, Nachiaramma still living.

Nachiaramma is not called. I have no doubt that plaintiff's 6th witness has lent himself to perjury when he swore that Krishna Chetti left a son. This instance of succession of a step-mother is a myth.

11. Thus plaintiff has not been able to place satisfactory evidence as to any case of succession by a step-mother. Even if any of the cases attempted to be proved be taken to be proved, they are all cases in which the step-mother had been left a house for her to reside in and her jewels and sundry properties of the house-hold. Such properties may not have been claimed by any reversioner inasmuch as the widow (step-mother) would have in any view a right to reside in the house and would have to be maintained in case the reversioner coveted the small items of properties. They cannot be considered unequivocal cases of succession or inheritance from any consciousness of a legal principle that the step-mother had a right to inherit. Defence 2nd witness mentions an actual case in which a step-mother has been given maintenance where the reversioner chose to take the properties.

12. The plaintiff next relies on the evidence of opinion of the men of the community and contends that such opinions are not to be disregarded even if the witnesses are unable to mention or prove instances in which the rule of inheritance has been acted upon. For this position, the observations in the cases of *Mohesh Chunder Dhal v. Satrugan Dhal* (9), *Garudadhwaja Prasad v. Superundhwaja Prasad* (10) are cited. If there was unimpeachable evidence to show that it was understood in the Sourashtra families that a step-mother inherits to her step-son, the mere absence of instances may not be a material obstacle to the inference of a custom to that effect. In this case, there is no such body of evidence to show that there is a general universally accepted view by the elders of the caste that step-mothers succeed to the properties of their step-sons. No attempt has been made to focus the opinion of the elders of the community residing in Madura, Ramnad, Salem and other places, where the members of this community are to be found in large numbers. Plaintiff is con-

(9) [1902] 29 Cal. 343. (P. C.).

(10) [1911] 23 All. 37.

tent with examining some petty people of this place and Aiyampet on the matter. On my suggestion, the plaintiff cited one or two of the members of the now defunct Sourashtra Sabah of this place and of the Sourashtra Dharmapariपालाना Committee. Their opinion is not based on any traditional knowledge or personal knowledge of *panchayets* determining in favour of the succession of step-mothers, but only their own individual opinion. Plaintiff's 9th witness was a member of the old *Sabah* not retained as a member of the present committee. He heard from his grandfather and father that step-mothers inherit, but he was obliged to admit that his grandfather died before he was born. His father is alive and has not been called. He is not able to specify the occasion when this custom came to be divulged to him by his father. I would not place any reliance on his evidence. Plaintiff's 8th witness was also a member of the old *Sabah* but not considered important enough to be retained as a member of the committee by the District Court. He is not able to give particulars of the succession in respect of which he learnt from his father about the inheritance by step-mothers. He owes money to plaintiff's uncle and does not remember if he applied to be declared insolvent. Plaintiff's 10th witness says there is no custom as regards step-mother's succession. Plaintiff's 11th witness is the only member of the local Sourashtra Committee examined in the case. He is only 49 years old, and gives it as his opinion. He is not aware of any step-mother claiming inheritance in his days. This is not evidence from which I would infer any general opinion of the Sourashtra community, as to the succession of step-mothers to the estate of their step-sons.

13. Considering the whole evidence placed before me, I am unable to say that the special usage set up in this case has been shown to be ancient or invariable or established by clear and unambiguous evidence. I, therefore, find that the plaintiff has failed to prove the custom which she undertook to prove, *vis.*, that according to the usage of the caste to which she and 1st defendant belong, the step-mother is entitled to inherit to her step-son.

14. As my finding on this issue is not in the affirmative, it is not necessary to try or record any findings on the other two issues.

[This appeal coming on for final hearing after the return of the above finding, the Court delivered the following:]

Judgment.—We agree with the Subordinate Judge that the evidence adduced on behalf of the plaintiff does not establish her case on the issue.

We dismiss the appeal with costs.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1914 Madras 37

SADASIVA AIYAR AND SPENCER, JJ.

Palaniappan and another—Plaintiffs—Appellants.

v.

Subbaraya Gounden and others—Defendants—Respondents.

Second Appeal No. 722 of 1912, Decided on 7th November 1913, from decree of Sub-Judge, Coimbatore, in Appeal Suit No. 11 of 1911.

Transfer of Property Act, S. 58 (c)—Ostensible sale—Counter-part executed by vendee within two days undertaking to reconvey properties sold to vendor—Sale and reconveyance constitute mortgage by conditional sale.

There is nothing to prevent parties to a mortgage instrument from executing it on different pieces of paper; but in order to constitute it one single transaction, the interval between the execution of each instrument should be very short. [P 38 C 2]

So where a person ostensibly sells certain properties to another, and the vendee, by the execution of a deed, called the counter-part of a sale-deed, executed within two days, undertakes to reconvey to the vendor the properties sold to him, both the acts constitute one single transaction, and the instruments constitute a mortgage by conditional sale; the mortgagor can, therefore, redeem such mortgage even when he has committed default in payment on the date fixed in the counter-part. 3 All. 369; 27 Mad. 348; 22 All. 149; 23 Mad. 114; 7 I. C. 911; 2 Bom. L. R. 1058, Foll.; 12 All. 387; 9 I. C. 1073; 15 I. C. 423, Dist.; 11 C. W. N. 400; 6 C. L. J. 208, Diss. from.

[P 40 C 1, 2]

K. N. Gopal—for Appellants.

T. V. Gopalaswami Mudaliar—for Respondents.

Sadasiva Aiyar, J.—The plaintiffs are the appellants. Their father executed the sale-deed, Exhibit I, dated the 23rd June 1902, in favour of the 1st defendant, conveying the plaint lands to the 1st defendant for Rs. 300. Two days afterwards, *i. e.*, the 25th June 1902, the 1st defendant executed a deed which he

called the counter-part of the sale-deed, Exhibit I, in favour of the plaintiff's father. This counter-part is Exhibit A. By this counter-part, the 1st defendant agrees to give back possession of the lands sold under Exhibit I, provided the plaintiff's father repays the purchase-money of Rs. 300 at the end of the sixth year, but imposed a condition that the plaintiff's father should not borrow the said sum of Rs. 300 from others, nor should he raise the Rs. 300 by selling or otherwise alienating the plaintiff land itself and that the Rs. 300 should be repaid out of the plaintiff's father's own earnings. This counterpart further says that if the amount of Rs. 300 be not paid at the end of the sixth year, the plaintiff's father will have no right whatever to the lands after that period "*notwithstanding this counter-part deed.*"

These two documents, *i. e.*, the sale-deed and the counter-part, executed at an interval of two days of each other, were both registered on the same date. As the properties were outstanding on usufructuary mortgage for Rs. 200 with the defendants Nos. 2 to 5 the 1st defendant did not get possession of the plaintiff lands on the date of Exhibit I and the lands are still with the said usufructuary mortgagees. *Patta* for the lands has not been transferred to the 1st defendant's name, notwithstanding that the sale-deed to the 1st defendant was executed about eight years before the suit. The plaintiffs and the plaintiff's father have been paying the Government *kist* of the plaintiff lands up to date. These are the undisputed facts and circumstances of this case.

The lower Courts have dismissed this suit brought (about 18 months after the expiry of the six years' term mentioned in the counter-part deed) for redemption of the mortgage by conditional sale which, according to the plaintiffs, was legally effected by the two documents, Exhibits A and I, read together. The lower Courts have based their decision on the ground that the two documents could not be so read together, that Exhibit I must be taken separately as an out and out sale and Exhibit A must be taken as a separate agreement of repurchase to be in force for only six years. Hence this second appeal by the plaintiffs. The learned Subordinate Judge notices one other conten-

tion put forward by the 1st defendant before him, namely, that the right of re-purchase given by Exhibit A to the plaintiffs' father was personal to the plaintiffs' father and could not be availed of by the plaintiffs after their father's death. But the learned Subordinate Judge does not give any decision on that contention.

The contentions of the plaintiffs (appellants) before us might be summarised thus: The two documents, Exhibit A and I, ought to be read together as forming one transaction and, when so read, they form a mortgage by conditional sale according to section 58 of the Transfer of Property Act, and that is the true construction of the said documents. I am of opinion that this contention must be upheld as valid. Section 58, clause (c) of the Transfer of Property Act describes a mortgage by conditional sale as a transaction "Where the mortgagor *ostensibly* sells the mortgage property—on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller." Though the section is worded as if the transaction of mortgage by conditional sale is expected to be effected by a single instrument in which both the ostensible sale and the condition for its becoming absolute or its becoming void or its being cancelled by re-conveyance is also entered, it has been held, in the Privy Council case of *Balkishen Das v. W. F. Legge* (1) and in the case of *Ramaya v. Krishamma* (2) and *Wajid Ali Khan v. Shafakat Hussain* (3), that, provided that the transactions entered in two separate documents can be reasonably inferred to be really intended by the parties to constitute together a single transaction, the mere fact that two separate documents were executed when the provisions contained in those documents could have been comprised in one and the same document will not prevent the two documents really and substantially forming a single transaction, namely, the transaction in the

(1) [1900] 22 All. 149 (P.C.).

(2) [1900] 23 Mad. 114.

(3) [1910] 7 I.C. 911=33 All. 122.

nature of a mortgage by conditional sale. As remarked in the decision of *Mutha Venkatachalapati v. Pyanda Venkatachalapati* (4), decided by Sir S. Subramania Aiyar, Officiating Chief Justice and Bashyam Aiyangar, J.:—"There is nothing in law to prevent the whole of a mortgage transaction being reduced in any form to writing on different papers, whether attached together or detached from each other and the Court, in cases in which the terms as appearing in the different papers are contradictory or inconsistent has to ascertain the intention of the parties by reading all the papers together as forming one document though each paper on the face of it purports to be a separate document."

The question whether Exhibits A and I should be considered as two separate transactions, that is, a transaction of sale and an independent transaction of re-purchase must be decided only on a perusal and construction of both the documents and by contemporaneous surrounding circumstances. No oral evidence as to what the parties intended and meant by the words in the documents can be allowed. The Privy Council say in *Balkishen Das v. W. F. Legge* (1):—"Their Lordships do not think that oral evidence of intention was admissible for the purpose of construing the deeds or ascertaining the intention of the parties. By section 92 of the Evidence Act (I of 1872), no evidence of any oral agreement or statement can be admitted as between the parties to any such instrument or their representatives-in-interest for the purpose of contradicting, varying or adding to, or subtracting from, its terms, subject to the exceptions contained in the several provisos.....The cases in the English Court of Chancery, which were referred to by the learned Judges in the High Court, have not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian Legislature. The case must, therefore, be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts."

"Mortgages by conditional sale under

(4) [1904] 27 Mad. 348.

various names are a common form of mortgage in India and have come before this Board in several reported cases. * * * If so, one would expect to find that the transaction would, as far as possible, be made to assume the appearance of a sale. I have quoted thus largely, because loose expressions and sentences in several cases decided by Indian High Courts and Chief Courts in India and Burma have been quoted before us on both sides for the proposition that oral evidence and evidence of subsequent conduct can be adduced for construing documents. I think that in view of the above distinct pronouncement of their Lordships of the Privy Council, such evidence ought not to be allowed.

Again, the Privy Council case of *Bhagwan Sahai v. Bhagwan Din* (5), the Full Bench case of *Jhanda Singh v. Wahid-ud-din* (6), the case of *Ma Hnin U v. Osman Gani* (7), the case of *Kinuram Mandal v. Nitye Chander Sirdar* (8) and several similar cases were quoted by the respondent's learned Vakil in support of his contention that, where two separate documents have been executed within a few days of each other or even contemporaneously, they ought to be treated as distinct transactions (one a sale and the other an independent agreement for repurchase) and not as together constituting a mortgage by conditional sale. On the other side, the case of *Wajid Ali Khan v. Shafkat Hussain* (3) and *Ramayya v. Krishnamma* (2) the Privy Council case of *Balkishen Das v. W. F. Legge* (1), the Full Bench case of *Ram Saran Lal v. Amrita Kuar* (9), the case reported as *Maruti v. Balaji* (10) and several other cases were quoted to show that contemporaneous documents should be read together and, if they come within the terms of section 58 of the Transfer of Property Act, should be dealt with as one transaction of mortgage by way of conditional sale. I do not think it necessary to consider in detail all these cases. Some of them may be distinguished on the ground that the particular circumstances surrounding the exe-

(5) [1890] 12 All. 387 (P.C.).

(6) [1911] 9 I. C. 1013=33 All. 585.

(7) [1912] 15 I. C. 423.

(8) [1896] 6 C. L. J. 208.

(9) [1881] 3 All. 369.

(10) [1900] 2 Bom. L. R. 1058.

Advocate High Court

cution of the documents and the special words used in the documents were the basis of the decisions in those cases. Others cannot be so distinguished, for instance, the case of *Kinuram Mandal v. Nitte Chander Sirdar* (8), which, I think, with the greatest respect to the learned Judges who decided it, is clearly inconsistent with the decision of the Privy Council in *Balkishen Das v. W. F. Legge* (1). I might further state that in *Jhanda Singh v. Wahid-ud-din* (6), one of the learned Judges states as follows: "There can, in my opinion, be no doubt that if the two deeds were of even date, an almost irresistible presumption would arise in favour of the transaction being mortgage." And then, the learned Judge considers the several circumstances of that case including the circumstance that the two deeds were separated by an interval of seven days and were registered on different dates and comes to the conclusion that in that particular case, the two deeds did not constitute a mortgage by conditional sale.

In this case, the second deed clearly states that it is the counter-part of the first deed, and it is an elementary principle of law that, where one deed calls itself the counter-part of another deed and the parties to the two deeds are the same individuals, the two deeds form one single transaction and must be read together, if possible, as parts of the same transaction. The interval of two days between the two deeds is, therefore, of little or no significance.

It must be admitted that some observations of the Privy Council in *Bhagwan Sahai v. Bhagwan Din* (5) might be plausibly argued as inconsistent with the decision of the Privy Council in *Balkishen Das v. W. F. Legge* (1). In fact, the case of *Bhagwan Sahai v. Bhagwan Din* (5) was quoted for the unsuccessful respondents in *Balkishen Das v. W. F. Legge* (1) before the Privy Council. But their Lordships distinguished the case of *Bhagwan Sahai v. Bhagwan Din* (5) on the ground that the decision in that case depended on the peculiar language of the deeds then in question. It seems to me that the facts of the case of *Balkishen Das v. W. F. Legge* (1) are more similar to the facts of the present case. The case of *Ramayya v. Krishnamma* (2), which is

also binding upon us, further supports the conclusion that the two deeds, now in question, form a mortgage by conditional sale. The learned Vakil for the respondents strenuously argued that, unless there were in the first document some *express words* indicating that there was the relation of creditor and debtor between the vendee and the vendor, no mortgage by conditional sale can be inferred. This is a contention based on some observations made in English Courts of Equity and having regard to the opinion of their Lordships in *Balkishen Das v. W. F. Legge* (1), such consideration cannot be imported into India where we have got the plain words of S. 58 of the Transfer of Property Act to show what the nature of a transaction is which should be treated as a mortgage by conditional sale. As Doctor Ghose says at p. 85 in his book on the Law of Mortgage in India, 4th Edition, "The test, therefore, whether the apparent vendee can exercise the rights of a creditor, cannot with propriety be applied in this country and the broad rule laid in *Alderson v. White* (11) 'no debt, no mortgage' may perplex but cannot guide our Courts. See *Tukaram v. Ramchand* (12). As Chief Justice Edge points out, Indian documents ought not to be construed as if they had been drafted by an English conveyancer familiar with equity cases, which are wholly unknown to the people of this country, and altogether inapplicable to the form and object of the contract of mortgage as understood by the parties." Then the learned Doctor says at page 87:—"It should be added that in doubtful cases the Court leans strongly to the construction most favourable to the person claiming the right to redeem." As regards the contentions that the right of redemption is personal, it is based on the prohibition in Exhibit A to assign the right of redemption. Such a prohibition is legally invalid and the right of redemption can be exercised by the heirs. See *Ram Saran Lal v. Amirta Kaur* (9). In the result, I would reverse the decree of the lower Courts and give the plaintiffs the usual decree for redemption on their paying into the Court of first instance Rs. 300 for payment to the defendants within three

(11) [1858] 2 De. & J. 97.

(12) [1902] 26 Bom. 252.

months from this date. The parties will bear their respective costs throughout.

Spencer, J.—The only hesitation that I have felt in deciding this case is occasioned by the fact that there is a difference of two days in the dates of execution of Exhibit I and Exhibit A, and that in none of the numerous cases cited at the hearing of this appeal have two documents executed on different days been held to constitute a mortgage by conditional sale.

In *Jhanda Singh v. Wah id-ud-din* (6), where there occurred an interval of seven days between the execution of the first and second documents, it was held that the documents must be construed separately and that the parties intended a sale and not a mortgage.

The lapse of seven days was one of the circumstances relied on by the learned Judges who decided that case.

In the present case, an explanation, more or less satisfactory has been offered for the agreement to transfer not having been written on the very same day as the sale deed was written; and the presumption that they were two independent transactions, suggested by the difference in dates, has been more than counter-balanced by the description which occurs in Exhibit I of the second document being a counterpart of the first. If the two documents are read together as they must be when one is described as a counter-part of the other, the words in Exhibit I denoting that it is an instrument, of absolute sale and that the vendor renounces all claims to the properties in future lose the significance which they would bear if the sale-deed had been executed singly.

I am, therefore, able to agree with my learned brother in holding that the appeal should be allowed on the terms stated in his judgment.

V.S./R.K.

Appeal allowed.

* A. I. R. 1914 Madras 41

SADASIVA AIYAR AND SPENCER, JJ.

Sornalinga Mudali—Plaintiff—Petitioner.

v.

Pachi Naicken and others—Defendants—Respondents.

Civil Revn. Petn. No. 719 of 1911, Decided on 20th November 1913, from decree of Dist. Munsif, Poonamallee, in Sm. C. Suit No. 473 of 1911.

* (a) Contract Act, S. 2 (d)—Joint promisors—Payment of consideration to one supports promise to pay by other promisors.

Consideration paid to one of several joint promisors is sufficient to support a promise to pay made by the others. [P 41 C 2]

* (b) Evidence Act, S. 92—Contemporaneous oral agreement discharging one of joint promisors from liability—Evidence of agreement is inadmissible.

Evidence to prove a contemporaneous oral agreement between the promisee and one of the joint promisors, that the latter will not be held liable under a promissory-note, is inadmissible under section 92 of the Evidence Act. 5 I. C. 757, Dist. 18 I. C. 696, Foll.

[P 41 C 2]

Arumainathan Pillai—for Petitioners.

K. V. Krishnasami Aiyar—for Respondents.

Sadasiva Aiyar, J.—The District Munsif is in error in holding that, where several persons make a joint promise in consideration of money paid to some of them, the others are entitled to contend that, because no portion of consideration was received by them, there was no legal consideration for their own joint promise. The consideration paid to any of the joint promisors is legally sufficient to support the promise of all the joint promisors.

As regards the case of *Sesha Iyer v. Bavaji Mangal Doss* (1), the learned Judges seemed to have held that the single executant of a promissory-note could show that there was no consideration for the only promise relied on, namely, the promise by that single executant. If the learned Judges intended to decide that a person who has made himself liable, according to the tenor of the pro-note, could prove that he and the promisee agreed contemporaneously that he should not be held liable, I respectfully differ from that view, as it is opposed to section 92 of the Evidence Act and to the law-merchant.

The case of *Narasimhamurthi Sastry v. Ramaswamy Chetty* (2) shows that as against the holder, one of the joint executants cannot be permitted even to prove that he was a mere surety. The plaintiff's contention as to subsequent interest and costs must also be allowed. In modification of the lower Court's decree, a decree will issue in the plaintiff's favour against all the five defendants for the sum decreed by the lower Court with interest at 6 per cent. per

(1) [1910] 5 I. C. 757.

(2) [1913] 18 I. C. 696.

annum from the date of suit and costs in the lower Court. The costs of this revision petition will be paid by the 5th defendant to the plaintiff.

Spencer, J.—The respondent (5th defendant) in his written statement said he signed the plaint promissory-note believing the plaintiff, who said that, if his name was on the note as that of a person jointly liable, the other defendants would take an interest in discharging the debt. From this it appears that he signed as a surety. The District Munsif seems to have thought that there was no consideration as between the plaintiff and the 5th defendant, but section 127 of the Contract Act shows that the value received by the principal debtor is a sufficient consideration to bind the surety, and section 128 makes his liability co-extensive with that of the principal debtor. He is clearly precluded by section 92 of the Evidence Act from setting up a contemporaneous oral agreement that he should not be made liable on the promissory-note. [Vide *Narasimhamurthi Sastry v. Ramaswami Chetty* (2).] No doubt, a promissory-note, that is without consideration, creates no obligation between the parties to the transaction (section 43 of the Negotiable Instruments Act), but here the District Munsif has made the other persons, defendants Nos. 1 to 4, who signed it liable. This is, therefore, not a case in which negotiable instrument was made without consideration. The respondents' Pleader relies on the case of *Sesha Iyar v. Baraji Mangal Doss* (1). This was not a case of several executants but of one executant. There was a finding that the promisor was a mere name lender for the real obligor, and, therefore, the learned Judges who decided that case held that there was no consideration by which the former could be bound.

I, therefore, agree in the order now pronounced by my learned brother.

V.S./R.K.

Decree modified.

A. I. R. 1914 Madras 42

SADASIVA AIYAR AND SPENCER, JJ.
Srinivasa Aiyangar and others—Defendants—Appellants.

v.

Radhakrishna Pillai—Plaintiff—Respondent.

Appeal No. 282 of 1912, Decided on 12th November 1913, from order of Dist. Judge, Trichinopoly in Appeal No. 435 of 1911.

Transfer of Property Act, Ss. 58 (c), 60 and 98—Anomalous mortgage—Construction of—Clog on redemption—Application of S. 60.

A mortgage-deed executed on 23rd July 1884, after the Transfer of Property Act came into force, was in the following terms:—

"The usufructuary mortgage-deed executed on 23rd July 1884, in favour of.....For this Rupees three thousand and six hundred, the undermentioned fruit bearing trees, garden...have been usufructuarily mortgaged and, therefore, you shall enjoy the undermentioned properties.....and shall receive from me on the 10th *Adi Vijya* the said principal sum of Rs. 3,600 towards the principal alone...and shall deliver to me the undermentioned and fruit bearing gardens. In case I do not pay you the said principal sum of Rs. 3,600 within the stipulated date mentioned above, the undermentioned usufructuarily mortgaged properties shall, according to the text of the absolute sale deeds, be held and enjoyed by you and your posterity as an absolute sale with eight kinds of enjoyment....In case repairs such as construction of earth-work etc., for the safety of the said gardens, are made within the stipulated time for the above mentioned redemption of mortgage, the costs of that as per your accounts shall be given to you along with the mortgage money at the time of redemption." It was contended that this document was a combination of a simple mortgage, usufructuary mortgage and a mortgage by a conditional sale, and was, therefore, governed by section 98 of the Transfer of Property Act:

Held, [Per *Sadasiva Aiyar, J.*]: that the mortgage was a combination of a simple mortgage and a usufructuary mortgage with a covenant clogging the equity of redemption. There was no ostensible sale on the date of the mortgage, and there was, therefore, no mortgage by conditional sale within the meaning of section 58 (c) of the Transfer of Property Act, so as to make it a combination of three mortgages: 1 *Mad.* 1 (P. C.), *Dist.*; 16 *I. C.* 209, *Foll.*; 27 *Bom.* 600, *Diss. from.*

[P 43, C 2, P 44 C 1]

[Per *Spencer, J.*] that there was no covenant to pay so as to make it a simple mortgage and the mortgage was a mere usufructuary mortgage with a clog on the equity of redemption: 15 *Mad.* 304; 27 *Mad.* 526, *Dist.* [P 45 C 1].

(*Per Curiam*):

(2) that the mortgage was not an anomalous mortgage so as to make section 98 of the Transfer of Property Act applicable:

(3) that to such a mortgage the provisions of section 60 of the Transfer of Property Act

applied and the equity of redemption could not, therefore, be lost except by an act of parties outside the mortgage instrument. 11 *Mad.* 403; 12 *I. C.* 382; *Foll.* 26 *Bom* 252, *Dist.* [P 45 C 2]

T. Rangac'ariar, A. S. Crodell and C. V. Ananthakrishna Iyer—for Appellants.

S. Srinivasa Aiyangar and K. V. Krishnasami Aiyar—for Respondent.

Sadasiva Aiyar, J.—This is an appeal against an order of remand. The appellants are the defendants.

The plaintiff sued for redemption of a mortgage created in 1884. This mortgage document (Exhibit A) begins by calling itself a usufructuary mortgage and, in two or three places in the course of the deed, it is expressly called a usufructuary mortgage-deed. It, however contains a clause that, if the mortgage amount was not paid on a date which is stipulated in the document at an interval of exactly nine years from the date of the document—the mortgage was to work itself out as a sale for the principal amount due on the mortgage bond. Possession was given to the mortgagee in accordance with the nature of the document and its spirit. At the end, there is a covenant to this effect: "I, the mortgagor, shall pay to you the costs of the construction of earthwork etc., on the date fixed for redemption as per your accounts along with the mortgage-money."

The question is, what is the nature of this document. It is contended by the appellant's learned Vakil that this is a combination of three kinds of mortgages, a simple mortgage, a usufructuary mortgage and a mortgage by conditional sale. The plaintiff's contention, on the other hand, is that it is a usufructuary mortgage with a covenant at the end clogging the equity of redemption. I am inclined to think that it is a combination of a simple mortgage and a usufructuary mortgage with a covenant clogging the equity of redemption. I think it cannot be called a mortgage by conditional sale, as it was executed after the Transfer of Property Act came into force, and it does not come within the definition of a mortgage by conditional sale found in section 58, clause (c) of the Transfer of Property Act. There is no ostensible sale of the mortgaged property on the date of the document. It is what was known as the Hindu form

of a mortgage by conditional sale before the Transfer of Property Act was enacted; but it seems to me that the definition given in section 58 clause (c) of the Act was expressly framed so as to exclude the Hindu form of mortgage by conditional sale from the definition of mortgage by conditional sale in the Transfer of Property Act. That Hindu form of mortgage by conditional sale, which began as a mortgage and worked itself out as a sale on breach of certain conditions by the mortgagor formed the subject of several decisions of the High Courts and the Privy Council and because much confusion resulted from conflicts between those decisions, their Lordships of the Privy Council expressly stated in *Thambusawmy Moodelly v. Hossain Rowthen* (1): "An Act of the Legislature affirming the right of the mortgagor to redeem until foreclosure by a judicial proceeding, and giving to the mortgagee the means of obtaining such a foreclosure, with a reservation in favour of mortgagees whose titles under the law as understood before 1858, had become absolute before a date to be fixed by the Act, would probably settle the law, without injustice to any party." I think that the Transfer of Property Act, so far as the Hindu form of mortgage by conditional sale was concerned, treated it as a mortgage either simple or usufructuary according to its terms and treated the condition as to its afterwards working out as a sale as not enforceable by enacting section 60 in the Act which gives to the mortgagors generally a right to redeem. A mortgage-deed which begins as a mortgage transaction cannot, in my opinion, be called a mortgage by conditional sale, though it is a mortgage which gives the mortgagee, after a certain time and on breach of certain conditions by the mortgagor, a right to claim a title as vendee. It is a mortgage with a clause providing for a future conditional sale and not a mortgage by means of a present sale transaction.

If, then, this document is not a mortgage by conditional sale, it is clearly a usufructuary mortgage according to the definition in section 58 clause (d) of the Transfer of Property Act. I think, that as there is the covenant at the end by the mortgagor which expressly says:—

(1) [1876] 1 *Mad.* 1 (P.C.).

"I shall pay some moneys along with the mortgage-money on the date of redemption", the document might, according to its literal construction, be treated as containing a personal covenant to pay the mortgage-money; and following *Rama Brahman v. Venkatanarsu Puntulu* (2). I would hold that, owing to the existence of that covenant, it is also a simple mortgage. Hence the document becomes a combination of a simple and usufructuary mortgage.

It was next contended that even a combination of a simple and a usufructuary mortgage is an anomalous mortgage under the definition of section 98 of the Transfer of Property Act. That section is as follows:— "In the case of a mortgage not being a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage or an English mortgage or a combination of the first and third, or the second and third, of such forms, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage." The construction sought to be put by the appellant's learned Vakil upon this section is that the words "in the case of a mortgage being" should be understood before the words, "a combination of the first and third." I do not think that this is a reasonable construction of the section. I think the meaning is "or in the case of a mortgage not being combination etc".

Reliance was placed upon the decision of *Amarchand Lakhmaji v. Kila Morar* (3). In that case, the respondent was not represented, and I think that that case was wrongly decided. Reference was also made to *Ramayya v. Guruva* (4). No doubt, there is an observation in that case that the Subordinate Judge who decided the case in the lower Court treated the mortgage in question in that case as an anomalous mortgage; but I do not think that the learned Judges of this Court intended to state that that opinion of the Subordinate Judge was correct. Again, reference was made to *Ammanna v. Gurumurthi* (5). There is an observation there that the transac-

tion evidenced by the document in question in that case was a mortgage by way of conditional sale as defined in section 58, clause (c) of Act IV of 1882. That observation was not necessary for the decision in that case, and with the greatest respect I dissent from that observation, though it seems to be accepted without criticism by Sheppard and Brown (page 238) and by Gour (section 1044) in their Commentaries on the Transfer of Property Act. In the result, I hold that the mortgage-deed in this case is not an anomalous mortgage as defined in section 98 of the Transfer of Property Act, but it is a combination of a simple mortgage and a usufructuary mortgage and hence that it is redeemable. That, in the case of such a mortgage the provision of section 60 would apply, seems to me to be clear from the observations in page 707 of Macpherson in his book on the Law of Mortgage. The case of *Perayya v. Venkata* (6) also shows that the right of redemption is not extinguished by the existence of a covenant at the end of the mortgage-deed similar to the terms given in the present mortgage-deed. [See also *Pamurlapati Ankivedu v. Samurlapati Subbiah* (7), where even less onerous terms were held not to destroy the right of redemption].

In this view, it is not necessary for me to consider the question whether the learned District Judge was right in his view that even if it was anomalous mortgage, section 60 of the Transfer of Property Act would allow the mortgagor to redeem the mortgage and that the terms of section 93 should be read subject to the provisions of section 60 and other sections of the Transfer of Property Act. I need only say that I would find it very difficult to hold that the express terms of section 93, which are intended to apply specially to anomalous mortgages, can be controlled by the provisions of the previous sections of the Act which deal with other matters.

In the result, I would dismiss the appeal with costs.

Spencer, J.—I agree with my learned brother in the interpretation he has put on section 93 of the Transfer of Property Act. I find it quite impossible to

(2) [1912] 16 I. C. 203.

(3) [1903] 27 Bom. 600.

(4) [1891] 14 Mad. 232.

(5) [1893] 16 Mad. 64.

(6) [1888] 11 Mad. 403.

(7) [1911] 35 Mad. 744.

read the words "or a combination of the first and third, or the second and third, of such forms" as not being governed by the negative which comes at the beginning of the sentence. If a different construction is to be put on this section, it would be necessary to imply the words "in the case of" between the words "or" and "a combination etc." This would be a violation of the meaning of the plain English of the sentence. I am unable to follow the statement of the learned Judges who decided *Amarchand Lakhmaji v. Kila Morar* (3), that a combination of a simple mortgage and a usufructuary mortgage is an anomalous mortgage provided for by section 98. Mr. Gour in paragraph 1603 of his book on the Law of Transfer in British India treats this statement as an oversight and in paragraph 1606 speaks of there being six and only six forms of mortgage eliminated by this section from the category of anomalous mortgages.

As regards the mortgage-deed, Exhibit A, as I read the document, I am inclined to treat it as either a usufructuary mortgage deed with a clause containing a clog on the equity of redemption or a usufructuary mortgage-deed combined with a mortgage by conditional sale. In either case, it will be subject to the conditions of section 60 of the Transfer of Property Act, and no act of the parties other than a transaction outside the mortgage-deed itself will extinguish the right of redemption: vide *Perayya v. Venkata* (6).

The words which provide for the payment of repairs, improvements etc., along with the mortgage-money, are evidently intended only to take effect in the event of the mortgage being redeemed. I do not consider that they constitute a personal undertaking to pay, nor are there any other words in this document which can be construed as a personal covenant, express or implied, to pay the mortgage money: compare *Gopalsami v. Arunachella* (8). In this respect, this case may be distinguishable from that of *Kangaya Gurukul v. Kalimuthi Annavi* (9), in which a personal promise to pay was contained in the words: "we shall cause Rs. 200 to be paid and we shall redeem our land."

If section 58, clause (c) of the Transfer of Property Act is to be read strictly, it is necessary that there should be an ostensible sale of the mortgage property to constitute a mortgage by conditional sale. There are no words in Ex. A, which, by themselves create a sale; but the document implies that, if payment is not made by the stipulated date, the property should be held and enjoyed by the mortgagee as if he had obtained it by absolute sale. In some cases, such words have been treated as a mortgage usufructuary by conditional sale. Instances are given in paragraph 1605, page 1025 of Mr. Gour's book. The next paragraph describes anomalous mortgages.

In *Tukaram v. Ramchand* (10), the document which passed the ownership of the property usufructuarily mortgaged in case of failure to pay the mortgage-money on the prescribed date, was construed as an anomalous mortgage. But in that case, the usufructuary mortgage seems to have been combined with a lease and that may have led the learned Judges to treat it as an anomalous mortgage. Whether the present document be treated as a usufructuary mortgage combined with a mortgage by conditional sale, as the lower Appellate Court treated it, or a usufructuary mortgage with a clog on the equity of redemption, in either case, the judgment of the lower Appellate Court will have to be upheld and this appeal dismissed with costs, and I, therefore, agree in the order proposed by my learned brother.

V.S./R.K.

Appeal dismissed.

(10) [1902] 26 Bom. 252.

A. I. R. 1914 Madras 45

AYLING, J.

In re Vempalli Bali Reddy and others
—Accused—Petitioners.

Criminal Revn. No. 297 of 1913 and Criminal Revn. Petn. No. 246 of 1913, Decided on 15th July 1913, from judgment of Dy. Magistrate, Jammalmadugu in Criminal Appeal 1 of 1913.

Evidence Act, S. 30—Trial of number of accused before Magistrate—Plea of guilty by two after charge implicating all—Magistrate trying all together—Trial held joint within S. 30, so as to admit confessional statements of two against others.

Where in a trial of several persons the Magistrate, on the conclusion of the evidence for the prosecution framed a charge and called upon the accused to enter on their defence and

(8) [1898] 21 Mad. 476.

(9) [1904] 27 Mad. 526.

two of them pleaded guilty and in doing so implicated all the accused and the Magistrate tried all of them together and relied on the confession of the two in convicting the others:

Held: that the two accused were persons tried jointly with the other accused within the meaning of S. 30 and their statements could be taken into consideration against the other accused: 17 All. 524 and 19 Bom. 195, *Dist.*

[P 46 C 1]

P. Venkataramana Row — for Petitioners.

Order.—The chief point taken by the petitioners' vakil is the fact that the Magistrate has taken into consideration against the remaining accused under S. 30, Evidence Act, the confessional statements of accused 14 and 17, who, when questioned under S. 342, Criminal P. C., at the close of the prosecution case, made statements implicating themselves and their co-accused, and pleaded guilty on a charge being framed under S. 255. The vakil contends, relying on the dictum of Boddam, J., in *Queen-Empress v. Lakshmayya Panduram* (1), that these were not the statements of persons "jointly tried" with the petitioners, and hence were inadmissible under S. 30, Evidence Act.

The learned Judge has based his conclusion on two other cases: *Queen-Empress v. Pirbhu* (2) and *Queen-Empress v. Pahuji* (3). With all respect, I do not consider that these decisions have any application to a case tried before a Magistrate under Ch. 21, Criminal P. C. Both relate to trials before a Sessions Court where the accused's plea of guilty is recorded under S. 271 at the outset of the trial. No doubt a prisoner, who then pleads guilty and is convicted on his plea, cannot be held to be tried jointly with others (co-accused) against whom the case proceeds under S. 272. But the present case is quite different. All the accused were jointly tried before the Magistrate and their pleas were not recorded until after the close of the prosecution evidence and after the recording of their statements now in question. I can see no reason why statements made under these circumstances should not be taken into consideration under S. 30, Evidence Act.

No other ground is shown for interference and the petition is dismissed.

V.S./R.K.

Petition dismissed.

(1) [1899] 22 Mad. 491.

(2) [1895] 17 All. 524.

(3) [1895] 19 Bom. 195.

A. I. R. 1914 Madras 46

SADASIVA AIYAR AND SPENCER JJ.

Adapa Subbarayadu and others—Defendants—Petitioners.

v.

Tippabhotla Lakshminarasamma and another—Plaintiffs—Respondents.

Civil Revn. Petn. No. 1026 of 1912, Decided on 16th December 1913, against order of Temporary Sub Judge, Kistna at Masulipatam in Appeal Suit No. 18 of 1912.

(a) Civil P. C. (5 of 1908), O. 21, R. 89—"Holding interest therein" mean "holding interest on date of application."

The words "any person either owning such property or holding an interest therein" in O. 21, R. 89, mean "any person owning such property or holding an interest on the date of the application." So, where the immovable property of a judgment debtor is sold by the Court, and subsequent to the sale but before its confirmation, he divests himself of his interest in the property, he has no locus standi to apply under O. 21, R. 89, to have the sale set aside, though under S. 310-A, of the old Code he had that right: 13 I.C. 134, *Foll.* and 25 Bom. 631, *Dist.* [P 47 C 1; P 48 C 1]

(b) Civil P. C. (1908), S. 115—Petition by judgment debtor cannot be amended into petition by purchaser.

The High Court when exercising its powers of revision under S. 115 will not allow a petition by the judgment debtor to be amended into a petition by the purchaser. [P 49 C 1]

(c) Civil P. C., S. 115—High Court will not interfere merely because lower Court erred on point of law.

Per Sadasiva Aiyar, J.—Although the lower Court has erred on a point of law the High Court will not interfere under S. 115.

[P 47 C 2]

(d) Civil P. C. (5 of 1908), O. 21, R. 89—Scope.

A person purchasing privately from the judgment debtor can apply separately to set aside the sale. [P 48 C 1]

V. Ramdoss—for Petitioners.

B Narasimha Rao—for Counter-Petitioners.

Sadasiva Aiyar, J.—This is a petition by the judgment debtor under O. 21, R. 89, Civil P. C., (corresponding to, but differing substantially in its wording from, the old S. 310-A) to have the Court auction-sale of a property, (which belonged to him on the date of such auction sale), set aside.

After the Court auction-sale however he sold away all his rights to a stranger and on the date of this application made by him under O. 21, R. 89, he had no title in the property. Could such a person be allowed to make an application

under the new Code to set aside the sale?

Now, an elementary principle of the law is that unless a statute clearly allowed it, a man, who has no right in a property on the date of filing a suit or making an application in respect of that property, cannot be allowed to file that suit or make that application. The natural meaning therefore of the words in O. 21, R. 89, "any person either owning such property or holding an interest therein, etc.," is "any person owning such property or holding an interest on the date of making the application." The judgment-debtor would continue to own the property sold in Court auction on the date of the application under O. 21, R. 89, if both of the following conditions are fulfilled: (1) that the Court auction sale has not been confirmed and he has not therefore ceased to be the owner (this condition would be usually fulfilled as the application under O. 21, R. 89, should be made within 30 days and the sale is confirmed only after 30 days); and (2) that the judgment debtor has not before the date of the application conveyed away all his rights to a stranger. The judgment debtor in the present case did not own the property and had no interest in it on the date of the application and hence his petition was rightly (it seems to me) dismissed by the appellate Court.

Reliance is however placed on *Narain Mandal v. Sourindra Mohan Tagore* (1), *Maganlal v. Doshi Mulji* (2) and other similar cases for the petitioner. In the first place, those cases were decided under the old Code. The judgment debtor was held in those cases to continue to come within the meaning of the words in S. 310-A, of the old Code, "person whose immovable property has been sold" in Court auction even after he had himself voluntarily sold away his properties. It is unnecessary to say whether those cases were rightly decided (I beg leave, with great respect, to express some doubt as to their correctness) because we have to construe the different words in the new Code.

I think that we ought to follow the ruling of this Court in *Anantha Lakshmi Ammall v. Kunnanchankarath Sankaran*

Nair (3), which shows that the subsequent purchaser from the judgment debtor is entitled to apply under O. 21, R. 89. If the subsequent purchaser is so entitled, why should the judgment debtor, who has no interest, be also permitted to apply in disregard of the plain rule of jurisprudence already referred to by me? The case of *Ishar Das v. Asaf Ali Khan* (4) shows that such a judgment debtor cannot apply under O. 21, R. 89, though I am not prepared to agree (with great respect) with Chamier, J., that even the subsequent purchaser cannot come in under O. 21, R. 89, as that opinion is opposed to the ruling of *Anantha Lakshmi Ammall v. Kunnanchankarath Sankaran Nair* (3).

Even if I am wrong in the above view, I am clearly of opinion that the lower Court did not act illegally or beyond its jurisdiction or act with material irregularity in arriving at the above conclusion and hence that we are not entitled to interfere under S. 115, Civil P. C. This view of mine, as regards the applicability of S. 115 is, no doubt, opposed to the view held in *Anantha Lakshmi Ammall v. Kunnanchankarath Sankaran Nair* (3). I am unable (with great respect) to hold that because a Court by falling into an error of law dismisses a suit or an application on the ground that the particular plaintiff or particular applicant has not got the right of suit or right of application claimed by him therefore that Court has declined to exercise jurisdiction over the suit or application. I therefore respectfully differ from *Anantha Lakshmi Ammall v. Kunnanchankarath Sankaran Nair* (3) so far as that case decides that the High Court could interfere under S. 115, Civil P. C.

In the result, this revision petition is dismissed but as we have allowed costs to the respondent in the connected appeal, we make no order as to costs in this petition.

Spencer, J.—I feel no doubt whatever that a judgment debtor who, after a Court auction of his immovable property has been held but before it has been confirmed, parts with his entire interest in such property in favour of a private purchaser is not a person

(1) [1905] 82 Cal. 107.

(2) [1901] 25 Bom. 681=8 Bom.L.R. 255.

(3) [1913] 18 I.O. 579.

(4) [1912] 13 I.O. 134=34 All. 186.

"either owning such property or holding an interest therein by virtue of a title acquired before such sale"

at the time of his applying to have the sale set aside, although he may be a "person whose immovable property has been sold under this Chapter,"

within the meaning of S. 310-A, of the Code of 1882: see *Maganlal v. Doshi Mulji* (2).

In this respect, I consider that *Ishar Das v. Asaf Ali Khan* (4) was rightly decided. I would follow that decision so far as it decides that a judgment debtor who has divested himself of all his interest in the property has no locus standi to apply under O. 21, R. 89, to have the sale set aside.

On the question whether the purchaser under the private sale is a person owning such property and can come in under this section, the above decision is in conflict with a later decision of a Bench of this High Court in *Anantha Lakshmi Ammall v. Kunnanchankarath Sankaran Nair* (3) but I find it unnecessary to express any view about the purchaser's rights in the present case as he is not a party to the present proceedings; and I am satisfied that we should not, as a Court acting in revision under S. 115, Civil P. C., allow any amendment of the petition at this stage or any presentation of a fresh petition by a person not a party to the proceedings in the lower Court, more than one year after the time allowed by Art. 166, Lim. Act, has expired.

I would therefore dismiss the revision petition but without costs, as costs have been allowed in the appeal against order which the petitioners took as an alternative remedy.

V.S./R.K.

Petition dismissed.

A. I. R. 1914 Madras 48

SADASIVA AIYAR, J.

Subramania Iyer—Defendant—Petitioner.

v.

E. S. B. Stevenson and others—Plaintiffs—Respondents.

Civil Revn. Petn. No. 183 of 1913, Decided on 11th December 1913, against decree of Sub-Judge, Ramnad, in Small Cause Suit No. 1370 of 1911, D/- 16th October 1911.

Provincial Small Cause Courts Act (9 of 1887), Sch. 2, Art. 13 — Suit to recover

kolavettu is cognizable by Small Cause Court.

A suit to recover kolavettu, i. e. price paid for the plaintiff's water used for irrigation purposes by the defendant, is cognizable by a Court of Small Causes. [P 48 C 2]

K. N. Aiya—for Petitioner.

T. Rangachariar—for Counter-Petitioners.

Judgment.—I agree with the Subordinate Judge that it is doubtful whether in Ex. 2 there is a finding that kolavettu was claimable only at two mercals per chei per year. All that appears is that in that suit kolavettu at two mercals per chei were "deliverable," that is, still due to the plaintiffs.

I therefore hold that that decision is not proved to be res judicata against the plaintiffs.

As regards Exs. C and C-1, I am unable to understand why they are not res judicata in favour of the plaintiffs. The decision in that former case was given by the same Subordinate Court on its Small Cause Side, and even assuming that the rate was not disputed there was a finding issue 4 raised in that case that the defendant was liable to pay kolavettu "as claimed," that is, I take it, at the rate of eight mercals per chei.

Even if the decision in neither of the former suits is res judicata the Subordinate Judge's finding on the evidence in the present case is right.

As regards the question of jurisdiction, Miller, J., said in *Seetharama Aiyer v. R. Fisher* (1):

"It is by no means clear that the claim for kolavettu falls within the prohibition enacted in Art. 13. What the exact nature of the kolavettu may be might have been more clearly ascertained."

It is admitted in this case that it is in the nature of price paid for the plaintiff's water used for irrigation by the defendant. It is therefore clear that the claim for it does not fall within the prohibition of Art. 13, Sch. 2, Act 9 of 1887.

The revision petition is dismissed with costs.

V.S./R.K.

Petition dismissed.

A. I. R. 1914 Madras 49

SUNDARAM AIYAR AND SPENCER, JJ.

In re N. Jaladu and another — Prisoners—Applicants.

Criminal Appeal No. 353 of 1911, Decided on 24th October 1911, against order of Acting Sess. Judge, Nellore.

(a) Penal Code (1860), S. 366—Minor removed with consent of guardian but improperly married without guardian's consent—Such marriage does not amount to kidnapping.

The offence of kidnapping consists in taking or enticing a minor out of the keeping of the lawful guardian of such minor without the consent of the guardian. If a minor is removed with the consent of the guardian and subsequently married improperly without the consent of the guardian such improper marriage would itself not amount to kidnapping.

[P 49 C 2]

(b) Penal Code (45 of 1860), S. 90—Scope—"Under a misconception of fact," meaning explained.

The expression "under a misconception of fact" in S. 90 is broad enough to include all cases where the consent is obtained by misrepresentation and the misrepresentation should be regarded as leading to a misconception of the facts with reference to which the consent is given. A misrepresentation as to the intention of a person in stating the object for which consent is asked is a misrepresentation of fact.

[P-50 C 1]

(c) Penal Code (45 of 1860), S. 90—Consent by misrepresentation is no justification.

Consent obtained by misrepresentation or fraud cannot be availed of under the Penal Code to justify what otherwise would be an offence.

[P 50 C 1]

P. R. Grant—for Public Prosecutor.

Judgment.—In this case, the appellants have been convicted under S. 366, I. P. C., of the offence of kidnapping a girl (P. W. 1) of about ten years of age from the guardianship of her mother, P. W. 2, with intent that she might be compelled to marry against her will. The facts found by the lower Court are that accused 2, a relation of P. Ws. 1 and 2 asked P. W. 2 and P. W. 3 her (P. W. 2's) grandmother, to send the girl for three days for Bogikolusu (or present gathering at a festival) but really with the intention of disposing of the girl in marriage to accused 1 without the consent of the girl and P. Ws. 2 and 3. P. W. 3, the girl's greatgrandmother, let her go. More than a week after accused 2 had taken the girl to her village, she led her to another village on a false pretext. She then took her to a temple there where accused 1 was waiting, and there the girl was married to accused 1 against her will.

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The defence was that the girl was taken and married to accused 1 with the consent of P. Ws. 2 and 3.

We agree with the lower Court in holding that the evidence adduced on behalf of the defence is not worthy of credit and that no consent was given by either P. W. 2 or P. W. 3 to the marriage. The Sessions Judge convicted both the accused under S. 366, I. P. C. He held that "if, as alleged by the prosecution, P. W. 2 allowed accused 2 to take her only for Bogikolusu and accused 2 took her and got her married in violation of her legal guardian's authority, the offence of kidnapping is complete." This statement of the law cannot be accepted as correct. The offence of kidnapping consists in taking or enticing a minor out of the keeping of the lawful guardian of such minor without the consent of such guardian. If a minor is taken with the consent of the guardian and subsequently married improperly without the consent of the guardian to any person, such improper marriage would not by itself amount to kidnapping. So far as accused 1 is concerned it was not alleged by the prosecution that he was a party to the taking away of the girl from the guardianship of P. W. 2 nor was it alleged that he took her away from the custody of accused 2. The Sessions Judge finds that he "acted in concert with her and assisted in the kidnapping." We do not find any evidence that he instigated or aided her in the taking of P. W. 1, nor is there any charge or proof of conspiracy as regards this part of the transaction. There is no evidence that, prior to the time of the marriage the girl had been removed by accused 1 from the custody of accused 2 who took her from P. Ws. 2 and 3. The offence charged has not been made out against accused 1. His conviction cannot therefore be sustained.

It remains to be considered whether accused 2 is guilty under S. 366 or not. P. W. 2 said that she refused to consent to accused taking the girl and that she had gone away from the house when she actually took her, but P. W. 3 does not corroborate her in this statement; and the girl, P. W. 1, clearly says that her mother, P. W. 2, sent her. We are of opinion on the evidence that P. W. 2 also consented to the girl going with ac-

cused 2. But it appears that accused 2 obtained the consent of the girl's guardian by falsely representing that the object of taking her was only to gather presents for a festival. The question is whether in these circumstances it can be said that the guardian gave her consent to the taking of the girl within the meaning of S. 61, I. P. C. S. 90, I. P. C., provides: "A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception." We are of opinion that the expression "under a misconception of fact" is broad enough to include all cases where the consent is obtained by misrepresentation; the misrepresentation should be regarded as leading to a misconception of the facts with reference to which the consent is given. In S. 3, Evidence Act, Ill. (d), that a person has a certain intention is treated as a fact. So, here the fact about which P. W's. 2 and 3 were made to entertain a misconception was the fact that the accused 2 intended to get the girl married. In considering a similar statute it was held in England in *Reg. v. Hopkins* (1), that a consent obtained by fraud would not be sufficient to justify the taking of a minor: see also Halsbury's Laws of England, Vol. 9, p. 623. In Stephen's Digest of the Criminal Law of England, Edn. 6, p. 217, the learned author says, with reference to the law relating to "abduction of girls under sixteen" thus: "If the consent of the person from whose possession the girl is taken is obtained by fraud, the taking is deemed to be against the will of such a person." And he gives the following illustration No. (5): "A induces B to permit his daughter C to go away by falsely pretending that he (A) will find a place for C. A abducts C." The illustration is founded on the case of *Reg. v. Hopkins* (1), already referred to. Although in cases of contracts a consent obtained by coercion or fraud is only voidable by the party affected by it, the effect of S. 90, I. P. C. is that such consent cannot, under the criminal law, be availed of to justify what would

otherwise be an offence. Accused 2 must therefore be held to have removed the girl from the guardianship of P. W. 2 without her consent.

In the result, we confirm the conviction and sentence with respect to accused 2 and reverse the conviction of accused 1 and direct that he be set at liberty.

S.N./R.K.

Order accordingly.

* A. I. R. 1914 Madras 50
WALLIS, SADASIVA AIYAR AND
SPENCER, JJ.

Public Prosecutor—Appellant.

v.

Raver Unithiri and another—Accused—Respondents.

Criminal Appeals Nos. 50 and 51 of 1914, Decided on 16th April 1914, from acquittal judgment of Sess. Judge, North Malabar, in Criminal Appeals Nos. 33 and 34 of 1913.

* (a) Criminal P. C. (1898), S. 195—Complaint requiring sanction if filed within six months of appellate order is within time though not filed within six months from lower Court's order.

A complaint requiring sanction under S. 195 Criminal P. C., is within time if filed within six months of the order of the appellate Court, though not within six months of the order of the lower Court. [P 51 C 1]

(b) Criminal P. C. (1898), S. 195 (b)—"Given", meaning explained.

The word "given" used in S. 195 (b) means "confirmed by a superior Court." [P 51 C 2]

Public Prosecutor—for Appellant.

V. Ryru Nambiar and K. Govinda Marar—for Respondents.

Wallis, J.—These are appeals from acquittal by the Sessions Judge setting aside the conviction of the accused on the ground that the complaint was not filed within six months from the grant of sanction in the first instance as required by S. 195 (b), Criminal P. C. It is argued by the Public Prosecutor that the terms of the section as interpreted by the decisions of two Full Benches of the Court, *Muthuswami Mudali v. Veeni Chetti* (1), *Bapu alias Adimulam Pillai v. Bapu alias Krishnayan* (2), were sufficiently complied with as the complaint was filed within six months of the order of the High Court confirming the sanction. It has been held in these decisions that the confirmation or revocation of a sanction by the appellate authority pursuant to the sub-section

(1) [1907] 30 Mad. 382 (F.B.).

(2) [1912] 14 I. C. 305.

(1) [1842] Car. & M. 254.

is a fresh giving or refusing of sanction within the meaning of the sub section, so as to give the Court to which the appellate Court is subordinate jurisdiction to entertain an appeal from such order. This point was expressly raised in the recent case in *Bapu alias Adimulam v. Bapu alias Krishnayan* (2) and was decided by five Judges in the affirmative. If this be correct, and it is our duty to bow to it whatever our own views may have been, it seems difficult to give the word "given" in the further portion of the section, which provides that no sanction shall remain in force for more than six months from the date on which it was given, therefore, a different meaning, and holding that it refers to the grant of sanction in the first instance. We are therefore constrained to hold that the complaint was filed in time.

It is unnecessary to consider whether the judgment of the appellate Court should not also be set aside as contravening the express provisions of S. 537 (b). The respondent's vakil has not taken the objection that the High Court in this case was not the proper Court to entertain the appeal from the Additional District Magistrate's order; and we do not think we are at liberty to go behind the order of the High Court confirming the sanction.

In the result the judgment of the appellate Court acquitting the accused, is set aside and the Sessions Judge is directed to take the cases again on his file and dispose of them according to law.

Spencer, J.—I concur.

Sadasiva Aiyar, J.—I take it that in these cases the High Court confirmed the sanction granted by the Additional District Magistrate acting under S. 195, Criminal P. C., as the authority to which the District Magistrate was subordinate and not under S. 439, Criminal P. C. They could not have acted in revision under S. 439, Criminal P. C., as the Full Bench decision of *Bapu alias Adimulam Pillai v. Bapu alias Krishnayan* (2) says that interference with an order granting or refusing sanction is not in the exercise of appellate or revisional jurisdiction.

It may be that the High Court in acting under S. 195, Criminal P. C., in this present case overlooked the fact that

the application under S. 195 should have been made to the Sessions Judge as the authority to which the District Magistrate was subordinate (see Cl. 7 of S. 195) and not to the High Court skipping the Sessions Court. However the High Court's decision is final as between the parties.

It has been finally decided by the above Full Bench decision that the word "given" in the first portion of Cl. (b) of S. 195, includes the meaning "confirmed by a superior Court." I do not think that in construing the same word "given" in another part of the same Cl. (b) which relates to the period of six months for which the sanction "given" is to be in force, it is advisable to place a different construction.

The Sessions Judge's order acquitting the respondents on the ground that the sanction "given" had expired must be set aside as there was a sanction "given" in this case by the High Court within six months before the charge, though the sanction given by the Magistrate expired more than six months before the charge.

The Sessions Judge's order being thus set aside the next question is whether to deal with the merits of the case ourselves or direct the Sessions Judge to re-hear the appeals before him. Whether such a direction is competent to an appellate Court acting under S. 423, Cl. (a) or not, it is competent to the High Court acting under S. 439 read with Cls. (a), (c) and (d), S. 423.

I think that the decision in *Chinna Karuppa Gounden v. Muthu Gounden* (3), which seems to be against the express provision of S. 537, Cl. (b), requires re-consideration but the question has not been raised in the appeal grounds in these cases and it is unnecessary to rely on S. 537 (b) in support of our order reversing the appellate Court's order.

S.N./B.K.

Order reversed.

(3) 2 Weir 202.

A. I. R 1914 Madras 51

WALLIS, J.

V. Balakrishnudu—Plaintiff.

v.

Narayanaswamy Chetty—Defendant.0

Original Civil Suit. No. 335 of 191,
Decided on 14th October 1912.

(a) Limitation Act (1908), Art. 145 — Applicability.

Article 145, Lim. Act, is not applicable to deposits on money. [P 54 C 1]

(b) Limitation Act (1908), Art. 66 — Money deposited for advances of suit costs and depositor's household expenses — Balance to be repaid with interest on disposal of suit — Transaction held as loan repayable at fixed date and that Art. 66 applied and if not Limitation Act (1908), Art. 115.

Where money was deposited with the defendant for the purpose of advances for costs of suit and household expenses of the depositor and the balance was to be repaid with interest on the disposal of the suit.

Held: that the transaction might be treated as a loan repayable at a fixed date, that it was governed probably by Art. 66 and if not by Art. 115, Lim. Act. [P 54 C 1]

(c) Probate and Administration Act (1881), S. 4 — To case not governed by Hindu Wills Act, Succession Act, S. 187 is inapplicable — Estate of deceased vests in executor on testator's death — S. 17, Lim. Act, is inapplicable — Limitation Act (1908), S. 17 — Succession Act (1865), S. 187.

In cases not governed by the Hindu Wills Act, S. 187, Succession Act does not apply and under S. 4, Probate and Administration Act, the estate of the deceased in such cases vests in the executor on the death of the testator, and there is nothing in that Act to prevent the executor from suing in respect of the property of the estate before probate is taken out. S. 17, Lim. Act is inapplicable to such cases. [P 54 C 2]

T. Ethiraja Mudaliyar — for Plaintiff.

C. P. Ramaswamy Aiyar — for Defendant.

Judgment. — The plaintiff in this case sues as executor of the will of the deceased V. Nagammal to recover with interest the sum of Rs. 10,680-9-9 alleged to have been deposited by her with her brother's son the defendant on 15th August 1900. It is common ground that this sum was due by the defendant to Nagammal on the date mentioned but the plaintiff's case is that at that time a suit for waste was about to be filed against Nagammal by the reversioner of her minor son's estate to which she had succeeded more than twenty years previously and that to prevent this sum getting into the hands of the receiver in that suit it was arranged between Nagammal and the defendant at the defendant's suggestion that Nagammal should give him a receipt for the money which could be used against the receiver in case of his seeking to recover the above sum from the defendant as part of the estate of Nagammal's son and that the defendant

should execute in her favour a document stating that though she had given a receipt for the money it had not really been paid to her and that it had been arranged between them that the money should remain on deposit with the defendant who should make her advances for costs of litigation and household expenses and should pay her the amount due with interest at 9 per cent on the disposal of the suit. The counter-receipt embodying these terms (Ex. B) which bears the defendant's signature though filed with the plaint was not in the terms referred to in the plaint and the defendant who was apparently unaware that it was forthcoming pleaded in his written statement that he had paid Nagammal the amount due on the date in question and thus discharged her debt in full and had also a receipt from her of the same date. He also denied that he had agreed to make any further payment to Nagammal as alleged in the plaint or that he paid her anything after September 1900. This case was persisted in during the examination of the plaintiff's witnesses but the only result of the cross-examination was to elicit further confirmation of their evidence and the defendant's *vakil* was well advised in the interests of his client in not putting him into the box or calling evidence and in relying entirely on the defences that the suit is barred and that the plaintiff is not the proper person to sue.

As regards limitation the following dates are material: the deposit was on 15th August 1900; Nagammal died on 16th January 1904 and the appeal of the reversioner against the decree of the District Court dismissing this suit was itself dismissed by the High Court on 1st December 1904 owing to her death while the appeal was pending. To save limitation the plaintiff in the first place relies on Art. 145 which in a suit against a depositary or pawnee to recover moveable property deposited or pawned allows 30 years from the date of the deposit or pawn. There has been some difference of opinion in the Calcutta High Court as to whether this article applies to deposits of money and the plaintiff relies on the decision of Maclean, C. J., and Stevens, J., from which Hill, J., dissented in *Adminis-*

trator-General of Bengal v. Kristo Kamini Dassee (1) and on the more recent decision of Mukerjee and Holmwood, JJ. in *Lala Gobind Prasad v. Chairman of Patna Municipality* (2) while the defendant relies on certain observations in the judgment of Wilson and O'Kinealy, JJ., in *Ishur Chunder Bhaduri v. Jibun Kumari Bibi* (3) and on the dissenting judgment of Hill, J. already referred to. This article was first enacted in the Limitation Act of 1871 and the proper course in my opinion is in the first place to see what it meant in that Act, because at any rate unless there is some strong reason to the contrary it must be read in the same sense in the subsequent Act in which it is re-enacted *Portsmouth Corporation v. Smith* (4). We should perhaps go further back as the language of Art. 145 is taken from S. 1 (15) of the Act of 1859. The only other article in the Act of 1871 in which deposit is mentioned is Art. 133 "to recover moveable property conveyed in trust deposited or pawned and afterwards bought from the trustee depositary or pawnee in good faith and "for value" which again is founded on S. 5, Act of 1859. As to these Arts. 133 and 145 the learned Judges observe in *Ishur Chunder Bhaduri v. Jibun Kumari Bibi* (3) that "it is clear from the context that the deposit meant is a deposit of goods to be returned in specie and that in accordance with the old use of "deposition" (obviously a misprint for depositum) with which all lawyers are familiar." I would venture to go even further and to say that when as in the Acts of 1859 and 1871 there is nothing to suggest the use of the word "deposit" in any other sense it must be taken to mean the sort of bailment known to lawyers under that name in the Roman law of Bailments which was accepted by Bracton and afterwards by Lord Holt in *Coggs v. Bernard* (5) as it to be enforced in England. This depositum is a bailment of a specific thing to be kept for the bailor and returned when wanted as opposed to commodatum where a specific

thing as a horse or a watch is lent to the bailee to be used by him and then returned; and both are contrasted with mutuum where corn, wine, or money or other things are given to be used and other things of the same nature and quality are to be returned instead. In my opinion there is no ground for holding that in the Acts of 1859 and 1871 the word "deposit" in the sections and articles already referred to included so-called deposits of money or other things which were not intended to be kept but to be used and there is nothing in the Acts of 1877 and 1908 to show that any different construction should now be put on Arts. 133 and 145.

The framers of these Acts were lawyers and must be taken to have used the term deposit in the ordinary legal sense. This conclusion is not I think in any way affected by the fact that in 1877 the legislature introduced a new Art. 60 which speaks of "money deposited under an agreement that it shall be payable on demand," thus using the word "deposit" not in its legal but in its popular sense. On the contrary an examination of what happened strongly supports the same view. No express reason was assigned for the amendment and doubt has been expressed in some cases as to the meaning of the legislature and the reasons for the change but it seems to me that those reasons are not very far to seek.

In English law and under the Act of 1859 time began to run in the case of loans payable on demand from the date of the loan. In the Act of 1871 the legislature altered this and under Art. 58 "for money lent under an agreement that it shall be payable on demand made time run from the date of demand." In 1877 the legislature changed its mind and decided to go back to the old rule and by Art. 59 made time run not from the date of demand but from the date of the loan. They however retained the date of demand as the starting point by a new Art. 60 with regard to a particular class of loans repayable on demand described in the new article as "money deposited under an agreement but it shall be re-payable on demand." It was then settled law that what are commonly known as deposits with banks and other bodies doing similar business whether carrying in-

(1) [1904] 81 Cal. 519.

(2) [1907] 6 C. L. J. 585.

(3) [1889] 16 Cal. 25.

(4) [1885] 10 A. C. 364.

(5) [1703] 1 Sm. L. C. 173.

terest or not and whether fixed or repayable on demand, are really loans and it would appear that the framers of the Act of 1877 who of course were aware of this considered very reasonably, if I may venture to say so, that in case of such deposits re-payable on demand seeing that re-payment is not contemplated until expressly demanded the date of demand is a more suitable starting point than the date of the loan; and that they accordingly inserted the new article to effect this. This view appears to me to be in accordance with the decision in *Ishur Chunder Bhaduri v. Jibun Kumari Bibi* (3) and *Perundevitayar Ammal v. Nammaluar Chetti* (6).

It seems to me fairly clear that the legislature in 1877 treated deposits of money re-payable on demand as a special class of loans which ought to have a special starting point. Accordingly instead of one article dealing with loans payable on demand (Art. 58, in the Act of 1871) they provided two Arts. 59 and 60 with different starting points. There is nothing to suggest that they thought deposits of money were covered by Art. 145. On the contrary if they had done so, they would scarcely have considered it necessary to provide a new article. The necessity was that otherwise Art. 59 would have been held applicable to such deposits.

For these reasons I have come to the conclusion that Art. 145 is not applicable to deposits of money and does not help the plaintiff. It has not been argued before me that the deposit should be regarded as one re-payable on demand within the meaning of Art. 60 or that the suit may be treated as against an agent for an account or as a suit against a trustee covered by S. 10. There are serious difficulties in the way of all these contentions, but I do not discuss them as the points have not been argued and the suit fails on another ground than limitation. Treating the transaction as a loan re-payable at a fixed date it is governed probably by Art. 66 and, if not, by Art. 115, and I can see no sufficient reason for having recourse to Art. 120. It is however contended that even if the period is three years the suit is not barred by virtue of S. 17, because the estate of the

(6) [1895] 18 Mad. 990.

deceased was unrepresented from her death in January 1904 until probate of her will was taken out by the plaintiff in 1910. The will is not governed by the Hindu Wills Act and S. 187, Succession Act, is therefore not applicable. Under S. 4, Probate and Administration Act, the estate of the deceased vested in the plaintiff as her executor on her death in January 1904 and there is nothing in that Act to prevent him suing the defendant at once. No doubt if he had omitted to take out probate he could not have obtained a decree without producing a succession certificate, but there is nothing in that Act to prevent his instituting the suit and afterwards obtaining the certificate before decree. In my opinion the plaintiff was capable of instituting the suit within the meaning of S. 17 from the death of the testatrix and that section does not help the plaintiff.

I have also come to the conclusion on issue 3 that the plaintiff is not entitled to maintain the present suit, because the money sued for belonged to her husband and his son after him and, when she succeeded as heir to her son, she only took a woman's estate for life and on her death the property passed to the heirs of her son as last male owner and they were the proper persons to sue for it. The will of the deceased recites that the property was the self-acquisition of her husband and that she had succeeded as her son's heir though she subsequently purports to dispose of this money in the hands of the defendant. The whole object of the transaction evidenced by Ex.B was to prevent the receiver in the suit against her for waste from receiving the money in the defendant's hands as part of the estate of her deceased son. The reversioner's suit, No. 46 of 1901 in the District Court of Chingleput, alleged that the property to which she had succeeded on her son's death included Rs. 40,000 in deposit with the defendant's father of which at the date of suit Rs. 15,000 remained in the hands of the defendant. In her written statement the deceased made the averment, which has not been proved in this case, that her relation had advanced Rs. 2,000 to her husband to enable him to start business and raised the curious contention that, as his property had been acquired with the aid of this nucleus, she had succeeded to it as her absolute property. She also pleaded,

pursuant to the secret arrangement made with the defendant, that she had received payment from him and given him a receipt, but she did not deny that the money in question had been deposited by her husband with the defendant's father. Lastly the conduct of the present plaintiff as executor and legatee under the will of the deceased in not proving the will and suing the defendant from the date of the death of the deceased in 1904 until late in 1910, though admittedly he was aware of all the facts, can scarcely be explained except upon the supposition that he well knew that the deceased had no powers of bequest over the money in the hands of the defendant and that the persons who became entitled on her death were her son's reversioners. On this ground the suit fails.

There only remains the question of costs. In view of the defence set up and persisted in until the close of the plaintiff's case that the defendant had repaid the money to the deceased, I direct that each party should bear his own costs.

S.N./R.K.

*Suit dismissed.***A. I. R. 1914 Madras 55**

AYLING, J.

Abdul Rahiman Sahib — Accused —
Petitioner.

v.

Emperor — Opposite Party.

Criminal Revn. No. 793 of 1913 and Criminal Revn. Petn. No. 644 of 1913, Decided on 23rd April 1914, from judgment of First Class Sub-Divl. Magistrate, Koilpatti, in Civil Appeal No. 68 of 1913.

Penal Code (1860), S. 225—Civil warrant not addressed to bailiff by name is not invalid—Rescuer of one arrested under such warrant is guilty under S. 225.

A civil warrant not addressed to a particular bailiff by name, but addressed "to the bailiff of the Court," is not invalid; therefore, the rescuer of a person arrested under such warrant is guilty of an offence under S. 225: 5 C. W. N. 843; 26 Cal. 748, Dist. [P 55 C 2]

M. D. Devadoss—for Petitioner.

Public Prosecutor—for the Crown.

Order.—The petitioner has been convicted of rescuing one Ramasami Moopan from lawful custody. Mr. Deva Doss' arguments have been devoted to show: (1) that the custody in which Ramasami Moopan was detained was

not lawful; (2) that the evidence does not show that the force used by the petitioner contributed to his escape.

No authority has been quoted to me to support the view that the arrest was illegal because the warrant was not addressed to P. W. 2 by name, but only to "the bailiff of the Court"; or that arrest only takes effect after the person ordered to be arrested has been given a chance of paying up the decree amount and has failed to do so. I have no hesitation in rejecting these contentions.

It is next argued that the procedure of the peon (P. W. 2) was defective in that he did not notify the contents of the warrant to the accused 1 before arresting him. It appears from the evidence that (P. W. 2) informed the accused 1 that he had a warrant for his arrest; that he held it out to him and asked him to sign it, thereby affording him chance of satisfying himself as to its contents; and that accused 1, without taking the warrant, began to object on the ground of the lateness of the hour and attempted to run away. Neither of the cases relied on for the petitioner: *In the matter of Rajani Kanto Pal v. Emperor* (1) and *Satish Chandra Rai v. Jodu Nandan Singh* (2), appear to be authority for holding that in these circumstances the arrest was illegal.

As regards the second point stress is laid on the fact that the force used by the petitioner was not to P. W. 2, but to another peon P. W. 3, who was accompanying him at his request and assisting him. A perusal of the evidence seems to show that the violence used against P. W. 3 contributed to the escape of accused 1, just as much as if it had been employed against P. W. 2.

I find no ground for interference and dismiss the petition.

S.N./R.K.

Petition dismissed.

(1) [1901] 5 C. W. N. 843.

(2) [1899] 26 Cal. 748.

A. I. R. 1914 Madras 56

TYABJI AND SPENCER, JJ.

Pattungal Moidin Kutti Musaliar—
Defendant—Appellant.

v.

C. P. Ummayya Umma and another—
Plaintiffs—Respondents.

Second Appeal No. 1591 of 1909, Decided on 9th March 1914, from decree of Dist. Judge, North Malabar, in Appeal Suit No. 272 of 1908.

(a) **Malabar Compensation for Tenants' Improvements Act (1900)**—Purchaser of leasehold interest of prior lessee must be paid compensation for improvements made by him as well as by prior lessee.Under Malabar Compensation for Tenants' Improvements Act (1 of 1900), where a subsequent lessee purchases the leasehold interest of a prior lessee also, he must be paid compensation not only for the improvements effected by him but also for the improvements effected by the lessee whose interest has passed to him.
[P 56 C 1, 2](b) **Malabar Compensation for Tenants' Improvements Act (1900)**—Quantum of compensation stated.Liberty should be given to the tenant to remove buildings on the land within a certain time and if he fails the compensation awarded ought not to be their full value but only a reasonable amount.
[P 57 C 1]*J. L. Rozario*—for Appellant.*K. Govinda Marar*—for Respondents.

Judgment.—The question raised in this second appeal relates to the amount of compensation that the defendant is entitled to for improvements. The defendant contended that at the time of the demise to him, the rights of the previous lessee, Asser, had vested in Kathiri Kutti under a sale held in execution of a decree which Kathiri Kutti had obtained against Asser. The plaintiffs, the lessors, reserved in the demise to the defendant only the rights of Kathiri Kutti under the mortgage obtained from Asser, and the lease was executed on the footing that Kathiri Kutti had only a mortgage right then. The defendant contended that a few days after the demise to him by the plaintiffs he purchased the rights of Kathiri Kutti, that is, the rights possessed by Asser under the previous lease by the plaintiffs. The defendant claims to be entitled to receive compensation not only for trees planted by him after the demise, but also for any improvements for which compensation would have been due to Kathiri Kutti. The lower Courts are wrong in holding that the defendant was entitled to have com-

pensation only for trees planted by himself subsequent to the demise to him. The District Munsif held that the defendant should institute a fresh suit for any compensation payable to Kathiri Kutti to which the defendant became entitled under the purchase from him. But in doing so he was clearly wrong. Mr. Kunjunni Nair contends that the statement in the demise that certain grown-up trees belonged to the plaintiffs should not be taken to mean that no young trees belonged to them. It is unnecessary for us to consider what presumptions of fact may be drawn by a Court of fact from the fact mentioned in the demise. We request the District Judge to submit a revised finding on issue 3 with reference to the above observations. The finding should be submitted within one month from date of receipt of this order by the lower Court and seven days will be allowed for filing objections.

(In compliance with the order contained in the above judgment the District Judge submitted the following):

Finding.—I am ordered by the High Court in their order of Friday, 5th January 1912, in Second Appeal No. 1591 of 1909, to record a finding on issue 3, in O. S. No. 517 of 1907 on the file of the District Munsif of Tellicherry which formed the subject of Appeal Suit No. 272 of 1908 on this Court's file. For the respondents it is urged that there is nothing to show what were the improvements effected by Asser and there is no evidence to show when he came into possession. He held under a marupat of 1071 and at any rate he was in possession at that time.

I think that the appellant's counsel rightly relies on Ex. 3 as showing what the improvements were. I find that they are those given in the resume of the commissioner's report as follows:

	Rs.	a.	p.
Value of fruit-bearing trees	115	5	10
Value of trees not bearing	12	9	6
Value of trees of spontaneous growth	5	10 8
Value of building ...	126	14	2
Cost of maintaining jenmi's trees	6	0 0
TOTAL ...	266	8	2

I therefore find that the value of improvements is Rs. 266-8-2.

(This second appeal coming on for final hearing after the return of the finding upon the issue referred by this Court for trial, the Court delivered the following:)

Judgment.—It is objected that the defendant should not be given the full value of the building which forms part of the improvements, but only Rs. 25. That point is taken in the plaint para. 3 (ii), and also in the fifth objection to the finding. The learned pleader, who appeared for the appellant in support of the finding, is unable to refer to any passage in the written statement denying the allegation in para. 3 (ii) of the plaint, and has not relied upon the Compensation for Tenants' Improvements Act (1 of 1900), S. 19. The learned pleader argued however that the judgment of the High Court asking for a finding has dealt with the point, and has decided that the defendant is to be paid the full value of the building. We think that the judgment referred to did not deal with this point, but that all that was contemplated in it had reference to the trees on the land. We will therefore order that the defendant should be at liberty to remove the building within three months of this date if he chooses; and if he does not do so, then the improvements should be valued as on the finding with this modification: that only Rs. 25 will be allowed for the building so that in all Rs. 115-5-10, Rs. 12-9-6 Rs. 5-10-8, Rs. 25, Rs. 6, total Rs. 164-10-0, will be allowed for improvements and the decree will be modified accordingly. If the building is removed by the defendant, the value of the improvements as given above will be lessened by Rs. 25. The time for payment will be extended to three months from this day. If the plaintiffs have already taken possession of the property they will pay interest at 6 per cent per annum on the amount due to the defendant for improvements from the time when they took possession. The appellant will have his proportionate costs in this Court and in the lower Courts. The respondents will bear their own costs.

S.N./R.K.

Decree modified.

A. I. R. 1914 Madras 57

TYABJI, J.

Jaldu Venkatasubba Rao—Petitioner.

v.

Asiatic Steam Navigation Co., Calcutta—Respondent.

Civil Revn. Petn. No. 568 of 1913,
Decided on 26th March 1914.

Limitation Act (1877), Art. 31 — Suit against carrier for non-delivery of goods is governed by Art. 31, and not by Limitation Act (1877), Sch. 1, Art. 49.

A suit against a carrier for non-delivery of goods, is governed by Art. 31 and not by Art. 49, Sch. 1, Lim. Act. The latter article will apply only when there is proof that the goods are still in the possession and custody of the carrier: 26 Bom. 562; 4 Bom. L. R. 447; 19 Bom. 165, *Foll.*; 3 Mad. 107; 5 Mad. 388; *Diss. form.* [P 58 C 1]

P. Nagabushanam—for Petitioner.

Partridge, Hignett and Sell—for Respondent.

Judgment.—The question involved in this petition is whether Art. 31 or Art. 49, Lim. Act, applies. The learned Judge has proceeded on the basis that the former article applies and accordingly has dismissed the suit as being barred by limitation.

His decision is in accordance with the view taken in *Haji Ajam v. Bombay and Persia Steam Navigation Co.* (1), and in *G. I. P. Ry. Co. v. Raisett Chandmull* (2). It is true that Farran, J., previous to the amendment of the Act, was inclined to follow the decisions which had held that S. 115 applied. But this was not Farran, J.'s own opinion. He says: "Had the question been *res integra* I should have felt much difficulty in concurring in that view." Then he says: "Having regard, however, to the current of decisions in the other High Courts I feel constrained to say that the learned Judge below could not have decided differently upon this branch of the case, and I think that now it is rather the part of the legislature to make its meaning more clear if it has been misinterpreted, than for us to run counter to the authorities in the other High Courts, upon the strength of which parties may have forborne to sue within the two years' limit, even though we may not be convinced of the reasoning upon which these authorities are based. However

(1) [1902] 26 Bom. 562.

(2) [1895] 19 Bom. 165.

it is not necessary for me to express a final opinion upon this point, as I agree with the Chief Justice on the other branch of the case." Bayley, A. C. J., however was prepared to act on his own opinion that Art. 30 applied, differing from the decisions holding that Art. 115 applied. In the opinion of the Court deciding *Haji Ajam v. Bombay and Persia Steam Navigation Co.* (1), the legislative amendment to which Farran, J., refers has been made. I respectfully concur with the decisions in those cases.

The doubt, therefore, as to the applicability of Art. 115 is set at rest, and it was not argued before me, as it was in the lower Court, that that article applied. Consequently the *British India Steam Navigation Co. Ltd. v. Hajee Mahomed Esack and Co.* (3) and *Hassaji v. E. I. Ry. Co.* (4), have not been cited to me by the learned pleader for the appellant though the learned Judge below refers to them.

The argument before me was that Art. 49 applied. It seems to me that Art. 49 cannot be applied to a case like this. Art. 49 refers to a wrongful detention of specific moveable property. On the facts of this case it is clear that what is complained of is non-delivery of goods by a carrier. It may be that if it had been proved that the property claimed was in the possession of the defendants either by some acknowledgment on the part of the defendants to that effect: cf. *Haji Ajam v. Bombay and Persia Steam Navigation Co.* (1), para. 1 of the judgment, (pp. 568, 569) or otherwise, then Art. 49 would be applicable. In the absence of this being proved, and on the allegations and the evidence in this case, the terms of Art. 31 seem to me directly applicable.

The petition is dismissed with costs.
S.N./R.K. *Petition dismissed.*

- (3) [1881] 3 Mad. 107.
(4) [1882] 5 Mad. 388.

A. I. R. 1914 Madras 58 (1)

AYLING, J.

Aravamudai Aiyangar—Petitioner.

v.

Kalia Perumal—Respondent.

Civil Revn. Petn. No. 18 of 1913, Decided on 27th March 1914, from decree of Sub-Judge, Kumbakonam, in Small Cause Suit No. 1353 of 1912.

Succession Certificate Act (1889), S. 4—
Pro-note in favour of deceased—Suit by assignee of widow of deceased—Conditional decree directing production of succession-certificate before execution is improper—
Proper order is to postpone decree.

In a suit on a promissory note executed in favour of a deceased person, a Court has no jurisdiction to pass a conditional decree directing the production of a succession certificate before execution of the decree, even if the suit be by an assignee of the widow of the deceased promisee. The proper order in such a case is to direct the production of the succession certificate before decree, and on failure hereof to dismiss the suit: 17 Mad. 419, 15 Bom. 105; 15 Mad. 419; 2 M. L. J. 116, *Foll* [P 58 C 2]

C. J. Seshagiri Sastri—for Petitioner.

Judgment.—In this case the plaintiff-respondent, sued on a promissory note as the assignee of the widow of the promisee. He produced no succession certificate. The Subordinate Judge gave him a decree directing at the same time that it should not be executed without filing a certificate.

It is argued on behalf of the petitioner (defendant 2) that the Court had no jurisdiction to pass such a decree in view of S. 4, Succession Certificate Act: see also *Santaji Khanderao v. Ravji* (1). I think this contention must prevail. The plaintiff can stand in no better position than his assignor: vide *Karuppasam v. Pichu* (2). The decree was illegal. The proper course in such cases is indicated in *Manasing v. Ahmad Kunhi* (3). The plaintiff should be allowed a reasonable time to file succession certificate, failing which his suit would be liable to dismissal.

The decree of the Subordinate Judge is set aside and he is directed to restore the suit to file and dispose of it according to law. Costs will abide the result.

S.N./R.K. *Petition accepted.*

- (1) [1891] 15 Bom. 105.
(2) [1892] 15 Mad. 419.
(3) [1894] 17 Mad. 14.

A. I. R. 1914 Madras 58 (2)

TYABJI, J.

Muniappa Choudhri—Defendant—
Petitioner.

v.

Singaravelu Mudali and another—
Plaintiffs—Respondents.

Civil Revn. Petn. No. 101 of 1913, Decided on 26th March 1914, from decree of Dist. Munsif, Tiruvallur, in Second Civil Suit No. 957 of 1912.

Landlord and Tenant—Suit for rent on basis of oral agreement—Agreement not proved—Court in exercise of discretion may give decree for profits for use and occupation.

Where a plaintiff claims rent on foot of an oral agreement, but fails to prove the agreement, the Court, in the exercise of its discretion, may give him a decree for profits for use and occupation if on the facts of the case no issues of an entirely different character would have been necessary had the basis of the plaintiff's claim been use and occupation: 22 Cal. 752, Ref. [P 59 C 1, 2]

A. Suryanarayaniah—for Petitioner.

S. DuraswamiAiyer—for Respondents.

Judgment.—It is argued before me that the District Munsif went in contravention of the cases *Lukhee Kant Doss Chowdhry v. Sumeerooddi Tustar* (1) and *Surendra Narain Singh v. Bhai Lal Thakur* (2), inasmuch as he permitted the plaintiff to succeed on the basis of claiming profits for use and occupation, whereas the case for the plaintiff, as set forth in the plaint, was founded on an agreement in the terms similar to those contained in a *muchi-lika* for the preceding fasli. The agreement alleged in the plaint however is an oral agreement, and it seems to me that the District Munsif used his discretion rightly in allowing the claim on the basis that he did. He evidently considered that, though the plaintiff was unable to prove the agreement to the full extent that he alleged, yet there was permission on the part of the plaintiff to allow the defendant to be in occupation of the land and that, under the circumstances, the proper rent to be charged was not what the plaintiff claimed but calculated on the basis adopted by the District Munsif. It is not alleged before me that if the plaint had been on the basis on which the plaintiff had obtained the decree, and if his claim had been for use and occupation it would have given rise to "issues of an entirely different character from those on which the trial as a suit for rent" proceeded: see *Surendra Narain Singh v. Bhai Lal Thakur* (2). It is argued however that the plaintiff having come to Court with a false case he should not have been allowed to obtain a decree on the true facts. I think the District Munsif exercised his discretion properly in per-

mitting the plaintiff to obtain the relief on the basis adopted by the District Munsif. It is however true that the plaintiff put his case somewhat too high. That is a matter which the District Munsif might have considered in making an order as to costs. Bearing that in mind I will order the petition to be dismissed but with only half the costs of the respondents.

S.N./R.K.

Petition dismissed.

A. I. R. 1914 Madras 59

TYABJI AND SPENCER, JJ.

Tadiparti Hanumanuli—Plaintiff—Appellant.

v.

Maddukuri Golayya and others—Defendants—Respondents.

Second Appeal No. 2564 of 1912, Decided on 31st March 1914, from decree of Temporary Sub-Judge, Rajahmundry, in Appeal Suit No. 198 of 1912.

(a) **Practice—Duty of Court**—Courts cannot convert rules of procedure into mechanical tests to save trouble of deciding issues between parties—Object of rules of procedure stated.

Rules of procedure are not to be converted into mechanical tests by which Courts may save themselves the trouble of deciding the real issues between the parties. The object of rules of procedure is to provide the best and most convenient mode in which the Courts may adjudicate upon the questions brought before them. [P 60 C 2]

(b) **Civil P. C. (1908), O. 6, R. 17**—Case set up by defendant after plaintiff closed his case—Amendment of written statement should not be permitted unless plaintiff is allowed to call further evidence to rebut new case.

The power of a Court to allow amendment of pleadings is very wide. But where a defendant changes his defence after the plaintiff has adduced all his evidence and prays for permission to amend his written statement, the permission should be refused unless the plaintiff also is given an opportunity to call such further evidence as he may be desired to produce to rebut the new case set up by the defendant: *Cropper v. Smith* (1884), 26 Ch. D. 700, Foll. [P 61 C 1]

P. Somasundaram—for Appellant.

T. Rama Chandra Rau—for Respondents.

Judgment.—The question in this appeal is whether the plaintiff is entitled to recover from defendants 19 and 21 the lands referred to in Exs. 2 and 3 and if so on what terms. The learned District Munsif held that the plaintiff could recover them but only on repayment of the consideration for which the sales to the said defendants

(1) [1874] 21 W. R. 208 (F. B.).

(2) [1895] 22 Cal. 752.

were respectively made. The learned Subordinate Judge held that the plaintiff was not entitled to recover the lands at all, and the ground on which he proceeded was that the said defendants had made out their title to the lands under Ex. 4. Ex. 4 refers to a sale on 11th November 1870. This sale was not by the widow but by the previous male owner. Each of these defendants in his written statement alleged that his predecessor-in-title derived his title from the widow. If Ex. 4 is genuine (as held by the learned Judge and we are bound by that finding) the question still is whether it refers to the land in question. That it may not refer to this land is indicated by two facts: (1) The extent of the land as given in Ex. 4 is 2 acres 10 cents, the extent given in Ex. 3 is 95 cents and in Ex. 2, 1'95 cents. (2) The said defendants' title-deeds refer to the widow and not to the male owner as being their predecessor-in-title, whereas if Ex. 4 referred to the lands now in question their predecessor-in-title would have been the last male owner. Under these circumstances the District Munsif did not allow the defendants to set up the case that they derived their title from the last male owner instead of the widow. The lower appellate Court however permitted the fresh defence to be raised and held in the result that the plaintiff had no cause of action in respect of the item of land forming the subject of this appeal.

It was argued before us that the Subordinate Judge was not justified in permitting the defendants to succeed on a case not set up in their pleadings and inconsistent with their original defence. On the other hand the respondents' vakil relied upon the admittedly wide powers of the Courts to permit amendments and reliance was placed on the following words used by Bowen, L. J., in a dissenting judgment in the case of *Cropper v. Smith* (1).

"Now, I think it is a well-established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with

what I have heard laid down by the other Division of the Court of appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace. O. 28, R. 1, of the Rules of 1883, which follows previous legislation on the subject, says that: "All such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right. It was said by Mr. Barber in his very powerful speech to us: "You are taking away an advantage from the plaintiffs who have got judgment below by making an amendment at the last moment. In one sense we should be taking away an advantage from them, but only an advantage which they have obtained by a mistake of the other side, contrary to the true bearing of the law on the rights of the parties."

We may respectfully agree with the opinion so forcibly expressed by the Lord Justice in as far as to say that rules of procedure are not to be converted into mechanical tests by which the Courts may save themselves the trouble of deciding the real issues between the parties. The object of rules of procedure is to provide the best and most convenient mode in which the Courts may adjudicate upon the questions brought before them.

In the case before us however the Court of first instance decided not to permit the defendants to make out their fresh case. The lower appellate Court differed from that decision. Had there not been difficulties in the way of upholding the lower appellate Court's decision we might have considered whether we ought to interfere with a discretion exercised by the lower ap-

(1) [1884] 26 Ch. D. 700.

pellate Court. These are however not only the difficulties to which we have already alluded, but also the fact that if the defendants were to be allowed to change their defence after the plaintiff had adduced all his evidence, the written statement should have been ordered to be amended and opportunity ought to have been given to the plaintiff to adduce such further evidence as he may have desired. This was not done. Under these circumstances we feel bound to interfere with the order made by the lower appellate Court. The question remains whether we should permit the defendants to have the matter reconsidered with liberty to each side to adduce fresh evidence. We think that in the circumstances of this case, it would not be right to do so. The course might have been adopted by the learned Subordinate Judge. But we think it is too late to do so at this stage. In our opinion the most equitable order will be to reverse the decree of the lower appellate Court on this point and to restore that of the District Munsif.

The costs will be borne by each side throughout.

S.N./R.K.

Appeal allowed.

A. I. R. 1914 Madras 61 (1)

TYABJI, J.

Thoppulan—Accused—Petitioner.

v.

Sankarayanarana Iyer—Complainant—Respondent.

Criminal Revn. No. 431 of 1913 and Criminal Revn. Petn. No. 348 of 1913, Decided on 3rd April 1914, from judgment of Sub-Divl. Magistrate, Devakottai, in Criminal Appeal No. 56 of 1912.

(a) Penal Code (1860), S. 379—Removal of trees by tenant in actual possession—Theft is not committed although landlord has joint interest.

Removal of trees by a tenant when in his actual possession does not amount to theft, even if his landlord is jointly interested in them : 26 Mad. 481, *Foll.* [P 61 C 2]

(b) Criminal P. C., S. 439—Trial under S. 379, Penal Code—Ingredients for offence under S. 403 or S. 424 not considered—Conviction under S. 379 cannot be converted to one under S. 403 or S. 424.

Where the necessary ingredients for an offence under S. 424 have not been considered in a trial under S. 379, it is prejudicial to the accused to convert his conviction under S. 379 to one under S. 403 or S. 424, I. P. C.

[P 61 C 2]

S. Sreenivasa Aiyangar, K. Rajah Aiyar—for Petitioner.

C. S. Venkata Chariar—for Respondent.

Public Prosecutor—for the Crown.

Order.—It seems clear to me that the conviction for theft cannot stand. This had to be more or less conceded by the learned pleader for the complainant and the Public Prosecutor. The facts found are that the trees were in the possession of accused 9 though it was also found that the complainant was jointly interested in the trees. *Subudhi Rantho v. Balarma Pudi* (1) is authority showing that in such a case the possession will be taken to be exclusively that of the tenants.

Then I am asked to follow *Subudhi Rantho v. Balarama Pudi* (1) to the full extent and convert the conviction to one under S. 403 or S. 424, I. P. C. I think to do so in this case would be unduly hard on the accused. The questions that would arise under those sections have not been considered in the trial for theft. To distort the findings now before me so as to give them such an aspect as to convert them into findings under S. 403 or S. 424, would, as I have already said, be prejudicing the accused instead of doing substantial justice.

I will therefore quash the sentences of the lower Court and order the fine to be refunded if it has been paid.

S.N./R.K.

Sentence quashed.

(1) [1903] 26 Mad. 481.

A. I. R. 1914 Madras 61 (2)

SADASIVA AIYAR, J.

Manjunathaya and another—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revns. Nos. 568 and 582 of 1913, and Criminal Revn. Petns. Nos. 461 and 462 of 1913, Decided on 4th March 1914, from judgment of Joint Magistrate, Coondapur, in Criminal Appeal No. 32 of 1913.

Evidence Act (1872), Ss. 26 and 27—Statement of accused while in custody of police, confessing to have committed theft—Statement as to stolen property being at certain place whence it was produced by accused himself—Former statement as regards theft held inadmissible but latter held to be admissible.

Where the accused, while in custody of the police, confessed to have committed theft and also stated that the stolen property would be

found in a heap of rubbish close to his house and after making the statement he took out the property from the heap in the presence of two police constables.

Held: that the statement as regards the commission of theft was not admissible in evidence, but the statement that stolen property would be found in the heap of rubbish was admissible; that though the accused himself took the property from the place where he had concealed it, the property taken and produced by him was discovered in consequence of the statement which he made immediately before he took the property and handed it to the police. [P 63 C 1, 2]

B. Sitarama Row—for Accused 2.

K. Yegnarayana Adiga—for Accused 1.

C. F. Napier—for the Crown.

Order.—Criminal Revision Petition No. 568 has been filed by accused 2, Manjunathaya, and Criminal Revision Petition No. 582 by accused 1, Subaraya Bhatta. They were convicted under Ss. 461 and 380, I. P. C., on the finding that they broke open a closed copper dabbi buried in the store room of the Kamalashili temple situated in a village in the Coondapur taluk. I may at once say as regards accused 2 that there is no evidence worth the name that he committed theft of any coins from the dabbi of the temple which contained the cash and metal plate offerings made by the temple devotees. His confessional statement, if it is admissible in evidence at all, merely shows that he received some coins from accused 1. This may be evidence of his having received stolen property, but not of his having committed theft. His conviction and sentence must be set aside and his bail bond discharged.

Coming to the case of accused 1, his conviction is based upon the following facts, namely, that he told P. W. 1 some time before the theft was discovered on 6th June 1913 that as his pay had not been disbursed to him, he would steal the dabbi in which the offerings in cash and gold and silver trinkets are placed by the devotees of the temple. The evidence of P. Ws. 6 and 7 proves that accused 1 obtained from P. W. 6 in April 1913 the duplicate key of the room in which the dabbi was kept on some pretext, that the key was 'afterwards returned' and that he had another key made for himself through P. W. 7 (a goldsmith) in accordance with the impression of a key made in wax and left with P. W. 7 by the accused.

The evidence of P. Ws. 1 to 5 proves that accused 1 made the following statements: namely, that he and accused 2 stole the missing money from the dabbi, and that that stolen money will be found in a heap of rubbish close to his house. Then there is the fact that just after making these statements he went to that rubbish heap in the presence of two police constables and of the witnesses who made the search in his house and took out certain coins and metal plates similar to the coins and plates usually offered by the devotees and kept in the dabbi. On the above facts, accused 1 was found guilty by both the Courts below.

It is argued before me that the coins and the gold and silver pieces taken from the rubbish heap have not been identified with the coins and pieces which had been placed in the temple dabbi, that the statement of accused 1 to the police that he stole those coins and pieces from the temple dabbi is not admissible in evidence as it was not connected with the discovery of the coins etc., in the rubbish heap, that that portion of his statement which signified that the coins and pieces found in that heap were properties stolen from the temple dabbi is also inadmissible in evidence as even that portion of the statement was not connected logically with the discovery of the properties in the heap, and that even if it could be held that that portion of the statement would have been logically connected with the discovery of these articles if the police had themselves acted on that information and recovered the properties from the rubbish heap it could not be connected with the discovery on the facts of this particular case, as the articles were taken by the accused himself from the rubbish heap and not by the police in consequence of that information.

As regards the first contention that the statement that he stole the articles is not admissible in evidence Mr. Adiga, who appeared for accused 1, is no doubt supported by all the cases. With the greatest respect to the Judges who decided those cases, I entertain some doubt on the question though my doubt is of very little practical consequence in the face of the dicta found

in so many cases. Many departments of law are closely connected with the abstract sciences of metaphysics and logic, especially the department of the law of evidence. On the interpretation of Ss. 26 and 27, Evidence Act, much logical acumen has been employed in many of the cases. As to whether a particular portion of an accused's confessional statement (a portion separable in idea though generally incapable of separation by taking apart some of the actual words used by the accused) can be said to be distinctly connected with the discovery of any particular fact, there has been much difference of opinion.

I should myself have held, if I were not bound by authority, that any statement which forms a simple connected narrative leading naturally to the discovery of the stolen property is admissible in evidence and that only statements which are patently irrelevant to the discovery and which the police may be suspected to have introduced into the statement in order to fasten the guilt more securely on the accused were intended to be excluded by the legislature as not connected with the discovery, especially as the legislature distinctly contemplated that a direct confession of guilt might form part of the statement leading to the discovery (see the use of the expression in S. 27, "Whether it amounts to a confession or not.") When the accused naturally says: "I committed this theft and I have concealed the stolen property in such and such a place" and then leads the police to the place where the stolen property is concealed and the property is discovered, I should think that the statement as to the whereabouts of the property is so naturally connected with the statement immediately preceding it that he stole the property, that the latter statement might also form one of the statements which are admissible in evidence though made in the presence of the police. However as I said the authorities—one of the latest is *Sankappa Rai v. Emperor* (1)—seem to be clear on the point that a statement that the accused himself committed the offence is not admissible in evidence under circumstances similar to those in the present case.

Then as regards the other portion of the statement of accused 1, namely the portion signifying that the property stolen from the dabbi, about which the police were then making an investigation, will be found in the rubbish heap: I think that is a statement which is distinctly related to the discovery of the stolen property and is therefore clearly admissible. That statement sufficiently identifies the properties found in the heap with the temple properties stolen from the dabbi.

The fact that the rubbish heap out of which the stolen property was taken was in or near the accused's compound and that he took it therefrom also proves the possession of the stolen property by the accused. A man found in possession of stolen property soon after the theft can be presumed to be the thief. That he was the thief was also indicated, as I said before, by the evidence of P. W.'s 1, 6 and 7. I cannot accept the argument that the fact that the police or somebody under the directions of the police did not take the property from the place where accused 1, said he had concealed it, but accused 1, himself took the property out of the rubbish heap, indicates that the statement is not connected with the discovery and is therefore inadmissible in evidence. I agree with the decision of the Full Bench of the Bombay High Court (composed of Sargent, C. J., and four other learned Judges) in *Queen-Empress v. Nana* (2). In that case it was held that though the accused himself took the property from the place where he had concealed it, it could be held without any violence to ordinary language that property taken and produced by him was discovered in consequence of the statement which he made immediately before he took the property and handed it to the police. In the result, I dismiss the petition of accused 1 and confirm his conviction and sentence.

He will surrender to his bail for serving the portion of the sentence remaining unserved.

S.N./R.K.

Petition dismissed.

(1) [1908] 81 Mad. 127.

(2) [1890] 14 Bom. 260 (F.B.).

A. I. R. 1914 Madras 64

AYLING AND SESHAGIRI AIYAR, JJ.
Ratna Chettiar and others—Plaintiffs
 —Appellants.

v.

Narayanaswami Chettiar and others
 —Defendants—Respondents.

First Appeal No. 249 of 1909, Decided on 3rd April 1914, from decree of Dist. Judge, South Arcot, in Original Suit No. 9 of 1909.

(a) **Hindu Law—Reversioner—Collusion of immediate reversioner—Remote reversioner can sue for declaration.**

A remote reversioner can sue for a declaration when the presumptive reversioner is either colluding with the alienee or is not interested in seeking to set aside the unlawful dealings of the widow in possession.

[P 64 C 2]

(b) **Will—Construction—Bequest to females—Whether qualified or unqualified estate passes—Rule stated—Qualified estate held to have been created—Ultimate interest held to be vested interest and on the death of such legatee estate would pass to his heirs—Transfer of Property Act, Ss. 21 and 26—Hindu Wills Act.**

Where the words of a disposition are clear and unambiguous, the sex of the donee will not be a disqualification for acquiring an unqualified estate. But where the words are consistent with the creation of an interest which the law ordinarily gives to females, then the rule of law is that the testator intended to conform to the principles of law by which the parties in the absence of a testamentary disposition are governed.

Where the material portions of a will ran in the following terms:

"All my properties should, after my death, be in the possession of my wife herself, and she herself should be heir to everything and Muthu Arunachella Chetty and my wife should live together amicably as of one family."

"If the two could not agree, my wife should pay Rs. 4,000 and separate him and then my wife should enjoy all the remaining properties with absolute right."

"If both of them should live amicably, Muthu Arunachella Chetty himself should enjoy the properties which remain after the death of the said Sengalani Ammal."

Held: (1) that the mere use of the words "should be heir," "remaining" and "which remain" in a testamentary disposition could not be said to enlarge the interest which the wife took otherwise under the Hindu law, and that the words had reference only to the ordinary disposition which a Hindu female as a limited owner could make;

(2) that the last clause of the will created in favour of Muthu Arunachella Chetty a contingent interest which on his living amicably with the testator's wife became a vested interest under Ss. 21 and 26, T. P. Act: 12 C. W. N. 668, Dist;

(3) that such interest passed on his death to his heirs and the wife of the testator had no power of disposition over it. [P 65 C 1, 2]

T. R. Venkatarama Sastri—for Appellant.

T. R. Ramachandra Aiyar and T. M. Krishnaswami Aiyar and G. S. Ramachandra Aiyar—for Respondents.

Judgment.—One Govinda Chetty executed a will on 20th December 1877, and died subsequently. It purports to be in favour of his widow and his nephew and son-in-law, Muthu Arunachella Chetty. The latter died in March 1878; defendant 2 is his widow and defendant 3 his widowed daughter. On 13th December 1908, Sengalani Ammal, the widow of Govinda Chetty, executed a will. She has died since. Plaintiffs are revisioners to the estate of Muthu Arunachella Chetty. They sue for a declaration that Sengalani was not competent to dispose of the plaint property by her will, that Muthu Arunachella Chetty had a vested interest in it at the time of his death and that they are entitled to succeed to the estate after the lifetime of defendants 2 and 3. The District Judge held that Muthu Arunachella Chetty had no vested interest in the property covered by the will, and that the discretionary relief of declaration should not be granted in this case, as the plaintiffs can succeed, if at all, only after the death of defendants 2 and 3. Plaintiffs have appealed. We are unable to concur with the learned District Judge upon either of the points decided by him.

It has been held in all the Courts in India that a remote reversioner can sue for a declaration when the presumptive reversioner is either colluding with the alienee or is not interested in seeking to set aside the unlawful dealings of the widow in possession. Sengalani's will is partly in favour of defendant 3, and it is clear that neither defendant 2, her mother, nor defendant 3 is interested in questioning the disposition made by the deceased. Following *Chidambara Reddiar v. Nallammal* (1) we hold that plaintiffs are entitled to bring this suit. Further, as pointed out by the Judicial Committee of the Privy Council in *Isri Dut Koer v. Hansbutti Koerain* (2), a pronouncement on the proper construction of Govinda Chetty's will may have the effect of preventing further litigation: see also *Monmohan Ghose v.*

(1) [1910] 5 I. C. 164=33 Mad. 410.

(2) [1884] 10 Cal. 324 at p. 333.

Equitable Coal Co. Ltd. (3). And it is all the more desirable as the District Judge has given his decision upon the construction to be placed on the will. We therefore hold that the suit is not liable to be dismissed on this ground.

The main question for decision is whether Muthu Arunachella Chetty had a vested interest in the property under the will of Govinda Chetty. There are four principal clauses in the will : (1) The preamble says that the will is made in favour of his wife and nephew; (2) it next recites the fact that his nephew has been living with the testator since birth and says: All my properties should after my death, be in the possession of my wife herself and she herself should be heir to everything, and Muthu Arunachella Chetty and my wife should live together amicably as of one family. (3) The third clause provides that if the two could not agree and live together amicably "my wife should pay Rs. 4,000 (four thousand) and separate him and then my wife should enjoy all the remaining properties with absolute right." (4) Then comes the final provision which directs "that if both of them should live together amicably, Muthu Arunachella Chetty himself should enjoy the properties which remain after the death of the said Sengalani Ammal." Apart from any question of technicality, it is clear that the testator did intend to give some property to his nephew. In case of disagreement he is to be cut off with Rs. 4,000 at the option of the widow. If there is no quarrel, he is to be the heir to all the properties remaining at the death of the widow. Mr. Ramachandra Aiyar's argument would lead to the conclusion that even though they lived together amicably it is open to Sengalani to deprive Muthu Arunachella Chetty of all rights in the property by disposing of it during her lifetime. This is manifestly against the intention of the testator. The learned vakil lays stress upon the use of the word "remaining" as qualifying the property and contends that the testator gave the widow absolute power to deal with it, as he did not apprehend that she would act ungenerously towards her own son-in-law. We were at first inclined to hold "remaining" was intended to give powers of absolute disposition to the

widow. On further consideration, we have come to the conclusion that that expression only refers to the power of alienation for necessary and binding purposes, which a limited owner has under the Hindu law. It is significant that in Cl. 2 of the will the testator refers to the widow only as heir, whereas in Cl. 3 he gives her absolute powers of alienation after having paid off Rs. 4,000 to his nephew. Mr. Ramachandra Aiyar argues that the use of the words "as heir" indicates that the testator gave the widow all his property as full owner and quotes *Mt. Surajmani v. Rabi Nath Ojha* (4) in support of it. The will in the Allahabad case provided that the widows should "remain in possession as owners with proprietary powers." The present will does not contain similar words. On the other hand it was laid down in *Radha Prosad Mullick v. Ranimoni Dassi* (5) that Hindu wills should be construed relative to the notions of Hindus respecting the rights of donees under the Hindu law; and in a case very similar to the present one it was held that the use of the word "malik (owner)" did not confer an absolute estate on the widow: *Motilal Mithalal v. Advocate-General of Bombay* (6). The two classes of cases are not in conflict as is often supposed. Where the words of a disposition are clear and unambiguous, the sex of the donee will not be a disqualification for acquiring an unqualified estate. But where the words are consistent with the creation of an interest which the law ordinarily gives to females, then the rule of law is that the testator intended to conform to the principles of law by which the parties in the absence of a testamentary disposition are governed. Bearing these principles in mind, we must hold that the words "should be heir" in Cl. 2 were not intended to confer an absolute estate on the widow, especially when the testator in Cl. 3 does give absolute powers of disposition in certain contingencies. Cl. 2 only gives the widow the rights which she is entitled to under the Hindu law.

Mr. Ramachandrarayar's next contention is that there are no words of gift

(4) [1908] 20 All. 84 (P.C.).

(5) [1908] 35 Cal. 896.

(6) [1911] 11 I. C. 547=35 Bom. 279.

(8) [1914] 24 I. C. 144.

in favour of Muthu Arunachella Chetty. It must be remembered that words of conveyance, which are usually to be found in wills made in England under legal advice, are not to be expected in this country. This will was made by a layman, and he begins by saying that he is making a will in favour of his wife and nephew and concludes by constituting the latter heir to all the remaining properties on the death of the widow. We cannot agree that these two clauses read together do not confer rights of property on Muthu Arunachella Chetty. The will having been made in a mofussil station, there are no statutory provisions governing its construction. We think we are justified in referring to the provisions relating to wills made in Presidency towns as embodying the principles of justice, equity and good conscience. The provisions of the Transfer of Property Act do not in terms apply to certain clauses of leases, and yet Courts have been guided by the principles contained in the Act in deciding these cases. The definitions of vested and contingent interests contained in the Transfer of Property Act are the same as those of the Hindu Wills Act. We shall therefore, refer to the Transfer of Property Act in discussing this question.

Section 19 lays down that where, on a transfer of property an interest therein is created to take effect on the happening of an event which must happen, such interest is vested. The event contemplated by the testator in the case before us is the death of his widow. It is then that the nephew is to become the owner of the property. The fact that he may be turned out by the payment of Rs. 4,000 does not deprive him of the right to succeed ultimately: vide the last clause of the explanation to S. 19. Mr. Ramachandrayar contends that the provision in favour of the nephew is analogous to the power to appoint mentioned in *Surendranath Ghose v. Kala Chand Banerjee* (7) and that, as held by the learned Judges in that case, the nephew had only a contingent interest. The report of that case does not give the provisions of the will, and the learned Judges, after taking it as conceded that the will gave only a contingent interest, proceeded to

say that that interest cannot be attached in execution. That decision affords no guide for the determination of the question before us. Even if the interest created was contingent at the outset, it became a vested interest before the death of Muthu Arunachella Chetty. He had not quarrelled and the widow had not sent him away by paying him Rs. 4,000 at the moment of his death, the happening of the contingency became impossible and he died possessed of a vested interest: vide the last clause of S. 21 and S. 26, T. P. Act. The condition, if any, to the nephew being entitled to a vested interest was fulfilled by his having lived amicably with the widow till his death. For all these reasons we hold that the plaintiffs are entitled to a declaration that the will of Sangalani Ammal is not binding on the reversioners. We reverse the decree of the District Judge, but as it was necessary to come to Court in order that the testament may be construed properly, we direct that the costs of all parties here and in the Court below do come out of the estate.

S.N./R.K.

Decree reversed.

A. I. R. 1914 Madras 66

OLDFIELD, J.

C. Venkatasubbaramiah—Defendant—Petitioner.

v.

Nambura Ramiah Sethi—Plaintiff—Respondent.

Civil Revn. Petn. No. 855 of 1912, Decided on 24th February 1914, from decree of Dist Munsif, Tirupati, D/- 29th July 1912, in Second Civil Suit No. 680 of 1912.

Civil P. C. (1908), O. 40, R. 1—Suit against receiver without leave of Court should be dismissed and not remanded to lower Court to obtain leave.

A suit against a receiver, without the leave of the Court, should be dismissed and not remanded to the lower Court for obtaining the necessary leave, especially when such an objection was taken by the defendant in the written statement and was disregarded by the plaintiff: 26 *Mad.* 492; 18 *I. C.* 722; 24 *M. L. J.* 350; 13 *M. L. T.* 903 and (1913) *M. W. N.* 287, *Foll.* [P 66 C 2; P 67 C 1]

R. Sitarama Rau—for Petitioner.

V. V. Srinivasa Aiyangar—for Respondent.

Judgment.—The petition is argued first on the ground that the suit, brought without the leave of the Court against a receiver, was unsustainable.

(7) [1903] 12 C. W. N. 668.

This contention is sanctioned by abundant authority, including the decisions of *Kamatchi Ammal v. Sundaram Ayyar* (1) and *Ramalinga Chetty v. Anantha Chariar* (2), to cite only those of this High Court.

It is argued for the respondents that this objection to the suing of a receiver without leave is not one to the jurisdiction of the Court in which the suit is brought, and that, therefore, though any decree passed may be unsustainable, the proper course for the appellate Court to take is to set the decree, passed in the absence of leave, aside and remand the case in order that the plaintiff may have an opportunity to obtain the necessary leave before proceeding with the litigation. Sitting as a Court of revision, I should in any event hesitate before adopting such a suggestion in the present case, since in it the objection based on absence of leave was taken in the written statement by the defendants and disregarded by the plaintiff. But on its merits also the contention must be rejected. The only authorities cited for it are the American decisions, referred to at p. 297, *High on Receivers*, Edn. 4; whilst the rule, insisting on the obtaining of leave as a condition precedent to the institution of a suit, has been acted on in English decisions and in those of the Calcutta and Bombay High Courts as well as in those of this Court above referred to.

In these circumstances petitioner's objection to the suit must prevail. The petition is allowed, the lower Court's decision being set aside and the Small Cause suit dismissed with costs in both Courts.

S.N./R.K.

Petition allowed.

(1) [1908] 26 Mad. 492.

(2) [1918] 18 I. C. 722.

A. I. R. 1914 Madras 67

AYLING AND SESHAGIRI AIYAR, JJ.

Ramanathan Chetty — Plaintiff—Appellants.

v.

Mallaka Anjappan and others—Defendants—Respondents.

Appeal No. 187 of 1908, Decided on 25th March 1914, from decree of Sub-Judge, Madura East., in Original Suit No. 67 of 1906.

Civil P. C. (1908), O. 1, R. 3—Removal of crops by each individual tenant—Absence of conspiracy or collusion among them—As

many causes of action exist as there are tenants and single suit against all is bad for misjoinder.

Where every one of the several tenants individually removes crops on the land and their acts spread over the space of a month in the absence of any conspiracy or collusion among them, there are many causes of action as there are tenants, and a single suit against all of them is bad for misjoinder of causes of action, even if the cause of action alleged in the plaint is only the denial of the landlord's title implied in the unauthorized removal: 14 Cal. 435 and 14 Cal. 681, *Foll*; 24 Cal. 831 and 33 Bom. 293, *Dist*. [P 67 C 2]

K. Sreenivasa Ayyangar and R. Rangasami Ayyangar—for Appellants.

C. S. Venkatachariar and N. R. K. Thathachariar—for Respondents.

Judgment.—We agree with the view of the lower Court that the suit is liable to dismissal for misjoinder of parties and causes of action (issue 1.)

The cause of action as set out in the plaint is the denial of plaintiff's title as landlord implied in the unauthorized removal of crops by the tenants. This removal of crops is the individual act of each tenant, and appears from the plaint to have been spread over the space of a month. There is no definite allegation of conspiracy and admittedly no evidence of conspiracy or collusion on the part of the various tenants impleaded as defendants. In our opinion the case cannot be held to be covered by the wording of O. 1, R. 3, Civil P. C.

These cases which are relied by appellant's *vakil*, *Ishan Chunder Hazra v. Rameswar* (1) and *Umabai v. Vithal* (2), relate to suits by reversioners, in which the right to recovery is based on a single event, the death of the last holder; and can be distinguished on this ground.

We may refer to other cases *Sudhendu Mohun Roy v. Durga Dasi* (3) and *Ram Narain Dutt v. Annoda Prosad Joshi* (4) in support of our view.

As regards respondents 8, 9, 17, 28, 38, 49, 87, 89, 93, 97, 122, 126, 127, 129, 169 and 175 the appeal has abated by reason of their death and appellant's failure to bring their legal representatives on record.

As regards the other respondents, the appeal is dismissed with costs of those respondents who are represented (*viz.* respondents 1 to 3, 18, 34, 35, 39 to 41, 52 to 54, 73 to 76), and the appeal as

(1) [1837] 21 Cal. 831.

(2) [1903] 33 Bom. 293.

(3) [1837] 14 Cal. 435.

(4) [1887] 14 Cal. 681.

against respondents 4 to 7, 10 to 16, 19 to 27, 29 to 33, 36, 37, 42 to 48, 50, 51, 55 to 72, 75, 77 to 86, 88, 90 to 92, 94 to 96, 98 to 121, 123 to 125, 128, 130 to 168, 170 to 174 and 176, who do not appear, and the memorandum of objections is dismissed.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 68

SANKARAN NAIR AND TYABJI, JJ.

Thadi Ramamurthi—Plaintiff — Appellant.

v.

Moola Kamiah—Defendant—Respondent.

Second Appeal No. 720 of 1912, Decided on 29th April 1914, from decree of Dist. Judge, Vizagapatam, in Appeal Suit No. 478 of 1911.

Hindu Law — Joint family — Attachment of property in execution of money decree against coparcener—Sale after his death—Share on his death is transferred to purchaser in auction.

If a member of a joint undivided Hindu family dies after his share in the family property is attached in execution of a money decree against him the sale of his share after his death in virtue of that attachment transfers his interest to the purchaser in auction and precludes the title by survivorship from arising: 4 *Mad.* 302, *Foll.*; 6 *I. A.* 88; 8 *M. L. J.* 64; 30 *Mad.* 413; 32 *Mad.* 429; 19 *M. L. J.* 40; 25 *Cal.* 179 and 9 *I. C.* 286, *Ref.* [P 68 C 1, 2]

Judgment. — A money decree was obtained against the undivided brother of defendant 1 in the suit and in execution that brother's share was attached on 26th December 1908. The judgment-debtor died on 2nd January 1909, and the defendant who was his coparcener was brought on the record as his representative. Sale was ordered on 7th April 1909 and the plaintiff purchased the judgment-debtor's interest in the property. The plaintiff now sues for possession. The lower Courts have dismissed the suit on the ground that as the judgment-debtor, who was an undivided coparcener, died before the order for sale was made his interest survived to the defendant and was not available to the plaintiff on sale. In our opinion the question is concluded by authority. In *Bailur Krishna Rau v. Lakshmana Shanbhogue* (1) the question was fully discussed, and following a judgment of the Privy Council reported as *Suraj Bansi Koer*

v. Sheo Prasad Singh (2) the learned Judges held that where an interest of the judgment-debtor, a coparcener, had by an attachment been brought under the control of the Court for the purpose of executing the decree, such attachment precludes the accrual of title by survivorship in the event of the death of the judgment-debtor before an order for sale is made. In the case before the Privy Council it is true that not only was there an attachment, but also an order to carry out the sale before the death of the coparcener. But in the course of their judgment, the Judicial Committee expressed their dissent from a judgment of the North-West Provinces High Court in which it was held that while the co-parcener had died after his interest in the property was attached, but before an order for sale was made, there remained no interest in the judgment-debtor which could be brought to sale.

The decision in *Lakshmana Aiyar v. Srinivasa Aiyar* (3) lays down the same principle. The lower Courts refer to certain later decisions which it is said upheld the contrary view. In *Sankaralinga Reddi v. Kandasami Tevan* (4) the decision in *Bailur Krishna Rau v. Lakshmana Shanbhogue* (1), was not dissented from, but it was expressly pointed out that under that decision the attachment has the effect of preventing the property passing by survivorship and the fact that the attaching creditor does not by attachment create such a charge on the property as to acquire priority over other creditors coming in, is in no way opposed to this view. This also is what was decided in *Zamindar of Karvetnagar v. Trustee of Tirumalai Tirupati, etc., Devasthanam* (5), wherein it was held that no charge was created by the attachment in favour of the creditor as against a subsequent creditor. There is no doubt an observation in *Zamindar of Karvetnagar v. Trustee of Tirumalai Tirupati, etc., Devasthanam* (5), that the decision in *Bailur Krishna Rau v. Lakshmana Shanbhogue* (1) is opposed to this view. But whether that is so or not no dissent

(2) [1880] 5 Cal. 148. (P. C.).

(3) [1898] 8 M. L. J. 64.

(4) [1907] 30 Mad. 413.

(5) [1909] 2 I. C. 18=32 Mad. 429.

(1) [1882] 4 Mad. 302.

was expressed from the decision to the effect that the attachment precludes the accrual of title by survivorship. The observation of their Lordships of the Privy Council in *Moti Lal v. Karrab-ul-din* (6), relied upon in *Zamindar of Karvetnagar v. Trustee of Tirumalai Tiruapti etc. Devastanam* (5), has no reference to this question. That such is the effect of this decision seems to be borne out by the judgment in *Murugaiya Mudaliar v. Ayyadorai Mudaliar* (7), in which the learned Judges say that the case of *Zamindar of Karvetnagar v. Trustee of Tirumalai etc. Devastanam* (5), had reference to the question whether in the circumstances of that case, the judgment-creditors who had obtained orders of attachment were in a stronger position than these who had not obtained such orders. The question before us is therefore concluded by decision in *Bailur Krishna Rau v. Lakshmana Shanbho ue* (1). We therefore reverse the decrees of the Court below. Before finally disposing of the case we direct the lower appellate Court to return a finding on issue 1. The parties may adduce fresh evidence.

(In compliance with the above order the District Judge of Vizagapatam submitted the following:)

Finding.—The appeal has been remanded by the High Court for a finding upon the issue "Whether the plaintiff is a benamidar for Akula Bangariah and cannot maintain this suit?"

The onus of proving the issue lies upon the defendant who set up the plea. He examined two witnesses, viz. himself and another. Defendant, as D. W. 1, says that on the third day of the auction, when the Amin told Bangariah that he would stop the auction, Bangariah sent for T. Ramamurthi (the present plaintiff) and others and got them to bid, that Ramamurthi bid up to Rs. 80 and that Bangariah afterwards paid that amount openly to Ramamurthi to deposit in Court. D. W. 1 says Bangariah and Ramamurthi have joint trade in a shop and joint contracts, D. W. 2, Y. Sanyasiraju says he was at Court on the day of auction on some business of his own unconnected with the auction and that he watched the auction from 4 to 6 p. m. though

he had no interest in it and did not bid. D. W. 2 is said by the defendant to have witnessed the payment by Bangariah to Rama Murthi. In chief-examination he says the real purchaser was Bangariah who paid the money for Ramamurthi, but in cross-examination he says he understood Ramamurthi was bidding for Bangariah as they came to auction together. D. W. 2 was a very unsatisfactory and prevaricating witness. Though in examination-in-chief he said he was getting Rs. 400 a year from land he admitted in cross-examination that his house is about to be sold under a decree. I reject his evidence as untrustworthy.

The only witness examined by the plaintiff is Akula Bangariah himself. He deposes that he has no joint business or contracts with the plaintiff Ramamurthi. He says that on the other hand since the sale there have been suits between him and Ramamurthi. Notwithstanding this A. Bangariah disclaims all interest in the suit house and declares Ramamurthi bought it with his own money and not on his (Bangariah's, behalf.

There are therefore only the uncorroborated statements of the defendant as against the denial of A. Bangariah (against his own interest) that he has any interest in the suit house. In these circumstances I find that defendant has failed to prove that the plaintiff T. Ramamurthi bought the suit house as benamidar for Akula Bangariah. Plaintiff can therefore maintain the suit.

(This second appeal coming on for final hearing this day after the return of the above finding the Court delivered the following:)

Judgment.—We accept the finding, set aside the decrees of both the lower appellate Court and the Court of first instance and direct a preliminary decree for partition to be passed. The plaintiff will get half his costs throughout from the defendant.

S.N./R.K.

Decrees set aside.

(6) [1914] 25 Cal 179 (P. O.).

(7) [1911] 9 I. O. 286.

A. I. R. 1914 Madras 70

WALLIS AND SADASIYA AYYAR, JJ.

Venkatagiri Nayani Varu and others
—Plaintiffs—Appellants.

v.

K. J. Subbarayalu Nayani Varu and another—Defendants—Respondents.

Appeal No. 80 of 1910, Decided on 16th April 1914, from decree of Dist. Judge, North Arcot, D/- 19th October 1909, in Original Suit No. 4 of 1907.

(a) Hindu Law—Family settlement—Bona fide compromise of doubtful claim entered into by father as manager binds his minor sons.

The minor sons of Hindu father are bound by a bona fide compromise of a doubtful claim entered into by their father as manager of the joint family: 27 *All.* 203; 2 *A. L. J.* 720; (1904) *A. W. N.* 244; 4 *I. C.* 954; 106 *P. W. R.* 1909; 139 *P. L. R.* 1909; 7 *I. C.* 134; 12 *Bom. L. R.* 621; 1 *I. C.* 573; 9 *C. L. J.* 19; 12 *C. W. N.* 687; 11 *M. L. J.* 70; 10 *I. C.* 477; 15 *C. W. N.* 545; 8 *A. L. J.* 552; 13 *C. L. J.* 575; 13 *Bom. L. R.* 427; 10 *M. L. T.* 25; (1911) *M. W. N.* 432; 21 *M. L. J.* 645; 38 *I. A.* 87; 33 *All.* 356 (*P. C.*); 10 *I. C.* 221; 9 *M. L. T.* 498; (1911) *M. W. N.* 145; 14 *I. C.* 295; (1912) *M. W. N.* 532; 20 *I. C.* 44; 35 *All.* 428; 11 *A. L. J.* 645, *Foll.* [P 75 C 1]

(b) Hindu Law—Maintenance claimed by widow from husband's property—Compromise by her brother (maintaining her) foregoing rights in consideration of husband's relatives giving up rights in village share, held one for good consideration.

Where a Hindu lady lays claims to maintenance from her husband's family, and her brother (maintaining the lady) agrees to forego her right in consideration of her husband's relations giving up their rights to a share in a village for themselves, there is a good consideration for supporting the compromise even if the lady herself was not a party to the compromise. [P 77 C 1]

(c) Hindu Law—Family settlement—Rights asserted and denied fairly considered—Compromise entered into should not be disturbed though one of the parties is under misapprehension.

Where the rights asserted on one side and denied on the other were fairly considered and a compromise was entered into, that compromise should not be disturbed even if one of the parties was under a misapprehension as to his rights: 18 *M. L. J.* 469; and 31 *Mad.* 474, *Foll.* [P 77 C 1, 2]

L. A. Govindaraghava Aiyar and A. Ramachandra Aiyar—for Appellants.*P. R. Ganapat'i Aiyar*—for Respondents.

Wallis, J.—I agree with the conclusion of the District Judge, that there was a bona fide compromise of a doubtful claim entered into during the plaintiff's minority by their father as manager of the joint family and that as such it is binding on the plaintiffs. His judgment has been attacked on the ground that it

is inconsistent with his finding that there was no real dispute between the parties as to Rangamma's claim to a one-third share of the village in question. In Ex. 4, the document it is sought to set aside, which purports to be a settlement of all matters arising with respect to the village, this dispute is put in the forefront, although it is suggested that there were other differences as well, and if there were no bona fide dispute in this matter, it would certainly go far to affect the binding character of the settlement. I am however satisfied on an examination of the evidence that a bona fide dispute existed. This was a village held by the plaintiffs' family on mokhasa tenure from the zamindar of Kangundi in the North Arcot District and was first granted in 1807 when the sister of the then zamindar married the plaintiffs' ancestor. The claims of the zamindar to resume mokhasa grants have since been the subject of litigation which has gone to the Privy Council and until 1891 there was a widespread idea that they were resumable, and in this very settlement the zamindar stipulated for certain special advantages in consideration of his renunciation of the right of resumption. There is abundant evidence that after the death in 1865 of Rukmani Ammal, the lady on whose account the first grant was made, the then zamindar purported to resume the village and that plaintiffs' predecessor besought his indulgence (Ex. 15).

The case for the defence is that a settlement was come to in 1868 under which each of the two descendants of the original grantee was to get a one-third share of the village and the zamindar's sister Rangamma, who was married to one of them, was to get the remaining one-third share which she transferred to the zamindar shortly before the date of the settlement. Apart from the Takids evidencing this arrangement, which the District Judge rejected wrongly it is contended—and which are not now before us, there is sufficient evidence of such an arrangement to justify the Court in holding that in 1891 when the settlement, Ex. 4 was made there was a bona fide dispute with regard to Rangamma's claim to a one-third share of the village. In addition to the evidence of resumption in 1865 we have the admitted fact that the other

branch of the family was in enjoyment of only a one-third-share of the village and not one-half. This strongly corroborates the evidence that there was such a settlement in 1868.

As against this we have only the recitals in a later document, Ex. 7, on which the District Judge relies. In this document it is recited that there was a re-grant to Rukmani Ammal's son in 1840 and that the division of the village between the two branches of the plaintiffs' family in the proportion of one-third and two-thirds was effected at a partition in 1871. Ex. 6 is a mining lease of the village executed by all parties to the settlement in favour of Mr. Ladd, a Bombay gentleman, and others to whom the plaintiffs' father had purported to lease the village as far back as 1886. It is a very lengthy document and reads as if it had been prepared for him by European solicitors. The recitals about the re-grant of 1840 and the partition of 1871 were probably part of the mokhasadar's case against the zamindar's prior to the settlement. Judging from the dearth of evidence regarding the allegations in the present case, they were not susceptible of proof but they appear to have found their way into the draft lease prepared on English lines by Mr. Ladd's solicitors and are contained in the deed as finally executed by the zamindar in accordance with the terms of the settlement itself. He had only recently attained majority and there is no evidence that his attention was specifically called to those recitals in a very lengthy document. I regard his having read them at all as more than doubtful and am not prepared to base an inference that there was no bona fide settlement of a doubtful claim upon the fact that the zamindar subsequently signed Ex. 7. In considering the terms of the settlement it should, I think, be borne in mind that in negotiating the terms of the settlement the parties were not on a very unequal footing as the mokhasadar was a much older man than the zamindar and had behind him the English lessee who had already spent money on the property and would no doubt have been prepared to spend money to protect the title of the lessor through whom he claims against unfounded claims on the part of the zamindar.

In cases such as this the Court will not too closely weigh the consideration given on one side and the other. I see no reason to doubt that there was a bona fide compromise of a disputed claim. That such a compromise, if entered into by the plaintiff's father, is binding upon the plaintiff has not been contested.

This appeal is dismissed with costs.

Sadasiva Aiyar, J.—The three plaintiffs are the appellants and the defendant-respondent is the zamindar of Kangundi. Shortly stated, the suit is for setting aside a settlement deed between plaintiffs' father and the previous zamindar of Kangundi (the defendant's deceased elder brother), executed on 15th May 1891. The plaintiffs' family and the defendant's family became closely related to each other by the marriage of two of the ladies of the noble zamindari family of the defendant (Rukmani Amma Garu and Rangamma Garu, paternal aunt and niece respectively) with two male members of the plaintiffs' family both called Venkatagiri Nayani Varu (father and son), the first marriage having taken place so long ago as in 1807. When a lady belonging to a rich zamindari family is given in marriage to a gentleman of the same community who is naturally not so well off pecuniarily as the family of the bride, the zamindar not infrequently makes a grant of lands to the outgoing bride on a resumable tenure, so that she might be able to live up to her rank on the income of the granted lands.

The plaintiff mentioned village of Attinatham was granted in 1807 to Rukmani Ammal, for her maintenance and pin-money expenses. In 1865 Rukmani Ammal died. There is dispute between the parties as to the facts about the possession and enjoyment of the village between 1865 and 1868. From 1868 it is admitted that the branch of the eldest son of Rukmani Ammal (Sadanapalli) began to enjoy one-third share separately and his branch enjoyed that one-third share till Sadanapalli's grandson (also named Sadanapalli) sold that one-third share to the defendant's elder brother in 1890 under Ex. 3.

As regards the other two-thirds share, there is again a dispute as to the true state of the facts, the plaintiffs contending that it belonged from 1871 to Sadanapalli's younger brother (plaintiff's

grandfather), Venkatagiri Nayani Varu alone, the husband of the zamindar's sister Rangamma, whereas the defendant's case is that it belonged to Venkatagiri Nayani Varu (plaintiffs' grandfather) and his first wife Rangamma in equal shares of one-third and one-third. Plaintiffs' grandfather had two wives, plaintiff's grandmother having been the second wife, that is, the co-wife of Rangamma, the zamindar's sister.

The parties being in issue as regards the right in the one-third share of the village, one contending that it belonged to her husband Venkatagiri Nayani Varu along with his admitted one-third share, the parties are naturally also at issue as to the enjoyment of the former one-third share (which I will call Rangammal's one third share for the sake of brevity) from 1868 downwards till September 1890 when Rangammal executed a conveyance, Ex. 1, to her nephew (the defendant's eldest brother and the then zamindar).

There can be little doubt from the evidence that owing to the claims set up to this one-third share of the zamindari (village) and owing to the powerful support of her eldest brother and of her nephew (the Kangundi zamindar) the plaintiffs' father Ramasami and their grandfather Venkatagiri Nayani Varu found great difficulty (to put it most favourably to them) in remaining in continued undisturbed possession of that one-third share from the date of Rukmani Ammal's death in 1865. Ex. 12, series 14, series, 15, and 18 to 30 make it abundantly clear that between 1865 and 1868, the zamindar and his officials treated the village as having been resumed by the zamindar on Rukmani Ammal's death in 1865 and even if we take it that the plaintiffs' grandfather and granduncle's son were not wholly dispossessed of the village, the zamindar's officials were able to interfere very much with the possession which Rukmani's descendants claimed as heirs of Rukmani Ammal. One letter, Ex. 15, dated 29th January 1868, written by the plaintiffs' grandfather Venkatagiri Nayani Varu to the zamindar need alone be quoted in this connexion, and I shall quote only the material portions of it: "To the zamindar of Kangundi Venkatagiri Nayudu

offers respects. Please issue orders indicating welfares By the time I went for (settlement of) the dispute that is going on between myself and Chinnasawmi (Sadanapalli's son) he seems to have passed along our village itself to Bodugur on account of some marriage You seem to have got offended that I did not call over Yesterday he told before the panchayatdars that you are favourably disposed, that I relinquished the village yielding to you, and that if the matters were left to them they would have dealt with it more profitably. They are influential people. I am all alone. I depend on you alone for help. What can I do if you neglect me. . . . I therefore request you to take care of me accordingly. If you neglect me I shall not at all stay in these parts. You should pay attention to this (my prayer) at least."

This letter is a clear admission that though, at first, the plaintiffs' grandfather tried to resist the resumption of the village in 1765 by the zamindar on Rukmani Ammal's death he did afterwards relinquish the village to the zamindar depending on the zamindar's generosity and that the zamindar had got possession of the village before 1867. The learned District Judge seems to think though Rukmani Ammal got the property in 1807 and though she died in 1865, she was not in possession of the village till her death in 1865, but that in the meantime in 1840 there had been a re-grant of the village to her son Sadanapalli (father of Chinnaswami) and the learned District Judge relies for this finding upon an ambiguous recital in the indenture, Ex. 7 of 1891. But that is an indenture, prepared in the interests of a Bombay gentleman, Alfred Elward Ladd, and of his partners who had obtained in 1886 a lease of the mining rights in the whole village from the plaintiffs' father alone and I do not think that the recital made in that document of 1891 in order to confirm as much as possible the title of these mining lessees is of much value. However as I said before, whether Rukmani Ammal herself lost her rights by a re-grant of the village to her son or not, there can be no doubt that the succeeding zamindar in 1865 claimed and exercised the right of resuming the

whole village and did come into possession before January 1868 as shown by Ex. 15. I am unable to agree with the learned District Judge that the disturbance of Venkatagiri's possession did not culminate in his dispossession. However in February 1868, there was a reconciliation. As to what the terms of the reconciliation were, there is again a dispute. The zamindar's (defendant's) case is that there was a re-grant in 1868 by a takid, 2/3rds being given to Venkatagiri Nayani Varu (the younger son of Rukmani Ammal) and to his wife Rangammal (sister of the zamindar) and 1/3rd to Chinna-sami the son of the elder son of Kukmani Animal. The plaintiffs' case is that there was no such re-grant in 1878, but the zamindar just withdrew his disturbance of the enjoyment of the whole village by Venkatagiri Nayani Varu and his nephew Chinna-sami and that in a division between Venkatagiri Nayani Varu and Chinna-sami in 1871, Venkatagiri Nayani Varu got 2/3rds without any participation of his wife Rangammal (the zamindar's sister) while Chinna-sami got the remaining 1/3rd share. As to this partition of 1871, there is no evidence except the vague recital in the indenture Ex. J which does not give even the month or date of the division and talks of the division as "about the year 1871."

As I said before, the mining lessees were anxious to have their title confirmed in all sorts of ways and hence they have recited in the deed given to them by both the zamindar and Ramasami the titles set up by both parties indiscriminately and impartially so that whatever state of facts may be true, their title may be secure. The zamindar (defendant) wished to rely on an unregistered takid alleged to have been sent in 1868 to the plaintiffs' grandfather re-granting the two-thirds share to the plaintiffs' grandfather and his wife Rangammal and re-granting the remaining one-third share to Chinna-sami; but when that takid was attempted to be proved, the plaintiffs objected to the admissibility of that alleged takid as evidence on the ground that it was in the nature of a gift-deed and as it was unregistered it was inadmissible in evidence. Though it might be inadmissible in evidence for the pur-

pose of affecting the title to the immovable property comprised in it, it seems to me that in this case in which the principal question is whether the registered settlement deed of 1891 was a bona fide compromise of honestly contested claims or not, the takid might be admitted in evidence to prove that existence and the honesty of the claim put forward on behalf of the zamindar and of Rangammal on the date of that settlement-deed. However, the document has been rejected by the lower Court and it is unnecessary to admit in evidence as even on the materials before us, the lower Court's decree ought to be confirmed.

The next circumstance to be considered in this case is that about the year 1875, Venkatagiri Nayani Varu died leaving his childless widow Rangamma (the zamindar's sister) and his descendants by his second wife (plaintiffs' father and others). As usual no love was lost between Rangamma and her co-wife's descendants. Even during her husband's lifetime her relations with the family of her husband who married a second wife during her lifetime were not always cordial. Some time after her husband's death in 1875, she seems to have gone to her brother's (the zamindar's) house to live with the zamindar. From before 1836, she was making a claim to be entitled to one-third share in the village as granted to her when her husband's family and the zamindar got reconciled with each other at the end of the disputes between them which lasted from 1865 to 1863. That this claim made by her was made openly appears from Ex. 2, the petition of a deceased karnam written in his own interest in which he recites the fact of the resumption of this village by the zamindars from time to time on more than one occasion and he mentions as a well-known fact that Rangammal's brother (the zamindar), Venkatagiri Nayani Varu, the father of the present defendant gave one-third share to Rangammal, one-third share to Rangammal's husband and the remaining one-third to Sada-napalli's son Chinna-sami. Now this claim of Rangammal to a one-third share was disputed by her co-wife's son, (the plaintiffs' father) who in 1836 treated that one-third share also as having descended to him from

his father and gave a mining lease in March 1886 to the Bombay European merchant and to his Mussalman partners for 99 years. The zamindar and Rangammal prevented the lessees from enjoying the mining rights and Rangammal even conveyed away her rights in 1890 to her nephew (the zamindar). It was admitted on both sides that the largest profit derivable from this village is the profit obtainable from granting mining leases. Both sides, the zamindar and Rangammal on one side and plaintiffs' father Ramasami and the lessees on the other side, were being put to great loss from 1886 onwards owing to the disputes about possession as regards this one-third share. The lessees naturally refused to give rent, etc., to the lessor (plaintiffs' father) as they were unable to work the lease. As I said before, the zamindar not only purchased what I have been calling his aunt's (Rangammal's) one-third share but he also purchased Chinnasami's son's (Sadanapalli's) one-third share treating a document executed by Sadanapalli to the plaintiffs' father as regards that one-third share as a fraudulent voidable deed executed in order to defeat the zamindar who was a decree-holder of Sadanapalli. Plaintiffs' father's attempt in March 1886 to give the whole village effectually on lease to the mining lessees was frustrated by the zamindar. The zamindar in the interests of his aunt Rangammal prevented the lessees from working the mines and his opposition was considerably strengthened by the documents he got from his aunt and from Sadanapalli.

It was in this state of facts and while these disputes were going on that the settlement-deed now sought to be set aside was executed between the plaintiffs' father and the defendant's elder brother, that document being Ex. 4 dated 15th May 1891. To complicate the disputes, the illegitimate son of plaintiffs' grandfather, one Sunnaipalli Nayudu, was also claiming a share in the village against the plaintiff's father.

This settlement deed, Ex. 4, begins by reciting the quarrels between Rangammal and the zamindar on one side and the plaintiff's family on the other side, recites the difficulties experienced in carrying on the gold mining work

owing to these disputes, recites the loss sustained by both the parties, and it recites also "inconveniences caused in some other manner" (probably alluding to the dispute raised by Sunnaipalli) and then it settles the disputes between the parties by splitting Rangammal's 13/rd share into two halves 1/6th and 1/6th and making the zamindar entitled to a 1/6th share alone (though he purchased a 1/3rd from Rangammal) and gives the other 1/6th share to plaintiffs' father the 1/3rd admittedly belonging to plaintiffs' father already being retained by him. Thus by this deed, the zamindar got $\frac{1}{2}$ (Sadanapalli's 1/3 and another 1/6) and the plaintiffs' father giving up his claim for 1/6th share, the zamindar, agreed to hold the plaintiffs' father free from all liability for the maintenance of plaintiffs' stepmother, Rangamma Garu (the zamindar's paternal aunt and vendor), who was living with the zamindar. It is this settlement-deed that the plaintiffs now wish to set aside (the suit having been brought nearly 15 years from the date of the deed) on the ground that the plaintiffs' father executed that deed not for a necessary or justifiable purpose and when the plaintiffs were minors. I might here add that within two weeks of the settlement deed Ex. 4, plaintiffs' father's illegitimate brother Sunnaipalli executed the release deed, Ex. 6, in favour of the zamindar and of the plaintiff's father and thus his claims were settled. Then we find about six months afterwards the zamindar and plaintiff's father executing the lease deed, Ex. 7, in favour of the lessees making long recitals of the claims made by both the parties and the disputes arising out of those claims show how the disputes were all settled by this settlement deed and how the lessees were to pay the rents and premia to the two parties interested in the village.

I shall quote only 3 paragraphs from this long indenture:

"Whereas the said Alfred Edward Ladd and the said Vellore Mohamad Kazim Sahib in his lifetime and also the said Vellore Shaik Mohamed Sahib and Rahimatoonisa Begum (the lessees under the document of 1886) have been prevented by the hereinbefore recited litigation in the years 1888 and 1889 from deriving any benefit under the

hereinbefore in part recited lease of 13th March 1886."

"And whereas by an agreement dated 11th May 1891 (agreement between plaintiff's father and the defendant's brother) both the parties to the now reciting agreement admitted the existence of the therein before mentioned shares besides the third share of the said Rangamma and that in consequence of the dispute which existed between the parties to the now reciting agreement as to the validity of the transfer by the said Rangamma to the said defendant's elder brother of the said 1/3rd share and as to her power to make such transfer the lessees under the said lease, were prevented from carrying on their operations and both parties were thereby put to loss and that also in consideration of other inconveniences and with a view to bring all disputes in connexion with the said village to a conclusion."

That the father and the managing member of a Hindu family has a right to bind his minor sons by a bona fide compromise of disputed claims is undoubted law. In *Sarabjit Partab Bahadur Sahi v. Indrajit Partab Bahadur Sahi* (1) it was held that where a family dispute which might have led to "disastrous litigation" was compromised by the father, the same was binding upon his minor sons unless it was proved that the father's consent to the compromise was obtained by undue influence or misrepresentation. As said in *Mt. Hassan Bibee v. Fazal Kadir* (2), the law as to family arrangements is governed by a special equity and will be enforced if honestly made. When the responsible members of a family agree to an arrangement which has been arrived at without undue advantage being taken, the minor sons cannot be allowed to disturb the arrangement after it had been acted upon for many years." In *Ramdas v. Chabildas* (3) Chandavarkar, C. J., and Macleod, J., held: "In the case of a family arrangement, where there is a sufficient motive for it, the Court will not consider the quantum of consideration and disturb the transaction on the ground of inequality of the benefit,

unless there was fraud or some other ground which in law vitiates it." Under Hindu law a son takes a vested interest by birth in ancestral estate; but it does not follow that he is absolutely independent of his father, where the two are joint and where the son is minor.

In family arrangements, the father represents and has power to bind his minor sons in the absence of fraud or other circumstances sufficient in law to vitiate the transaction. In *Kamal Kumari Devi v. Narendra Nath Mukherji* (4) it was held that "In case of family arrangements the consideration is not the sacrifice of any right, but the settlement of a dispute, and the Court does not in such cases consider narrowly the quantum of consideration. Equity leans towards the maintenance of family arrangements." In *Rai Gajindar Narain v. Rai Harihar Narain* (5) it was decided that the constitution of a joint Hindu family consisting of the father and his sons is such that the father represents the sons without express written authority and is considered to be the accredited agent of the joint family. "In family arrangements settling disputed rights and liabilities, his action as representative of the family is binding on the dependent members." In *Maharajah of Jeypore v. Jayakota Jammanadora* (6), Subramania Aiyar, J., and Benson, J., held that "a bona fide compromise of a disputed claim entered into by a father is prima facie binding upon his sons and cannot be impugned in the absence of fraud or other invalidating circumstances of the kind." In *Khunni Lal v. Gobind Krishna Narain* (7), their Lordships of the Privy Council quote with approval the observations of High Court of the North-West Provinces made in 1868 that it is the duty of the Court to give full effect to a family arrangement settling disputed claims. Their Lordships in that case reversed the decision of the Allahabad High Court and dismissed the suit of the plaintiffs which sought to nullify a family arrangement. In *Natesa Iyer v. Ram Iyer* (8) the learned Chief Justice held that a compromise of doubt-

(4) [1909] 1 I. C. 573.

(5) [1908] 12 C. W. N. 697.

(6) [1901] 11 M. L. J. 70.

(7) [1911] 10 I. C. 477=38 I. A. 87=33 A.L.J. 356 (P.C.).

(8) [1911] 10 I. C. 221.

(1) [1904] 27 All. 203.

(2) [1909] 4 I. C. 954.

(3) [1910] 7 I. C. 185.

ful claims by a guardian who was not even the father (who had failed to make due inquiry into some of the facts) was binding on the minor, "if the compromise was fair and prudent." In *Prakkateri Parkum v. Karam* (9) the following observations occur :

"It has been held in several cases that, where the major members of a family, with full knowledge of all the facts, have entered into a family arrangement on behalf of themselves and of minors, fully represented by their natural guardians, such arrangement is binding on the minor members in the absence of fraud, though there were doubtful claims admitted to be valid by the guardians of the minors, which claims might be held to be invalid, if fought out to the end in a Court of Justice" : see also *Ram Kuber Pande v. Ram Dasi* (10) as to the effect of the compromise made by a father on behalf of his sons and grandsons.

In the present case, the plaintiffs' contention seems to be that their father made an imprudent bargain in settling the dispute between himself and his sons on one side and the zamindar and the zamindar's aunt on the other side by giving up half of Rangammal's 1/3rd share (conveyed by her to the zamindar) in order to get peaceable possession of the other half (1/6th share) and in order to avoid the delay and loss occasioned by the obstruction to the lessees enjoying their mining rights. It is further contended that neither the plaintiffs' father nor the defendant's elder brother could have believed that there was any bona fide dispute as to the rights of the plaintiffs' family to the 1/3rd share alleged to have belonged to Rangammal. The learned District Judge has, in my opinion, considered the matter in too critical a spirit and too favourably to the plaintiffs. He thinks that the zamindar's recognition of plaintiffs' future title to his admitted 1/3rd share free from all claims to resumption by the zamindar is not an abandonment of a bona fide claim by the zamindar, but I am unable to see why it is not so. The plaintiff's family had lost their alleged title-deed of 1840. As I said in the beginning the zamindars not infrequently make grants to re-

lations on resumable tenures and I am unable to hold that the zamindar's claim to resume the 1/3rd share admittedly enjoyed by the plaintiff's branch in certain contingencies is so shadowy as is stated by the lower Court. Then it is said that the zamindars undertaking to hold the plaintiff's father free from his liability for the maintenance of Rangammal was not a legal consideration for the compromise because Rangammal was not a party to the compromise. I am unable to agree with this contention also. Plaintiffs' father was under a legal obligation to maintain Rangammal and the zamindar undertook that obligation and he thereby guaranteed to secure plaintiffs' family from loss through any claims made by Rangammal for maintenances against them and this is a good consideration for the compromise.

Again, the learned District Judge says that there was no bona fide dispute in respect of the claim of Rangammal to a 1/3rd share in the village which claim she transferred to the zamindar. Here again I think the learned District Judge took too narrow a view of the matter. Having regard to the fact that the previous zamindar in 1865 professed to resume the whole village on the death of Rukmani Ammal and succeeded in getting possession before 1868 and having regard to the plaintiffs' father's and plaintiffs' granduncle's branches having no title deed either of 1840 or 1868 to show under what definite title they were enjoying the lands or under what title the plaintiffs' grandfather's branch got the 1/3rd share plaintiffs' fathers' elder brother's branch were enjoying only 1/3rd share), I think the finding of the District Judge, which practically means that neither Rangammal nor the zamindar could have bona fide believed that Rangammal had a right to 1/3rd share, cannot be upheld. The lower Court's view has been too much influenced by its opinion that the taluk of 1868 was inadmissible in evidence for want of registration and therefore it must be held that her claim was a dishonest invention. Rangammal, as D. W. 1, proves that she made request to her brother to give her 1/3rd share of the zamindari and even supposing that her evidence that she was given the 1/3rd share is inadmissible

(9) [1912] 14 I. C. 295.

(10) [1913] 20 I. C. 44=35 All. 428.

owing to the inadmissibility of the alleged written takid in her favour she proves that she was enjoying 1/3rd of the profits of the village (receiving the same from the karnam of the Athintham village who had been the common manager for herself and the plaintiff's father's and uncle's families). She further proves that the plaintiffs' father himself was giving her 1/3rd share of the income of the village for several years. The plaintiff's father was bound to maintain her if she was not receiving 1/3rd of the income of the village. I do not see why her evidence on this point should not be believed, as it is corroborated by the evidence of D. W. No. 6 about the negotiations with the zamindar for Rangammal and her husband being jointly given 1/3rd of the property and by the evidence of D. W. 5 who says that the karnam had told him that he was sending her her share of the profits of the village.

He further proves that Rangammal's 1/3rd share was enjoyed by her nephew the zamindar after he sold the 1/3rd share to him. He further says that he himself brought grain from the village as her agent two or three times for her share of the mesne profits of the village. The learned District Judge upheld the settlement on the sole ground that because there was a bona fide dispute about the plaintiffs' father's right to lease Sadanapalli's 1/3rd share to the lessees along with the other 1/3rd share, therefore, it could be upheld as against the plaintiffs. I am rather inclined to put it on the ground that the plaintiffs' father without any undue influence having been exercised over him, believed that Rangammal and the zamindar were putting forward bona fide claims as regards a 1/3rd share in the village and that the zamindar was putting forward the bona fide claim to resume the whole village on certain contingencies and that the plaintiff's father thought it best to get a guarantee from the zamindar for Rangammal's maintenance against plaintiffs' father's family.

All these formed, in my opinion, good consideration for the compromise made under Ex. 4, between himself and his near relation the zamindar. I, therefore, agree in the conclusion of the learned District Judge that the com-

promise cannot be disturbed by the plaintiffs and that the plaintiff's contention that there was no bona fide dispute and that the compromise was brought about by a high-handed coercion on the part of the zamindar as against the plaintiffs' father and that the plaintiffs' father received no consideration in the eye of the law for the compromise, is futile. I think the right of the zamindar and Rangammal on the question of the right of 1/3rd share and on the question of right of resumption by the zamindar cannot, in my opinion, be said to be unsubstantial or dishonest. That the claim was really not good is of little consequence: see *Olati Pull'ah Chetti v. Varadarajulu Chetti* (11).

In the result I would also dismiss the appeal with costs.

S.N./R.K.

Appeal dismissed.

(11) [1908] 31 Mad. 474.

A. I. R. 1914 Madras 77

WALLIS AND SADASIVA AIYAR, JJ.

(Nagarampalli) Kanesam—Plaintiff—Appellant.

v.

(Nagarampalli) Batchamma and another—Defendants—Respondents.

Appeal No. 243 of 1911, Decided on 3rd April 1914, from decree of Tempy. Sub-Judge, Ganjam, in Original Suit No. 13 of 1911.

(a) Hindu Law—Adoption—General authority given by sapindas of widow's husband—Immediate adoption when all sapindas are alive is not invalid.

An adoption made by a Hindu widow in pursuance of an authority given to her by her husband's sapindas in the general terms to adopt any boy at any time she liked is not invalid if the adoption is made immediately and when all the sapindas are alive: 26 Mad. 681; 19 I. C. 663, 24 M. L. J. 484; 36 Mad. 145; Dist. [P 78 C 1]

(b) Hindu Law—Adoption—Consent—Unreasonable refusal by nearest sapinda—Remoter sapinda may authorise adoption.

Where the nearest sapinda unreasonably refuses to give permission to adopt the authority given by the remote sapindas is sufficient. [P 78 C 2]

K. V. L. Narasimham—for Appellant,

H. Suryanarayana—for Respondents

Judgment.—We think that the cause of action on which this suit was brought as we read the plaint, was based on the fact that defendant 2 was adopted by defendant 1 without due authority as the alleged authority of the sapindas

other than the plaintiff which was relied on by the widow (defendant 1) being alleged to be invalid under the rules of Hindu law.

Now that defendant 2 is dead and that defendant 1 is at present (whether we take the view contended for by the plaintiff or that contended for on behalf of the late defendant 2), a female heir owning a limited interest, the question of the validity of the adoption of defendant 2 has to be decided merely for the purpose of considering whether the order as to costs made by the lower Court so far as that order is in favour of defendant 1 in her individual right is supportable.

After hearing the appellant's learned Counsel we see no sufficient reason to accept his contention that the authority Ex. 1, given by the sapindas is legally invalid on the ground that it was expressed too generally, that is, that it gave defendant 1 authority to adopt any boy at any time she liked. Reliance was placed for the above contention on an obiter dictum in *Suryanarayana v. Venkataramana* (1). Reading that dictum in the light of the facts of that case we think that all that was intended to be laid down in that case was that an authority given in such general terms cannot be relied upon as validating an adoption made several years afterwards when several of the sapindas who gave that authority had died when other sapindas interested in the estate and the affairs of the widow had come into existence and when other similar circumstances had intervened before the adoption actually takes place: see also *Mani v. Subbarayar* (2). We do not think that the learned Judges intended to lay down that merely because the sapindas had so much confidence in the widow's good sense and good faith as to give her the widest discretion as to the time of adoption and the boy to be adopted the authority cannot be availed of by the widow when she made the adoption almost immediately after she got the authority and when the sapindas who gave the authority were all alive and had not withdrawn their authority.

Then it was contended that the authority is invalid because it gives

power to make successive adoptions. That portion of Ex. 1, which gives this power is clearly separable from the previous portions and forms a distinct third paragraph in Ex. 1. If the authority given in the previous portion of Ex. 1, to make an adoption is good, defendant 2's adoption is valid and we think it unnecessary for the purpose of this case to decide the question whether the further power to make successive adoptions is valid or not.

Lastly it was argued that the plaintiff's permission was not asked for or refused and as the plaintiff is the nearest reversioner the authority Ex. 1, given by remote reversioners, is useless in the absence of a request made to the plaintiff and his refusal to comply with that request. We agree with the lower Court that the evidence of D. Ws. 1, 2, 5 and 6 proves that the plaintiff unreasonably refused to give permission to defendant 1 to make the adoption of defendant 2, after repeated requests made to him personally and through others. We dismiss the appeal with defendant 1's costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 78

AYLING, J.

Subbarama Aiyar and another—Petitioners.

v.

Mariya Pillai—Respondent.

Criminal Revn. No. 187 of 1914, and Criminal Revn. Petn. No. 157 of 1914, Decided on 12th May 1914, from order of Sub-Divl. Magistrate, Negapatam, D/- 5th March 1914, in Misc. Case No. 9 of 1914.

(a) Criminal P. C. (1898), S. 145—Existence of civil Court decree as to title of one party is no bar to Magistrate taking action under S. 145 to determine actual possession.

Where the dispute is as to the possession of immovable property, the existence of a decree of a civil Court declaring merely the title of one of the parties to the dispute is no bar to a Magistrate taking action under S. 145, with a view to determine the fact of actual possession on a particular date: 26 Cal. 625; 3 C.W.N. 461; 15 I. C. 486; 40 Cal. 105; 13 Cr. L. J. 486; 16 C. W. N. 1052; 32 Cal. 796 and 2 Cr. L. J. 761, *Dist.* [P 80 C 1]

(b) Criminal P. C. (1888), S. 145—Procedure in S. 145 must precede order under S. 146.

The procedure prescribed in S. 145 must precede an order made under S. 146 of the Code. [P 81 C 1]

(1) [1903] 26 Mad. 681.

(2) [1913] 19 I. C. 663=36 Mad. 145.

T. V. Gopalaswami Mudaliar—for Petitioners.

J. C. Adam—for Public Prosecutor.

N. Srinivasacharya—for Respondent.

Order.—This case arises out of a dispute between the petitioners and one Mariya Pillai (counter-petitioner), regarding the possession of certain lands. On 17th January 1914, Mariya Pillai filed a petition asking for an order under S. 144, Criminal P. C. directing the petitioners to abstain from interfering with his possession. This petition is said to have been forwarded for report to the Tiruvallur Sub-Inspector of Police. He submitted a report on 2nd February 1914. Meantime on 24th January 1914 Mariya Pillai put in another petition objecting to the course of the police inquiry and asking that harvest of the crops by the present petitioners should be stopped, that the crops already harvested should be taken possession of by the Village Munsif; that the petitioners should be ordered not to interfere with the lands and that an early inquiry should be held.

On this, the Magistrate passed the following order on 24th January 1914: "Issue notice under S. 144 forbidding both sides to harvest until the question of possession has been settled by this Court. The crops already harvested shall be taken into the custody of the Village Munsif. Order both sides to produce witnesses before me at Negapatam on 5th February."

The notice actually issued to both sides on the same date does not purport to be issued under any particular section and runs as follow:

To

The Petitioners and Counter-Petitioners.

Whereas it has been made to appear to me that a dispute likely to cause a breach of the peace exists in respect of possession of the lands noted below* within the local limits of my jurisdiction, I hereby forbid both the parties to harvest until the dispute is finally decided by this Court or until further orders, the crops standing on the above lands.

The crops already harvested shall be

* (1) Elavangarkudi Vattam. Lands comprised in the patta of Ganapathia Pillai No. 50 and said to have been comprised in the sale deed of the first counter-petitioner, the extent being 10 vells 16 and odd mahs.

taken into the custody of the Village Munsif of Elavangarkudi. Both parties are also directed to appear with the evidence before this Court on 5th February 1914 at Negapatam. They should put in a list of witnesses to be examined before 1st February 1914.

(Initialled) P. A.

S. D. M.

For some reason or other, the hearing of the case was delayed, but from the order now under review it appears that written statements were filed by both parties and arguments heard.

It appears that the present petitioners claimed the lands under a sale deed from the sons of the admitted original owner, Kolandavelu Pillai. Respondent, Mariya Pillai, claimed as the lessee of Kolandavelu Pillai's widow. A judgment was filed by the petitioners of the District Munsif of Tiruvallur in Original Suit No. 144 of 1911, in which it was decided that the widow had no right to lease the disputed lands. It was argued apparently that this judgment concluded the disputes. The petitioners asked for an order declaring them to be entitled to possession and forbidding disturbance by the other side. Reliance was placed on the case of *Doulat Koer v. Rameswari Koeri* (1). On 5th March 1914 the Magistrate passed the order now sought to be revised. He first explains that he has taken up the case under S. 145, Criminal P. C. He then considers the point above noted and after referring to the Calcutta case says: "If I were to make any order allowing the possession of the petitioner, the lessee of Chandrathayammal, I should be cancelling the order of the civil Court passed so lately as June 1912. Under these circumstances I cannot do otherwise than dismiss the petition."

It may here be remarked that from the heading to the proceedings it must be taken that the petition dismissed is that filed by Mariya Pillai which asked not for proceedings to be taken under S. 145, but for an order under S. 144, Criminal P. C.

The order then proceeds: "The paddy on the land has been to a certain amount harvested by the Village Munsif: that officer will be ordered to harvest the remainder and attach all the paddy on the land until an order is

(1) [1893] 26 Cal. 625.

obtained from a civil Court. If such order is not obtained within a month the paddy will be sold in public auction."

It is this concluding portion of the order that the petitioners object to as illegal and without jurisdiction.

The question has been greatly complicated by the confusion which has attended the Magistrate's procedure from the start, but after careful consideration it seems to me that the objection must be allowed.

The portion of the order in dispute must be taken to have been passed under S. 146, Criminal P. C.; there is no other provision of law which will cover it. This section is a sort of corollary to S. 145 and the legality of an order under it depends on its having been preceded by legal proceedings under S. 145, Criminal P. C., and on the holding of an inquiry as to the fact of possession ending in the Magistrate's either finding that neither of the contending parties is in possession or being unable to satisfy himself as to which was in possession: vide *Sheobalak Rai v. Bhagwat Panday* (2).

Now in the present case, apart from the fact that apparently whatever inquiry was held did not end in either of the ways indicated, the only conclusion I can come to is that the proceedings of the Magistrate, in so far as they purport to be under S. 145, Criminal P. C., are void for want of jurisdiction. This, indeed, appears to be the conclusion the Magistrate himself has come to, though for altogether different reasons.

It is clear from the whole tenor of his order that he deemed himself precluded by reason of the civil Court's judgment from inquiring into and determining the question of actual possession under S. 145, Criminal P. C.

I am by no means satisfied that the existence of the Tiruvalur District Munsif's judgment in Original Suit No. 144 of 1911 affects the Magistrate's jurisdiction to take proceedings under S. 145 Criminal P. C., which is the argument advanced by the learned vakil for the petitioners.

There is, no doubt, authority of the Calcutta High Court tending in some measure to support the Magistrate's

view though the cases are far from being on all fours with the present one. In the case he relies on, *Gulraj Marwars v. Sheik Bhattoo* (3), it was held that an order under S. 146 following an inquiry as to actual possession under S. 145 was without jurisdiction by reason of the fact that, eight days before the institution of the enquiry, the petitioner had been put in possession of the disputed land in execution of a civil Court's decree establishing his right to the same. A case of this kind would seem to fall under the first proviso to S. 145, Cl. (4), and this may have been in the minds of the learned Judges when they say: "It was the duty of the Magistrate to have found possession in accordance with the decree of the civil Court." But at the same time, with all respect, I fail to understand how the jurisdiction of the Magistrate to take proceedings under S. 145 was affected. Provided he is satisfied that the dispute is likely to cause a breach of the peace and chooses to give himself jurisdiction by recording a formal order under Cl. 1, S. 145, it is difficult to see, looking to the words of that section, that his proceedings are ultra vires.

The same point has been dealt with in *Doulat Koer v. Rameswari Koeri* (1). In that case "possession of some sort" was made over to one of the contesting parties by a Court receiver under orders of the District Judge on 29th August 1898, and the Magistrate took proceedings under S. 145 on 1st November 1898 and found actual possession to be with the other party. The learned Judges held that where the right of one party has been declared within a time not remote from his taking proceedings under S. 145, it is the duty of the Magistrate to maintain the order of the civil Court and "to take proceedings which necessarily must have the effect of modifying or even cancelling, such orders, is to assume a jurisdiction which the law does not contemplate." The Magistrate's proceedings under S. 145 were therefore declared to be without jurisdiction. Here again with all respect, I find it difficult to follow the reasoning of the learned Judges. Prov. 1, Cl. (4), already quoted, protects per-

(2) [1911] 15 I. C. 486=40 Cal. 105.

(3) [1905] 32 Cal. 796.

sons who being in possession whether under a civil Court's decree or otherwise, are forcibly and wrongfully dispossessed within two months before the proceedings. But, apart from this, the whole scheme of the chapter contemplates an inquiry solely with reference to the fact of actual possession, irrespective of title.

Apart from this it is by no means clear how far the learned Judges were prepared to go. A considerable element of doubt (which is very undesirable where a question of jurisdiction is concerned) is imported by the phrase "within a time not remote from his taking proceedings under S. 145." What meaning should be attached to these words? In the present case the interval between the decree of the civil Court and the institution of these proceedings was more than 18 months, and it may be further noted that the suit was neither for declaration of title nor for possession of the disputed lands but merely one for damages in which the determination of title was incidentally necessary. There is no order of a civil Court which could be said to be "modified or cancelled" (to quote the last mentioned ruling) by a possession order under S. 145. There is merely a finding on an issue in the suit as to the title to the lands. Apart therefore from my doubt based on the wording of the section, it is by no means clear that the Calcutta rulings would apply, or were intended to apply to a case like the present.

No rulings of this Court have been quoted in support of the petitioners' contention and I am inclined to hold, with all deference, that the judgment of the District Munsif does not affect the jurisdiction of the Magistrate.

On the other hand it seems to me that the Magistrate's proceedings are void ab initio by reason of his failure to comply with the requirements of Cl. 1, S. 145, Criminal P. C. This provides that where a Magistrate is satisfied that a dispute exists regarding any land or water or the boundaries thereof within the local limits of his jurisdiction, he shall record a formal order in writing setting forth the grounds of his being so satisfied and requiring the disputing parties to attend his Court and file written statements. It is only in this way that

proceedings under S. 145 can be initiated. The provision of law is imperative and failure to comply with it destroys the Magistrate's jurisdiction: vide *Banwari Lal Mukerjee v. Hriday Chakrawarti* (4).

It has no doubt been held in *Kamal Kutty v. Udayavarma Raja Valia Raja of Chirakal* (5) by a Bench of this Court of which I was was a member that where a formal order under Cl. (1) had been passed the mere omission to set forth in the body of the order the reasons which satisfied the Magistrate is an irregularity which will not affect his jurisdiction. But a formal order there must be.

In the present case there is no order purporting to be passed under S. 145, Cl. (1), or which by any stretch of reasoning can be treated as having been passed thereunder. The notice to parties issued on 24th January 1914 and set forth above certainly is not such an order: and indeed it seems clear that at the time he issued it, the Magistrate did not conceive himself to be acting under S. 145 at all. The Magistrate himself states that he only took up the case under S. 145 on receipt of a report from the police which did not reach him till 2nd February 1914. No subsequent order is on record, which could possibly be referred to this clause.

The whole proceedings under S. 145, Criminal P. C., being thus illegal for want of jurisdiction, the order under S. 146, Criminal P. C., can stand on no better footing.

I therefore set it aside as illegal.

S.N./R.K.

Order set aside.

(4) [1905] 32 Cal. 552.

(5) [1912] 17 I. C. 65=36 Mad. 275.

A. I. R. 1914 Madras 81

TYABJI AND SPENCER, JJ.

Abburi Venkataswamy and others—
Defendants—Appellants.

v.

Nalluri Kristnamma and others—
Plaintiffs—Respondents.

Appeal No. 164 of 1908, Decided on 3rd March 1914, from decree of Dist. Court, Guntur, in original Suit No. 24 of 1906.

(a) Transfer of Property Act (1882), S. 111—Title denied in previous litigation between occupant and owner—Occupant is not entitled to notice

Where in the pleadings of a previous litigation between the occupant and the owner of

land, the former denied the title of the latter, that is sufficient to disentitle the occupant to a notice to quit. [P 82 C 2; P 83 C 1]

(b) Limitation Act (1908), Art. 143—Occupant in possession of land with owner's permission—Limitation against latter does not run until former sets up independent title.

Where an occupant comes into possession of the land with the permission of the owner, limitation as against the latter does not run until the former denies the permission and sets up an independent title in himself.

[P 82 C 1]

(c) Transfer of Property Act (1882), S. 111—Presumption that zamindar is merely collector of revenue cannot be extended where possession of occupant is recent and under cowle granted by owner—Landlord and Tenant.

The ordinary presumption raised against a zamindar that he is merely a collector of revenue and that he must prove his title to eject an occupant of the land, cannot be extended where the possession of the occupant is recent under a cowle granted by the owner, the occupant possessing no rights anterior to the grant of such cowle; 13 *Mad.* 60; 15 *Mad.* 95; 12 *I. C.* 1; 21 *M. L. J.* 845; 10 *M. L. T.* 185 and (1911) *M. W. N.* 162, *Dist.*

[P 84 C 1]

T. Prakasani—for Appellants.

T. R. Venkataramasastry — for Respondents.

Tyabji, J.—This appeal arises out of a suit in which the plaintiffs claim possession of certain lands on the basis of a cowle, Ex. B, granted to them or to their predecessor-in-title—whom I shall include in the term “plaintiffs”—on 16th July 1883, by one P. Venkatapayya who was then owner of the land. Defendants 1, 2 and 3, contend that they are entitled to continue in possession of the land.

The first contention of the defendants before us was that the cowle, Ex. B, was in fact benami, that the person who in accordance with the true intent and purpose of Ex. B, had in fact the right to the possession of the lands was Chinna Subbayya, the father of defendants 1, 2 and 3, and that after him defendants 1, 2 and 3 were so entitled. That contention has not found favour with the lower Court; and, on the evidence adduced before us, it seems to me to be impossible to come to any other conclusion. For it is admitted that the defendants (in which term I include defendants 1, 2 and 3 and their predecessor-in-title, Chinna Subbayya, their father) have been paying rent at the rate of Rs. 30 to the plaintiffs. It was contended before us that Rs. 30 that has been so paid should not be taken as payment of rent.

It is difficult to understand how else this sum was paid to the plaintiffs; and I have no hesitation in coming to the same conclusion as the learned Judge, namely, that the sum of Rs. 30 was in fact paid as rent and in accordance with the terms agreed upon between the plaintiffs and the defendants when the plaintiffs became entitled to possession of the property, and that the cowle Ex. B, was not a benami transaction.

Another ground upon which the appellants rely before us is, that assuming that the plaintiffs had any right to eject the defendants that right is barred by limitation. For it is contended that the right to eject the defendants arose, if at all, when Ex. B was executed, that was about 30 years ago; and it not having been exercised till now it is argued that the suit for ejection is barred. But the right to eject on the facts alleged and proved by the plaintiffs arose only when the defendants claimed to be in possession of the land without the permission of the plaintiffs. The plaintiffs say (and, as I have said, in my opinion, that allegation was rightly considered to be proved by the lower Courts) that the defendants have been in possession of the land with the permission of the plaintiffs as their tenants and that until quite recently, the defendants have been paying to the plaintiffs rent for being permitted to be so in possession. The suit was therefore in my opinion, rightly held not to be barred.

The third point with which I shall deal is whether the plaintiffs cannot succeed because there has been no notice to quit. The plaintiffs admit that they did not give any notice to quit, but they rely on the Transfer of Property Act, S. 111, Cl. g (2) and contend that there was a renunciation on the part of the defendants of their character as lessees by the fact that they set up a title in a third person, and that such renunciation is evidenced by Exs. C. C., which are the pleadings in the previous litigation between the parties. In those proceedings the present defendants claimed that the plaintiffs had no right under the cowle, Ex. B, contending that Ex. B was in truth in favour of the defendants and not (as it purported on its face to be) in favour of the plaintiffs. As the plaintiffs derived their title from Ex. B the

denial by the defendants that the plaintiffs were entitled to any rights on their own behalf under the terms of Ex. B, meant the denial of plaintiffs' title on the part of the defendants. I therefore come to the conclusion that the learned Judge was right in holding that no notice to quit was necessary and the terms of S. 111, T. P. Act, were satisfied by the facts of this case.

Finally—and this is the only point in the case about which I have felt any doubt—it was argued on behalf of the appellants that on all the facts found, it has not been shown that the plaintiffs are entitled to eject the defendants. It was argued on the authority of *Veeranan Ambalam v. Annaswami Iyer* (1), *Veakatacharlu v. Kandappa* (2) and *Appa Rau v. Subbanna* (3) that it is for the plaintiff to affirmatively establish that he has a right to eject. The result of these authorities seems to be :

(1) That in the case of zamindari lands there is a presumption (which presumption may, however, be rebutted by evidence in any particular case) that the zamindar, though he may be spoken of as the landlord, has not the whole ownership of the land but only a limited interest in it; that interest is originally derived from the zamindar having been the collector of the revenue it does not make him the absolute owner of the land but the ownership is divided so to say between him and the actual occupant of the land.

(2) Secondly, in the case of lands other than zamindari lands also the authorities seem to establish that there may be circumstances from which it may appear that the person in actual possession of the land has a right to continue in possession which cannot be terminated so long as the tenant continues to do that which he has been doing in the past; in other words, that the relationship between the actual holder of the land and the person claiming to be the absolute owner of the land is a relationship fixed in perpetuity so that neither party can alter the tenure of the land without the consent of the other : the relationship so existing may not be exactly the relationship existing between the zamindar and a person having

the occupancy right over the land in question.

The defendants claim that the present case falls under the second head to which I have just referred. Their contention is that on the facts as they appear on a consideration of all the evidence the presumption to which I have referred must operate and that presumption not having been rebutted by any sufficient evidence adduced by the plaintiffs, in the result we must hold that the defendants have some such indefeasible right as I have just referred to. It seems to me however that the contentions of the parties and the facts admitted on the pleadings leave no room for our coming to the conclusion to which the defendants now desire us to come. For both parties claim under Venkatappayya by virtue of the cowle, Ex. B, and the question on which they have been at issue is who was entitled under that cowle. It is not alleged by the defendants, and it was not their case, that irrespective of Ex. B and anterior to it there were certain rights vested in the defendants which could not be altered by any dealings with the property purporting to be made by Venkatappayya in favour of the plaintiffs or any other person : that is the only basis on which this contention can be put forward. But assuming that the defendants can be allowed now to contend that they had certain indefeasible rights in themselves and that they cannot be ejected from these lands so long as they continue to pay a certain sum to Venkatappayya and the persons deriving title from him, I can only say that on the evidence that is adduced before us, and on the facts relied upon by the defendants themselves, it seems extremely unlikely that they should have had any such right. That contention seems to me to be quite inconsistent with the case with which both parties came into Court and with the case of the defendants themselves. The case of *Veeranan Ambalam v. Annaswami Iyer* (1) is strongly relied upon by the appellants. In that case the tenants had been in possession for about a hundred years and they had purported to deal with the property in a manner which furnished indications that they had certain indefeasible rights in the land. It is under such circumstances, it seems to

(1) [1911] 12 I. C. 1.

(2) [1892] 15 Mad. 96.

(3) [1830] 13 Mad. 60.

me, that the presumption arises, or as I should prefer to say, the inference may legitimately be drawn, that the tenant is entitled to continue in possession for all time on the same terms on which it is shown that he has been holding possession in the past: for, from the long-continued possession and from dealings in the past, the most natural inference is that the tenants had some such indefeasible rights. That presumption cannot be raised on the facts alleged by the defendants and on the contentions contained in their written statement. The presumption cannot be raised indiscriminately and irrespective of the particular circumstances in every case where the relationship of landlord and tenant is established. For these reasons, I consider that this appeal should be dismissed with costs.

Spencer, J.—I concur.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Madras 84

AYLING AND TYABJI, JJ.

Gopalakrishna Aiyar and others—Defendants—Appellants.

v.

Sukirtha Theenthara and others — Plaintiffs—Respondents.

Second Appeal No. 504 of 1912, Decided on 21st April 1914, from decree of Dist. Court, Tinnevely, in Appeal Suit No. 46 of 1911.

(a) Registration Act (1908), S. 17—Oral agreement to lease not registered under S. 17—Landlord may evict lessee in possession.

Where there is merely an oral agreement to lease and not a lease registered under S. 17, Registration Act, a landlord is not estopped from evicting the lessee in possession.

[P 85 C 1]

(b) Landlord and Tenant — Tenant being induced to believe that he is granted permanent lease erecting building is entitled to compensation if evicted — Easements Act, S. 60.

Where a tenant in the belief (induced in him by the conduct of the landlord) that a permanent lease of the land was granted to him erects a building thereon, he is entitled to compensation when evicted therefrom.

[P 85 C 1]

T. V. Muthukrishna Aiyar—for Appellants.

K. Sreenivasa Aiyangar — for Respondents.

Judgment.—The learned District Judge's decision to exclude from consideration Exs. C, II and III appears to us to be wrong. If they were put forward

as containing an agreement to lease, the want of registration is undoubtedly a fatal objection to their admissibility and they could not be adduced as evidence of a written agreement to lease, which under S. 17, Registration Act, is compulsorily registerable. But there is nothing to prevent these documents being admitted as evidence to prove an oral agreement to enter into a lease, or a license to build on the land. If the former transaction were established, the defendant might possibly plead that the plaintiffs were equitably estopped from evicting him or at least bound to compensate him; and in the case of a license he might put forward a similar plea with special reference to S. 60, Easements Act. We do not consider that the failure to specifically set up the case of a license in the written statement should prevent the District Court from considering such a plea, seeing that it was taken in the District Munsif's Court.

It follows from the above that the District Judge has wrongly excluded important evidence from consideration. We must call for findings on the following issues:

(1) Whether there was an oral agreement between plaintiff 1's predecessor and the defendant's father to enter into a lease; and if so, what were to be the terms of the proposed lease?

(2) Did plaintiff 1's predecessor give the defendant's father a license to build on the plaintiff land within the meaning of S. 52, Easements Act?

(3) If either an oral agreement or a license is proved, are the plaintiffs thereby estopped from evicting the defendant; or, if not estopped, are they bound to pay him any, and, if so, what compensation?

The findings should be submitted within one month from the date of this order and seven days will be allowed for filing objections.

[In compliance with the order contained in the above judgment, the District Judge of Tinnevely submitted the following]:

Findings.—Findings have been called for on the following issues:

- | | |
|-----|-----------|
| (1) | See above |
| (2) | do. |
| (3) | do. |

Issue I.—It seems to me perfectly clear from Ex. 2 that there was an oral agreement between plaintiff 1's predecessor and defendant's father to enter into a lease. That document shows that plaintiff 1's predecessor had agreed to give defendant's father a permanent lease at a rent of Rs. 6 a year for a consideration of Rs. 60, at the same time reserving authority for the addressee to substitute for such a permanent lease one for a term of 12 years. The addressee having taken no steps to enter into a lease of either description with the proposed lessee, I think I am justified in finding, as the latter was in presuming, that there was an agreement to enter into a permanent lease for building purposes.

Issue II.— I do not think that what was contemplated between the parties amounted to a license. For a license is for a particular purpose while a lease is intended as here to pass an interest in property.

Issue III.— On the finding that there was only an oral agreement, plaintiffs are not, I think, estopped from evicting defendant. The latter cannot succeed by setting up, instead of a legally registered lease, a mere oral agreement on the part of plaintiff's predecessor with himself to lease the suit property: *Gopalasami Chettiar v. Fisher* (1). A lease for the term asserted by him requires registration under S. 107, T. P. Act. Where there is no registered instrument, there is no lease and the supposed lessor can evict. And it is not open to the supposed lessee to argue that his lessor is equitably estopped by his conduct in letting him remain on the land and build. For there can be no estoppel against the plain provisions of a statute: *Jagad-bandhu Saha v. Radha Krishna Pal* (2), and *Abdul Aziz v. Kantha Mallick* (3).

I would therefore find that defendant having no registered lease is liable to eviction and that plaintiffs are not estopped from evicting him. As however he seems to me to have been misled by the inaction of the addressee of Ex. 2 into the belief that he would get a permanent lease and was entitled to build, I consider that he should be paid

compensation. He values his building at Rs. 500 and the other side puts it at Rs. 250. The true value is probably between those figures, but my predecessor thought that Rs. 250 would be adequate compensation and I have been shown no ground for holding that he under-valued the building.

(After the return of the findings of the lower appellate Court upon the issues, the Court delivered the following):

Judgment.—We accept the findings except as regards the amount of compensation. On this point we called for a finding from the learned District Judge, as we did not consider that his predecessor had recorded a definite finding. He was not justified in simply following his predecessor, especially as he considered a higher figure to be nearer the truth. We do not however propose to refer the matter again. On the meagre evidence on record, we fix the amount of compensation at Rs. 375 and direct in modification of the lower appellate Court's decree that plaintiffs be put in possession of the property on payment of this amount to defendants.

Each side will bear its own costs throughout.

S.N./R.K.

Decree modified.

A. I. R. 1914 Madras 85

MILLER AND SADASIYA AIYAR, JJ.

Nori Lakshminarasimham and others
—Plaintiffs—Appellants.

v.

Pratipathi Lakshminarayana and others—Defendants—Respondents.

Appeal No. 59 of 1912, Decided on 21st April 1914, from appellate order of Dist. Judge, Guntur, D/- 26th January 1912, in Appeal Suit No. 383 of 1911.

(a) Civil P. C. (1908), Ss. 151 and 148—**Terms of decree when once final cannot be altered.**

A Court has no power to alter the terms of a decree when once it becomes final. 17 I. C. 912 and 10 A. L. J. 520, *Foll.* [P 85 C 2, P 86 C 1]

(b) Religious Endowment — Claimant to office of archaka must possess competency in reciting mantrams.

A claimant to the office of archaka in a temple must possess the competency of the average archaka in reciting mantrams in the temple. [P 86 C 2]

P. Nagabushanam—for Appellants.

T. Prakasam—for Respondents.

Judgment.—We are unable to agree with the learned District Judge that S. 148 or S. 151, Civil P.C., could enable

(1) [1905] 28 Mad. 328.

(2) [1909] 4 I. C. 414=36 Cal. 920.

(3) [1911] 10 I. C. 467=38 Cal. 512.

a Court after a decree had become final to change the terms of the decree: see *Suranjan Singh v. Ram Bahal Lal* (1).

Defendant 1 "declared his inability to stand the test," that is, he admitted that he could not prove his competency for the office. As regards defendant 2 the learned District Judge's finding as to his competency, is somewhat obscure. In one place, the Judge says: "Defendant 2 on the other hand showed much improvement in learning and in reciting the mantrams, though the Commissioner was not perfectly satisfied with the result." In another place the Judge says that defendant 2 also should undergo another test and prove his competency.

We shall request the District Judge to submit definite findings on the following issues on the evidence on record:

1. "Whether defendant 2 was fairly cognizant of the mantrams mentioned in the decree, and whether he was fairly fit for the office of archaka when the District Munsif granted a declaration as to his unfitness."

2. "If defendant 2 was fairly fit at that time, whether the plaintiffs are entitled to any relief under the decree and, if so, what relief?"

The findings should be submitted within four weeks from the date of receipt of records and ten days will be allowed for filing objections.

Findings. — The High Court has called for findings in this case on the following two issues:

(1) Whether defendant 2 was fairly cognizant of the mantrams mentioned in the decree, and whether he was fairly fit for the office of archaka when the District Munsif granted a declaration as to his unfitness.

(2) If defendant 2 was fairly fit at that time, whether the plaintiffs are entitled to any relief under the decree and, if so, to what relief?

2. The answer to issue 1 depends mainly upon the report of the Pandit appointed as a commissioner by the lower Court to test the knowledge of defendants 1 and 2 of the mantrams referred to in the decree and his evidence. His report shows that he found defendant 2 very deficient in his knowledge of one of the said mantrams, *Desantulu*, for he recited two imper-

fectly and did not know the remaining eight at all. It also appears from the commissioner's evidence that these mantrams have to be recited daily and they, therefore appear to be important. As regards the other mantrams, the report of the commissioner shows that defendant 2 recited them badly and that his knowledge of them was poor. Defendant 2 was apparently himself conscious of this, for when, on 7th April 1911, he applied to the lower Court for extension of time to qualify himself in mantrams, he admitted that his knowledge was deficient. The defendants rely on the Pandit's statement in his evidence which runs thus: "Comparing the knowledge of the defendants with the knowledge of the average archaka, they cannot be called incompetent. This statement is a loose one, for it includes defendant 1 also as to whose incompetence there was no doubt, and I do not therefore think it can be safely acted upon. I would therefore find issue 1 in the negative."

3. Issue 1 does not arise in view of the finding on issue 1. Were a finding necessary, I would say that, in the event of defendant 2 being found fairly fit, the plaintiffs would be entitled to no relief.

(After the return of the finding of the lower appellate Court upon the issues referred, the Court delivered the following:)

Judgment.—We accept the finding and reverse the decree of the District Judge and restore that of the District Munsif with costs here and in the lower appellate Court.

S.N./R.K.

Decree reversed.

A. I. R. 1914 Madras 86

SANKARAN NAIR AND AYLING, JJ.

Kothandapani Naidu—Appellant.

v.

Kuppusami Naiker and others—Respondents.

Appeal No. 244 of 1911, Decided on 30th January 1914, from order of Sub-Judge, Negapatam, D/- 7th July 1911, in Execution Petn. No. 88 of 1911.

Civil P. C. (1908), O. 21, R. 16—Application by transferee from transferee for execution opposed by judgment-debtor—Court's order refusing to recognize transfer with-

(1) [1912] 17 I. C. 912.

out inquiry into validity of transfer held to be illegal.

Where an application by a transferee of a decree from a person who was himself a transferee thereof was opposed by the judgment-debtor on the ground that the transfer was fraudulent, and the Court, without inquiring into the validity of the transfer and the competency of the transferee to execute the decree refused to recognize the transfer,

Held: that the order was illegal and must be set aside. [P 87 C 1]

S. Srinivasa Iyengar—for Appellant.

G. S. Ramachandra Aiyer—for Respondents.

Judgment.—The appellant claims to execute the decree which he says, has been transferred to him by a person who is himself an assignee of the original decree-holders. Respondent 4 who is the judgment-debtor, contends that the decree itself is fraudulent, that the transferor of the present applicant is bound to pay him a certain sum of money which he is entitled to set-off against the decree debt, and the applicant who is the son-in-law of the transferor took the assignment with notice of his claim and that he had already instituted a suit against the transferor.

The lower Court, without deciding any of the questions in issue between the parties, held that the assignment should not be recognized as it was made after notice of the suit by respondent 4. We think this order is not right. We are of opinion that the Subordinate Judge should decide whether the transfer is valid and the petitioner is entitled to execute the decree.

We, therefore, set aside the order of the Subordinate Judge, and direct him to restore the petition to his file and dispose of it according to law. Costs will abide the result.

S.N./R.K. *Appeal allowed.*

A. I. R. 1914 Madras 87

SADASIVA AIYAR AND SPENCER, JJ.

Veduruvaranna Venkana and others—Appellants.

v.

Receiver, Medur, and Nidadavole Estates—Respondents.

Second Appeals Nos. 1472 to 1477 of 1912, Decided on 23rd December 1913, from decrees of Dist. Court, Kistna, in Appeal Suits Nos. 6, 24, 10, 11, 12 and 15 of 1911.

(a) Madras Estates Land Act (1908), S. 40 (3)—Three considerations in (a), (b) and (c)

are not the only considerations to be borne by Collector before determining fair money rate.

The three considerations (a), (b) and (c) in S. 40 (3) are not the only considerations which the Collector has to bear in mind before determining what the fair money rate to be fixed by him should amount to. Nor should the considerations in a particular clause (a), (b), or (c) be given more weight than in the other two. [P 38 C 1]

(b) Madras Estates Land Act (1908), S. 40 (3)—“Average value of the rent”—Meaning explained.

The expression “the average value of the rent actually accrued due to the landholder during the preceding ten years” means the average rent per acre of the holding arrived at by dividing the total of the rents *per cultivated acre* received during the ten years by the number “10.” [P 88 C 1, 2]

P. Nagabhushanam—for Appellants.

M. Purushothama Naidu—for Respondents.

Sadasiva Aiyar, J.—These six second appeals raise the question as to the proper rate of money rent into which the rent in paddy grain produce, which has been till now paid by certain tenants in the village of Mondur in the Nidadavole and Medur Estates, should be commuted. The suits out of which these second appeals have arisen were brought by the tenants for such commutation of the grain rents into money rents. In their plaints they were prepared to pay money rent according to the quality of the lands from Rs. 4-4-0 to Rs. 7-8-0 per acre. The entire area in each holding had always been treated as consisting of wet lands in the accounts from fasli 1303. When grain rents were being received by the landlord, the tenants seem to have been in the habit of letting some fraction of the entire area in some of the holdings lie fallow or to be cultivated with dry produce. The zamindar used to receive a share of the wet produce raised from the cultivated wet area. Although the records do not show whether the area in which wet crops were not cultivated was left wholly fallow or whether dry crops were raised on the said area (or most of that area), for which some rent in money was paid to the zamindar, the learned vakils for the plaintiffs - appellants represented to us that at least some portion of the area not cultivated with wet crops used to be cultivated with dry crops and money rents paid to the zamindar by the tenants.

As regards the question of commutation into money rents, S. 40, Madras Estates Land Act, deals with the principles which ought to guide the Courts in fixing the money rents in holdings which were paying grain rents. S. 40, sub-S. 3, says: "In making the determination the Collector shall have due regard to each of the following considerations: (a) The average value of the rent actually accrued due to the landholder during the preceding ten years other than the years which the Local Government may notify to be or to have been famine years in respect of any local area or, if the value for such period cannot be ascertained, during any shorter period for which evidence may be available, excluding famine years; (b) the money rent payable by occupancy ryots for land of a similar description and with similar advantages in the same village or neighbouring villages; and (c) improvements effected by the landholder or the ryot in respect of the holding, and the rules laid down in S. 32."

In the present case the consideration referred to in Cl. (c) might be ignored as there is no evidence that improvements were effected either by the landholder or the ryot in respect of the holdings in dispute. Sub-S. 3 again does not state that the three considerations (a), (b) and (c) are the only considerations which the Collector has to bear in mind before determining what the fair money rate to be fixed by him should amount to. Nor does it say that the considerations in a particular clause, (a), (b) or (c), should be given more weight than in the other two. A general direction that "due regard should be given to each of the following considerations" is all that appears in the section. In the present case I am unable to say that such "due regard" has not been given to the considerations mentioned in sub-S. 3.

As regards the consideration in Cl. (b) if no evidence is let in by either side and if neither side relies upon any facts which have to be established before the Court is in a position to give effect to consideration (b), I cannot say that that consideration has not been given due regard to by the lower Courts.

Coming to the consideration (a), the only question argued was whether the expression "the average value of the rent actually accrued due to the land-

holder during the preceding ten years" means the average rent per acre of the holding arrived at by dividing the totals of the rents per cultivated acre received during the ten years by the number "10," or whether it meant the average value of the rent found out by dividing the rents received in each of the ten years by the number of acres in the holding (both cultivated and uncultivated), totalling up the rents per acre during those ten years as found above, and dividing the result again by 10. I think the fairer rule of construction as regards the terms of S. 40, Cl. 3 (a), is the former rule followed by the lower Courts. At any rate that rule seems to be the fairer rule for application on the facts of these present cases. I therefore dismiss these second appeals with costs.

Spencer, J.—I agree. The point upon which the parties are really at issue is whether the average portions which the tenants have been in previous years leaving uncultivated should be included in the area which is adopted as the figure for dividing the average total yield in order to ascertain the average yield per acre. There is no evidence that it is necessary to keep certain portions of each holding uncultivated in an average year, and if so, what such portions should be. It seems to me that in seeking to discover what is the proper rent value per acre we should in this case be exchanging certainty for uncertainty if we take "the average value of the rent actually accrued" referred to in S. 40 (3), Cl. (a), as meaning the average value of the rent actually accrued on the whole holding, instead of the average value of the rent actually accrued on the average extent cultivated out of the total area. I think the methods adopted by the lower Courts for arriving at the money rents are fair to both sides and these appeals should therefore be dismissed with costs.

S.N./R.K.

Appeals dismissed.

A. I. R. 1914 Madras 88

SANKARAN NAIR, J.

V. V. Srinivasa Aiyangar—Plaintiff.

v.

V. Cunniappa Chetty and others—Defendants.

Original Civil Suit No. 448 of 1912,
Decided on 31st March 1914.

(a) Letters Patent (Madras), Cl. 12—Suit for damages for trees cut and removed is one for land.

Where on the allegations in the plaint the title to a land has to be determined either expressly or by implication so as to preclude it from being raised in any subsequent suit, the suit is one for land within the meaning of the words of Cl. 12 of the Madras Letters Patent. Therefore a suit for recovery of damages for trees cut and removed by the defendants is a suit for land within the meaning of the said clause. [P 89 C 2]

(b) Practice — Pleader's fees—Party instructing counsel is entitled to get counsel's fees as part of costs awarded to him—Madras High Court Original Side Rules, R. 533.

It is open to a counsel to appear instructed by his client. Therefore where a party instructs his counsel he is entitled to get as part of the costs awarded to him the fee that he has paid to his counsel. [P 91 C 1]

C.P. Ramaswami Aiyar—for Plaintiff.

M. A. Thirunarayanachari for *V. Parthasarathi Aiyangar* and *Pattabhirama Aiyar* and *Visvanatha Sastri*—for Defendant.

Advocate-General—for the Bar.

J. Krishna Row—for Bar Association and *Chamier* for Attorney's Association.

Judgment.—A preliminary objection is taken as to the jurisdiction of this Court. It is first objected that the defendant 3 does not live or carry on business in Madras and therefore the suit, so far as he is concerned, should be dismissed. Evidence has been taken on this point and I am of opinion that the suit is properly brought against defendant 3. The evidence shows that he comes here to sell his casuarina trees and whenever he has any business to transact in Madras with reference to those trees he comes to Madras. Suits have been brought here against him and he has been arrested on warrants issued against him in Madras. I accordingly overrule the objection so far as defendant 3 is concerned.

The more difficult question that remains is whether the suit is one for land within the meaning of those words as used in S. 12, of the Madras Letters Patent. The suit is brought for the recovery of damages for trees cut and removed by the defendants. They are said to be trees in a plantation situated outside the limits of the ordinary original civil jurisdiction of this Court, and the plaintiff's case is that this plantation where in the trees stood is vested in him. The jurisdiction of this Court has to be determined on the facts alleged in

the plaint. Now, it is true no doubt that no relief with reference to the land is claimed, the only relief claimed being the recovery of a certain sum of money. But the plaintiff cannot obtain that relief without proving his title to the land and an averment made in the plaint that the land belongs to him is necessary. If the title to the land is denied, then of course evidence has to be given to prove his title. If it is admitted by the defendants, then it is unnecessary to decide the question of title; but in any subsequent suit between the parties the question of title to this land cannot be raised again. Either, therefore by express decision or by implication the title to the land has to be declared in this suit and the matter becomes *res judicata*. Now it appears to me that where, on the allegation in the plaint, the title to a land has to be determined either expressly or by implication so as to preclude it from being raised in any subsequent suit, the suit is one for land within the meaning of the words in S. 12 of the Letters Patent. Mr. Ramaswami Aiyar relied upon the decision of this Court in *Manappa Mudali v. S. T. McCarthy* (1) and upon the decision in *Puttangoth v. Nilkanth Kalo Deshpande* (2) in which it was decided that when a suit is brought in a Small Cause Court for the recovery of a certain sum of money and the plaintiff has to prove his title to any land in that suit, then the title to the land comes only incidentally before the Court and the Small Cause Court is not divested of its jurisdiction to try that suit. That may be so. But the ground of these decisions is that the title to the land will not be *res judicata* in any subsequent litigation between the parties, and when the title will not be *res judicata* between the parties, it cannot be said that the question of title is properly before the Court for determination. I am therefore of opinion that the suit is one for land and it is conceded that if the suit is one for land it will not lie in this Court. I accordingly dismiss the suit. As defendant 3's plea is disallowed, I make no order as to his costs. The plaintiff will pay the costs of defendants 1 and 2.

(1) [1881] 3 Mad. 192=6 Ind. Jur. 21.

(2) [1913] 20 I. C. 974=37 Bom. 675.

Mr. Tirunarayanachariayar applies for a certificate for counsel's fee. Mr. Ramaswami Aiyar opposes this on the ground that no counsel's fee can be taxed in any case where he is instructed by a vakil. Mr. Chamier supports him. The question has been argued earnestly for one entire day. I shall therefore give my reasons for my conclusion.

When a party is declared entitled to his costs, he is *prima facie* entitled to receive all the reasonable costs incurred by him in the conduct of the suit. The fee that he might have paid to a counsel, attorney or vakil is included in his costs; but such fees, of course, should not be unreasonable.

The rule for taxation of costs therefore provides that when a party instructs an attorney, the attorney's fees are to be taxed according to the scales in Appx. 4 of the Original Side Rules. As an attorney cannot plead, it is necessary for him to instruct a counsel, and therefore it is only right that a party should get the attorney's fees as well as the fees which were paid to counsel by the attorney on his behalf, and as it is the attorney who pays the counsel whom he instructs, counsel's fee is included in his bill of costs. But as it is necessary for an attorney only to instruct one counsel in the conduct of the case, if he instructs also another counsel, then he is not entitled to get that fee as a matter of right. It is open to the Taxing Officer not to allow it. It is also open to him to say under R. 29, High Court Fees Rules, that it was necessary and proper that a second counsel should be engaged in the case; then he can allow the second counsel's fee. Of course, the Judge can always certify for such counsel's fee.

Where a party appears by a vakil, vakil's fees are fixed by O. 6, R. 63, High Court Fees Rules, and the amount of such fee is calculated where practicable according to the value of the suit and the amount fixed by the scale of fees framed under the Legal Practitioners Act, 1879. For the same reason that a second counsel's fee is not always allowed, it is only reasonable that when counsel appears instructed by a vakil the counsel's fee should not be allowed as a matter of course. A vakil can conduct the case alone. He can act and appear and plead, and

therefore there is no necessity for him to engage a counsel. He can do the work which an attorney and counsel together can do when a party appears by an attorney. But those reasons which influence the Court or the Taxing Officer to certify for second counsel's fee would seem to be also applicable to cases in which a vakil instructs a counsel. They would seem to apply with greater force, as it might be said that cases which required a second counsel would a fortiori seem to require a counsel when a party instructs a vakil instead of an attorney. This principle is followed in R. 533, Original Side Rules, which allows the Taxing Officer to allow counsel's fee in respect of his attendance at Chambers or at the first hearing of a suit when the Judge certifies that the case is a proper case for his attendance. The rule is not limited to cases in which the advocate appears instructed by an attorney.

It was then argued before me that a party is not entitled to claim as part of his costs fee paid by him to counsel whom he instructs directly without the intervention of an attorney or whom a vakil instructs, because the rules about payment of fees when a party appears by an attorney go to show that a party can claim the fee paid to counsel only when the counsel appears instructed by an attorney; and the rules about payment of costs when a counsel appears instructed by a vakil go to show that no counsel's fee can be allowed. The argument is that in attorney's cases when costs are awarded under R. 191 they must be inserted in the decree followed by the words "when taxed and noted in the margin thereof," and taxation of costs can only take place as provided by O. 4 which requires an attorney to present his bill of costs in which the fee paid to counsel must be entered. There is no provision relating to payment of counsel's fee, and it is argued therefore that it is only in cases in which an attorney may be able to present his bill of costs, and therefore cases in which an attorney appears that counsel's fee can be awarded to the successful party. In my opinion, those who put forward these arguments forget that rules for taxation of costs only prescribe the procedure for recovery of costs and the conditions

subject to which they might be recovered. The right to recover costs, and fees as part of costs, exists apart from the rules for taxation of costs. They cannot be intended or read to get rid of the right the existence of which is a pre-requisite to the taxation rules coming into operation. Moreover, they were framed at a time when it was not the practice for counsel to appear instructed by a party or vakil. The rules therefore had not such cases in contemplation; and the rules which were framed to provide for payment of costs when a counsel appears instructed by an attorney cannot be construed to impose restriction even indirectly by disallowance of fees upon counsel appearing instructed by a party or a vakil, a matter which was never contemplated by those rules. Again on the question whether any rules can fetter a Judge in his judgment, I express no opinion; but it certainly cannot be done by implication, and in express terms his powers to award costs as prayed for is not taken away.

Coming to the rules, it may be pointed out the argument that a party represented by counsel should not get the fees that he might have paid to him included in his costs, on the face of it, would seem to be unreasonable. It has been held by Wallis, J., and I agree with his conclusion, that it is open to a counsel to appear instructed by his client, and if that is so, it appears to me that he is entitled to get as part of the costs awarded to him the fee that he has paid to his counsel. Otherwise, it would amount to the virtual prohibition of a party engaging a counsel and the Courts will undoubtedly struggle against a construction of the rules which has that result.

Now taking the rule about attorney's bill of costs: R. 191 states that the procedure therein prescribed should be followed "unless otherwise ordered by the Court"; and an order certifying for counsel's fee is such an order if it is inconsistent with that rule. R. 63 about vakil's fee states clearly that it applies to fees "to be allowed to the vakils." Reading it with Rr. 30 to 40, of the Appellate Side Rules, I have no doubt that it only means that a vakil cannot claim anything more for appearing, acting or pleading up to the date

of the decree. It may also be pointed out that if R. 41, of the Appellate Side Rules applies, it can only operate when ad valorem fees are paid and the argument to help the plaintiff in this case must cover other cases. Liberally construed, it would prevent higher costs being awarded when a party is represented by counsel and attorney.

If I am right in my interpretation of R. 533, that also is against this view, as counsel may appear instructed by a vakil who may claim as part of the costs the fee paid to the counsel. It was contended that this rule must be read subject to R. 191 and O. 4; but in my opinion all these rules have to be read together and they certainly are not to be strained to include cases which were not in the contemplation of those who framed the rules.

I am therefore of opinion that when counsel is instructed by the party in person, the latter is entitled to claim as part of the costs decreed to him the reasonable fee paid to his counsel; and when he is instructed by a vakil the Taxing Officer or Judge may certify for his fee.

Certified accordingly.

S.N./R.K.

Suit dismissed,

A. I. R. 1914 Madras 91

WALLIS, J.

T.R. Ganesh Rao—Plaintiff.

v.

T.V. Tulga Ram Row and others—Respondents.

Original Civil Suit No. 194 of 1906,
Decided on 18th December 1913.

(a) **Hindu Law—Alienation by father cannot diminish by subsequent birth of son.**

An alienation made by a father is not diminished by the birth of a son subsequent to the alienation. [P 92 C 1]

(b) **Hindu Law—Joint family—Son born after alienation but before partition succeeds by birth to joint family property so as to reduce shares of other members of his branch.**

The son born to the alienor after the alienation but before partition succeeds by birth to a share in the joint family property, and the shares of the other members of his branch are reduced proportionately to make up his share. [P 95 C 1]

(c) **Hindu Law—Alienation—Father and son forming joint family—Second son born subsequent to alienation by father—Alienation will be upheld to the extent of father's share before second son's birth.**

Where a joint Hindu family consists of a father and a son, and the father alienates the family property, and another son is born sub-

sequently to the alienation, the alienation will be upheld to the extent of the father's share (i. e., half) before the birth of the second son, and the second son will be allowed an equal share with his elder brother in the remaining half of the family property. [P 95 C 1]

(d) Civil P. C. (1882), S. 244 — "Determined" meaning explained.

The word "determined" in S. 244 shows that the questions referred to are to be finally disposed of, and the effect of the section is to give the Court executing the decree jurisdiction to dispose finally of such questions by granting appropriate relief. [P 93 C 1]

T. R. Venkatrama Sastri—for Plaintiff.

V. Masilamani Pillai and T. V. Muthukrishna Aiyar—for Defendants.

Judgment.—In this case the Privy Council have given the plaintiff a declaration that the compromise entered into by his father in Civil Suit No. 266 of 1886 was not binding on him for want of sanction under S. 462, Civil P. C., and that he ought to be remitted to his original rights under that decree. They have also remitted the suit under appeal 194 of 1906 to this Court in order, in the words of the orders in council, 'that the other questions arising between the parties and covered by issues 6 and 7 may be disposed of'. Issue 6 is: "Is the plaintiff in any event entitled to recover more than a moiety of the amount sued for?" It is not seriously contended that the compromise entered into by the plaintiff's father did not bind his own share in the property of the joint family which consisted at the time of the plaintiff and his father, or that the compromise must not in this suit be considered an alienation made by the father for consideration. It is consequently binding on the father's share. The fact that since the institution of Civil Suit No. 194 of 1906 two sons have been born to the plaintiff's father cannot under the recent Full Bench decision in *Chinnu Pillai v. Kalimuthu Chetti* (1) have the effect of diminishing the alienation made by the compromise in favour of defendant 1, and the issue, therefore be answered in the negative.

Issue 7 is: "Is the plaintiff entitled to charge interest and if so, at what rate?" The rate of interest given by final decree in Civil Suit No. 266 of 1886 is 6 per cent. At the date of the final decree there was an appeal pending against the interim

decree and the final decree was made subject to the result of the appeal. On the appeal which was heard shortly before the compromise an additional amount was made payable to the plaintiff's father as representing his branch of the family. In the ordinary course the final decree would have been amended as provided therein and the additional sums would have been made payable with the same rate of interest and from the same date. As it was, the plaintiff's father entered up satisfaction pursuant to the compromise which has now been declared to be not binding under the decree. Their Lordships have declared the plaintiff to be entitled to be remitted to his original rights under that decree, and they include, in my opinion, a right to receive interest at 6 per cent not only one-half the sum mentioned in the final decree but also half the additional sum which was found payable on appeal against the interim decree. This disposes of issue 2.

These are the only issues remitted by their Lordships, but some further questions have been raised on behalf of defendant 1. In the first place it is contended that as this Court decided at the hearing an objection taken by defendant 1 that the plaintiff ought not to have instituted a separate suit but to have proceeded under S. 244, Civil P. C., in Original Suit No. 266 of 1886 and decided to treat this suit as an application under that section, and as under the decree in Original Suit No. 266 of 1886 no relief is awarded to defendant 6 the present plaintiff, the plaintiff is not entitled to recover anything in this proceeding but must be referred to another suit. There are several answers to this objection. In the first place it appears from a perusal of their Lordships' reasons and of the orders in council that this Court is required to dispose of the case finally in obedience to the order. Their Lordships were clearly of opinion that this Court was right in disposing of the case on the merits and were not called upon to consider whether the present proceedings might be described more correctly as a suit or as an application under S. 244, Civil P. C. Secondly defendant 1 who persuaded the Court at the hearing that the plaintiff's remedy was under S. 244 can scarcely be bound now to say that no remedy is available

(1) [1911] 9 I. O. 596=35 Mad. 47.

to him under that section. Lastly I hold that on the merits there is no foundation for the objection. S. 244 requires that questions of the nature specified in the section arising between the parties to the suit shall be determined by the Court executing the decree, and not by a separate suit. The word "determined" shows that these questions are to be finally disposed of, and the effect of the section is to give the Court executing the decree jurisdiction to dispose finally of such questions by granting appropriate relief. In Original Suit No. 266 of 1886 certain moneys were made payable to defendant 3 as representing his branch of the family which then consisted of himself and the minor defendant 6, the present plaintiff. Defendant 3 having alienated his own share and affected to release the plaintiff's share of such moneys in favour of the judgment-debtor it seems to me that it is open to the Court under S. 244 to declare the release not binding on defendant 6, the present plaintiff, and to make his share payable to him directly by the judgment-debtor.

Defendant 1 then raises another objection based on the fact which was not before their Lordships, that, subsequent to the institution of Original Suit No. 194 of 1906, two more sons have been born to the plaintiff's father and are, it is suggested, entitled to equal share in the fund with their brother, the present plaintiff. As they have not been made parties to the suit, and as the plaintiff has no title to represent them, it is contended that the utmost he can recover is one-third of one-half or one-sixth of the whole fund in dispute. For the plaintiff on the other hand it is contended that the effect of the release by his father of his own share in the fund was that the residue ceased to be joint family property and became the separate property of the plaintiff in which sons subsequently born to his father acquired no right by birth: *Sripat-Chinna Sanyasi v. Suriya* (2), *Aiyagari Venkatramayya v. Aiyagari Ramayya*, (3) *Kadegan v. Periya Munusami* (4), *Iburamsa Rowthan v. Thirumalai Muthuveera Thiruvenkatasami*

Naik (5), *Chinnu Pillai v. Kalimuthu Chetty* (1) and, *Srinivasa Sundara Thathachariar v. Krishnasamy Iyengar* (6) were cited in support of this proposition as to which see *Shivajirao v. Vasantrao* (7). On the other hand it was argued that this contention was opposed to the settled practice of the Courts in partition suits in which it is sought to declare that alienations made by some of the coparceners are not binding on the others.

I cannot give judgment for the plaintiff for the whole half-share without deciding this question in his favour, and I think I ought not to decide it in the absence of the plaintiff's minor brothers who, it is suggested, are interested in the fund. I accordingly direct the plaintiff's brothers, Ramachandra Row and Krishna Row, minors, to be made parties defendants with liberty to come in and prefer a claim to share in the fund.

Adjourned to 7th January 1914.

[The plaintiff's brothers were made parties and the Court delivered the following judgment on 24th March 1914 :]

I have considered the cases referred to in the argument and also the recent decisions of Sankaran Nair and Bakewell, JJ., in *Nanjaya Mudali v. Shanmuga Mudali* (8). The question for decision is where a father and son constitute a joint family, and the father alienates to a third party his share in a certain portion of the joint family property, and subsequent to the alienation but before partition of the joint family property another son is born to the father, is such son entitled by birth to share to any, and what extent, with his brother in the unalienated moiety which did not pass to the alienee by virtue of the alienation, or is the elder son entitled to the whole of the unalienated moiety to the exclusion of his younger brother? The question is one of considerable difficulty and does not appear to have arisen directly for decision. In *Hardi Narain Sahu v. Ruder Perksh Misser* (9) however the facts were very like those of the present case. A creditor of the father acquired his share by purchase at a Court auction and obtained

(5) [1910] 7 I. C. 559=34 Mad. 269.

(6) [1912] 15 I. C. 354.

(7) [1909] 2 I. C. 249=33 Bom. 267.

(8) [1914] 22 I. C. 555.

(9) [1894] 10 Cal. 626=11 I. A. 26 (P. C.).

(2) [1882] 5 Mad. 196.

(3) [1902] 25 Mad. 690 (F.B.).

(4) [1903] 18 M. L. J. 477.

possession of the joint family property. The father then purported to convey his share to his son, the remaining coparcener, and the latter sued to recover possession from the auction-purchaser on the ground that at utmost he had acquired the father's share, and that as he had not enforced his rights by partition he was not entitled to possession of any of the property. The High Court held that the defendant had only acquired the father's share and that though he ought strictly to have brought a suit for partition, this proceeding might be treated as such a suit and partition effected. They accordingly joined the plaintiff's mother who under the law then prevailing was entitled to a share. In their judgment they say that another son had been born since the institution of the suit, and that it was contended, apparently by the appellant, his elder brother, with a view of reducing the share of the defendant, the alienee, that the subsequently born son was entitled to a share against the alienee. This they negative, holding that the alienee was entitled to the share he would have had if partition had taken place at the date of the alienation, and allotting the other two shares to the minor plaintiff and his mother. The new-born son was not a party and the Court apparently thought he was not entitled to a share or they would have brought him on the record. The point therefore cannot be said to have been decided.

When the case was under appeal to the Privy Council the mother died and her two surviving sons were brought on as legal representatives. As the younger of them is described in the judgment of the Privy Council as the second son, he must be the son who was born while the appeal to the High Court was pending, and the statement in the body of the report that this son was born while the appeal to the Privy Council was pending, must be a slip. No question appears to have been raised before their Lordships as to his claim, if any, to share in the unalienated portion of the joint family property, and the decision of their Lordships does not seem to touch the point.

The result of the case would appear to be that the High Court did not consider the after-born son of the coparcener

who had alienated his share entitled to share with the remaining members as, if they had considered him so entitled, they would have protected his interest in passing the decree. In that case he was not a party and the other coparceners were asserting his right to share so that the case does not seem to be of much authority on this point. All that it decided was that the alienee was entitled to the share which the alienor would have got if there had been a partition at the time of the alienation, a point since expressly settled by this Court in *Chinnu Pillai v. Kalimuthu Chetti* (1). Krishnaswami Aiyar, J., in the judgment which he prepared but did not deliver in this case, held on the analogy of a rule of English law as to joint tenancy that an alienation by one of the coparceners of a portion of the joint family property puts an end to the joint tenancy and converts the coparceners into tenants-in-common. And Benson and Miller, JJ., in *Srinivasa Sundara Thathachariar v. Krishnasamy Iyengar* (6), subsequently held that where a coparcener parts with his share in a portion of the joint family property the effect is to put an end to the joint tenancy altogether as to this particular property and make the other coparceners tenants-in-common as between themselves along with the alienee. In *Subba Row v. Ananthanarayana Aiyar* (10) Benson and Sundara Aiyar, JJ. held that the effect is to make the alienee a tenant-in-common with the other coparceners in respect of his property, but to leave the other co-parceners joint tenants as between themselves. In the latest case of all, *Nanjaya Mudali v. Shunmuga Mudali* (8), Sankaran Nair and Bakewell, JJ., dissented from these decisions based on the judgment of Krishnaswami Aiyar, J., and held that, where a coparcener alienates his share in a specific portion of the joint family property, the alienee does not become a tenant-in-common of the alienated property, but is only entitled to an equity to stand in the shoes of the alienor, and at partition to have the share allotted to him which he would have had if partition had taken place at the time of alienation and further have a portion of the specific property alienated allotted to him if it can be done without incon-

venience. In view of the latest decision, which I ought, I think, to follow, no arguments can be based upon the existence of a supposed tenancy-in-common after alienation and before partition. How then does the case stand on the footing that the alienee only acquires an equity of the nature indicated above? The son born to the alienor after the alienation but before partition succeeds by birth to a share in the joint family property, and the shares of the other members of his branch are reduced proportionately to make up his share. In the present case the joint family before the birth consisted of the father and elder son. On the birth of the second son to give him his one-third share the share of his father and brother would each be reduced by one-third, and he would get from each a one-sixth share of the whole to make up his one-third share. The fact of the father having alienated his share appears to me to be no reason why the elder brother's share should not be diminished by a one-sixth share of the whole, as it would have been if no alienation had taken place.

But in order to give the new-born son a share equal to his brother, it would be necessary to reduce the elder brother's share by an additional one-sixth of the whole, as according to the decision the father's share in the hands of the alienee is not liable to any diminution for this purpose. If we allow the elder brother's share to be further reduced in this way, he is prejudiced as a result of the father's alienation. If we refuse to do so, the new-born son is prevented from participating in what was still joint family property at the time of his birth. The question really comes to this: Is the equity in favour of the alienee of the father's share to be enforced at the expense of both the other coparceners, the son born before and the son born after alienation, or only at the expense of the latter? In theory, something may be said for the second solution but the settled practice of this Court, and as far as I can ascertain of mufassil Courts also, is the other way. It frequently happens that in partition suits alienees from individual coparceners are made parties and the alienations made by individual coparceners are found not to be binding on the other

members of the joint family. In such cases it has never been the practice to make any distinction between sons of the alienor born before the alienation and sons born after alienation but before partition. To do so would add greatly to the complexity of the task of working out a partition. In the absence of direct authority, and in the somewhat conflicting state of the decisions I do not think that, sitting here, I should be justified in departing from what appears to be the settled practice of the Courts, more especially as I consider that the existence of such a practice is, in a question of this kind, a very strong argument against any alteration based on purely theoretical considerations.

There will be a joint decree in favour of the plaintiff and defendants 3 and 4. Plaintiff to recover the costs of the suit from defendant 1 and to pay the costs of defendants 3 and 4.

S.N./R.K.

Suit decreed.

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OLDFIELD, J.

Sundararaja Aiyangar and another—
Petitioners.

v.

Lakshmiammal— Plaintiff — Respon-
dent.

Civil Revn. Petn. No. 872 of 1912,
Decided on 27th February 1914, from
decree of Dist. Munsif, Periyakulam, in
S. C. Suit No. 1047 of 1912.

Contract—Provision in favour of daughter not a party to partition-deed is trust for her benefit which she can sue to enforce—Such suit will not lie in Small Cause Court—Provincial Small Cause Courts Act (1887), Sch. 2, Art. 18.

A provision in a family partition-deed for the performance of the marriage of a daughter of the family creates a trust for her benefit and she can sue to enforce it although not a party to the partition-deed. Such a suit will not lie in a Small Cause Court as it would "relate to a trust" within the meaning of Art. 18, Sch. 2 Provincial Small Cause Courts Act, 9 of 1887: 29 I. C. 351 and 13 I. C. 205, *Dist.*; 18 *Mad.* 252, *Foll.* [P 96 C 1]

*K. V. Krishnaswamy Aiyar—*for Peti-
tioners.

*K. Balamukunda Aiyar—*for Respon-
dent.

Judgment.—The case was tried and has been argued here with reference only to Ex. 1 and not to the alleged agreement of May 1908, and the first point taken is that plaintiff who was not a party to Ex. 1 cannot sue on it.

Schedule E of Ex. 1, a partition-deed in plaintiff's family, contains the arrangement made for the performance of her nuptial marriage. It is headed "amount due to plaintiff" and sets out that Rs. 100 is to be given by each of the branches between which the property is to be divided defendants 1 and 2 taking one share and two sons of defendant by his first wife the other two.

Plaintiff's right to sue is denied mainly on the grounds given for the decision in *Iswaram Pillai v. Taregan* (1). But that case can be distinguished from the present in two ways. Firstly there was no question in it of a family settlement. In *Kasuri Rajagopal Raja v. Datla Radhaya* (2) was one in question and it was held that a sister could sue to enforce a provision made for her under it in pursuance of what is referred to as a moral duty. Secondly, in *Iswaram Pillai v. Taregan* (1) the finding was against the creation of any trust in the plaintiff's favour because "there was no property transferred to the defendants of which they agreed to become trustees but all they agreed to do was to allocate a certain sum in their hands and to make that sum the trust fund." Here however Ex. 1 transferred the properties divided under it from the joint ownership of the family to the several ownerships of its members. Though their shares were not charged in plaintiff's favour they were by mutual agreement accepted subject to an obligation to pay her. It is not alleged that Ex. 1 has not had effect or that defendants have freed themselves from the burden imposed by it by any repudiation of it or the benefit it conferred. The trust in the present case has therefore been constituted completely. In these circumstances defendants were held liable rightly.

In order however to obtain this decision, plaintiff has had to define the character of the transaction evidenced by Ex. 1 so far as it affected her to an extent which was apparently unnecessary at the trial and to rely on its provisions as creating an express trust in her favour. Her suit is to enforce that trust and, that fact recognised, it is clearly covered by Art. 18, Sch. 2, Act 9 of 1887. It therefore is not within the

jurisdiction of a Court of Small Causes: *Krishna Ayyan v. Vythianatha Ayyan* (3). Without reference therefore to the other grounds, for revision which have been argued the lower Court's decision must be set aside and the suit must be remanded with a direction to return the plaint for presentation to the proper Court. The objection to the lower Court's jurisdiction was not taken before it or in the civil revision petition and was mentioned here only after plaintiff's contention had been stated. The parties will therefore bear their own costs to date.

S.N./R.K.

Case remanded,

(3) [1895] 13 Mad. 252.

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SADASIVA AIYAR AND SPENCER, JJ.

Kantipudi Somaya and another — Plaintiffs—Appellants.

v.

Khatya Begam Saheba and others — Defendants—Respondents.

Second Appeal No. 1231 of 1910, Decided on 26th January 1914, from decree of Sub-Judge, Kistna, in Appeal Suit No. 309 of 1909.

Transfer of Property Act (1882), S. 107—Instrument signed by lessee in favour of lessor and accepted by him is sufficient to create relation between lessor and lessee.

To create the relation of lessor and lessee it is not necessary that there should be a registered lease signed by the lessor. An instrument signed by the lessee in favour of the lessor and accepted by him will also be sufficient for the purpose. The lessee may bring a suit for possession even after the expiry of the lease-term. [P 97 C 1]

P. Somasundaram for *P. Narayana-murti*—for Appellants.

T. Prakasam—for Respondents.

Facts.—The suit was by a lessee against his lessor for possession of the lands leased or in the alternative for refund of the premium paid by the plaintiff to the lessor. A tenant holding under a prior lease was also made a party. There was no registered instrument evidencing the suit lease but there was a muchilika executed by the lessee in the lessor's favour. The District Munsif decreed the plaintiff's suit. On appeal by the contesting defendant (the prior lessee) the Subordinate Judge dismissed the suit on the ground that owing to the want of a registered lease signed by the lessor the relation of lessor and lessee was not constituted

(1) [1914] 23 I. C. 951.

(2) [1912] 13 I. C. 205.

between the parties. The plaintiff thereupon appealed to the High Court.

Judgment.—Following *Syed Ajam Sahib v. Ananthanarayana Aiyar* (1) and Second Appeal No. 308 of 1910, we reverse the decision of the lower appellate Court and restore the Munsif's decree. The costs in the lower appellate Court will be borne by the respective parties as directed by that Court. Respondents 4 and 5 will pay the appellant's costs in this Court.

S.N./R.K.

Appeal allowed.

(1) [1910] 8 I. O 668=35 Mad. 95.

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SADASIVA AIYAR, J.

Arunachalam Chettiar — Plaintiff —
Petitioner.

v.

Kasi Nevenda Pillai and another —
Defendants—Respondents.

Civil Revn. Petn. No. 540 of 1911,
Decided on 13th April 1914, from decree
of Sub-Judge, Tanjore, in Small Cause
Suit No. 610 of 1910.

(a) Contract Act (1872), S. 230—Contract
in principal's name — Agent and not principal
is liable.

An agent, by entering into a contract in his
principal's name, holds out that he is merely
an agent and it is the principal and not the
agent that is liable on such a contract: 27
Mad. 315, Foll. [P 98 O 2]

(b) Civil P. C. (1908), O. 41, R. 18—Res-
pondent failing to appear on first hearing
whether can appear without permission
(*Quaere*).

Whether a respondent failing to appear on
the first hearing of an appeal has a right to
appear at any further hearing of that appeal
without the Court's permission. [P 98 O 2]

G. S. Ramachandra Aiyar—for Peti-
tioner.

T. K. Venkatarama Sastri—for Res-
pondent.

Judgment.—The Subordinate Judge
is mistaken in saying that Exs. 5
Series, 6 Series, 7 Series and 8 Series
mention Ralli Brothers as the other con-
tracting party. They mention "Messrs.
Agence Ralli Freres" which I take to
mean "The Agents of Ralli Brothers."

Probably they mean the agents at
Pondicherry of whom defendant 1 alleges
that he is only a sub-agent (para. 6).

The lower Court's finding on issue 4
cannot be accepted as it is vitiated by
its misreading of these documents. He
is requested to give a revised finding
after considering the question whether
he is merely a sub-agent of the Pondi-

cherry agency and whether, if the con-
tract was with the Pondicherry agency,
defendant 1 will be liable. He will also
consider the oral evidence (if any) on
the record as to defendant 1's under-
taking to be personally liable before
coming to his conclusions.

He will also give a finding on issue 3.

The time for the submission of the
findings will be one month from date
of the receipt of the records.

Seven days will be allowed for filing
objections.

Findings.—The above suit has been
remanded for a revised finding on the
evidence on record on point 4 and for
a finding on point 3.

Point 4.—Defendant 1 in para. 6 of
his written statement says that he is
merely the sub-agent of Messrs. Ralli
Brothers at Patukota. In his deposition
as his witness, he swears that he was
appointed sub-agent at Pattukota by the
chief agent of Messrs. Ralli Brothers at
Pondicherry. Ex. 1 is a letter written
by one of plaintiff's kariasthans ap-
parently to defendant 1, in which he is
described as the sub-agent of Messrs.
Ralli Brothers at Pattukota. Exs. 8 and
8 (a) are day-book and ledger maintained
by defendant 1. They are described as
the accounts of Messrs. Ralli Brothers'
sub-agency at Pattukota. These docu-
ments corroborate defendant 1's state-
ment that he is only a sub-agent. I hold
therefore that defendant 1 was only a
sub-agent appointed by the chief agent
of Messrs. Ralli Brothers at Pondicherry.

Exhibits 5, 5 (a) and 5 (b) are the
sale memos. relating to the contracts in
question. They were executed by defen-
dant 2 (alleged agent of the plaintiff) to
the agent of Messrs. Ralli Brothers at
Pondicherry. Exs. 7, 7 (a) and 7 (b) are
memos. of accounts relating to the said
contracts and it is stated in them that
they are accounts of defendant 2 with
the agent of Messrs. Ralli Brothers at
Pondicherry. It is therefore clear that
the agent of Messrs. Ralli Brothers at
Pondicherry was in writing made the
contracting party and that the contracts
in question were made directly in his
name.

The plaintiff's pleader here has not
pointed out to me any authority to show
that in the circumstances of the case
defendant 1 is personally liable for the
plaint claim. He merely relies on the

statement of the plaintiff made in his deposition as his first witness that he looked to defendant 1 for payment of the money due in respect of these contracts. These contracts were entered into, not by the plaintiff personally, but by defendant 2. In the plaintiff's accounts, Exs. A Series, no mention is made of defendant 1's name in any place, but it is shown in them that the dealings are with Messrs. Ralli Brothers, Pattukota. The plaintiff's statement in the light of documents in the case appears improbable and I do not believe it. I hold that the contracts in question were with the agent of Messrs. Ralli Brothers at Pondicherry and that defendant 1 did not undertake to be personally liable to the plaintiff for the money alleged to be due in respect of the said contracts.

Section 192, Contract Act, lays down that the sub-agent is responsible for his acts to the agent, but not to the principal except in case of fraud or wilfulness. S. 230 does not in terms apply to sub-agents. If the agent of Messrs. Ralli Brothers at Pondicherry is to be treated as the principal, and the sub-agent (defendant 1) as his agent at Pattukota, the principle of the decision reported in *Tutika Basavaraju v. Parry & Co.* (1) applies. I find point 4 against the plaintiff and in favour of defendant 1.

Defendant 2 does not put in his appearance either in person or by a pleader. The plaintiff's pleader and defendant 1's pleader here put in memos. asking me not to give any finding on point 3 and I therefore record no finding.

(After the return by the lower Court of the findings on the issues referred, the Court delivered the following)

Judgment.—When this case came on before me on the 31st October 1912, the interested respondent (defendant 1) did not appear and I called for a revised finding, believing, in the light of the argument of the petitioner's vakil, that a French expression used in Exhibits 5 Series et cetera meant: "The Agents of Ralli Brothers." The respondent's learned vakil now tells me that that expression has the meaning: "The Agency business carried on by the firm of Ralli Brothers." I am not quite sure that a respondent, who did not appear

when an appeal or a revision petition was called on or argued on the first day of the hearing, can afterwards appear as of right and claim to be heard at later stages of the case without the permission of the Court. However I shall allow him to appear, assuming that such permission is required.

It is unnecessary to consider the meaning of that French expression further, for, whether the defendant is a sub-agent under the agent of Ralli Brothers, or is an agent directly of the firm of Ralli Brothers, the contract with plaintiff was in writing, and according to the ruling in *Tutika Basavaraju v. Parry & Co.* (1) the presumption raised under S. 230, Contract Act, is rebutted by the fact that the contract is made in the name of defendant 1's principal (whoever he may be) and not of defendant 1.

As regards the Subordinate Judge's refusal to add Ralli Brothers as defendants, it is too late to add them now having regard to S. 22, Lim. Act.

The petition is dismissed with only half of defendant 1's costs as defendant 1's failure to appear on the first occasion has unnecessarily delayed the disposal of this case.

S.N./R.K

Petition dismissed.

A. I. R. 1914 Madras 98

AYLING, J.

Vannavalli Seshagiri Row and another
—Petitioners.

v.

Gopisetti Narayanaswami Naidu — Respondent.

Civil Revn. Petn. Nos. 312 and 313 of 1913, Decided on 20th April 1914, from order of Dist. Judge, Kistna, in Misc. Appeals Nos. 6 and 7 of 1912.

Suits Valuation Act (1887), S. 8—Suit for recovery of immovable property from tenant is covered by S. 8 of Act being included in Court-fees Act (1870), S. 7, Cl. 11 (cc).

A suit for the recovery of immovable property from a tenant is included in Cl. 11 (cc) of S. 7, Court-fees Act and is covered by S. 8, Suits Valuation Act and its valuation is the same for court-fees as well as for jurisdiction.

[P 99 C 1]

B. N. Sarma—for Petitioners.

P. Nagabhushanam—for Respondent.

Judgment.—The only question for disposal is as to the correct valuation of the suit for purposes of jurisdiction. The District Judge has held that it is governed by S. 14. Madras Civil Courts Act; for the petitioner it is argued that

(1) [1904] 27 Mad. 315.

the Subordinate Judge was right in applying S. 8, Suits Valuation Act (7 of 1887).

The ruling relied on by the District Judge *Chalasamy Ramiah v. Chalasamy Ramaswami* (1) does not, in my opinion, afford any support for his view that the present suit is one of which the subject-matter is land so as to bring it within the scope of S. 14, Madras Civil Courts Act (3 of 1873) and that this section governs the valuation for purposes of jurisdiction. At the time when the latter Act was passed, the wording and arrangement of S. 7, Court-fees Act, was such that it was at any rate open to argument that a suit of this kind brought by the landlord to evict a tenant was for the possession of land and fell under Cl. 5. If so, it was probably meant to be covered by S. 14, Act 3 of 1873. Assuming that this was so and that a suit like the present one fell under Cl. 5, S. 7 as that section originally stood, the enactment of Act 7 of 1887 made no difference, for such a suit would be excluded from S. 8 of the same. But a very important change was effected by Act 6 of 1905. This Act amended the Court-fees Act by introducing in Cl. 11, S. 7 a new category of suit "(cc) for the recovery of immovable property from a tenant."

The present suit undoubtedly falls under this category; and although respondent's vakil may be right in contending that, before the Amending Act, it fell under Cl. 5 the effect of the amendment was clearly to take it out of Cl. 5 (if it were even there) and put up into Cl. 11 (cc). The indirect effect of the amendment would then be to enlarge the scope of S. 8, Act 7 of 1887 which applies to all suits other than those referred to in S. 7, Cls. 5, 6, 9 and 10 (d) of the Court-fees Act. It certainly cannot be contended now that this suit is not covered by S. 8, Suits Valuation Act. Whether this effect was intentional or due to inadvertence may be a matter of speculation, but is of no importance. The Acts must be construed as they stand.

Adopting the most favourable view for respondent, viz., that S. 14, Madras Civil Courts Act, at the time of its enactment was intended to cover a case of this kind in the event of conflict, I think

(1) [1912] 18 I. O. 903.

preference must be given to S. 8, Suits Valuation Act, as the later enactment, S. 14, Madras Civil Courts Act, is referred to in the Suits Valuation Act, but I find nothing to indicate that S. 8 should be read subject to its provisions.

I must therefore set aside the order of the District Judge and restore that of the Subordinate Judge. The petitioner will get his costs in this and the District Court from respondent.

S.N./R.K.

Order set aside.

A. I. R. 1914 Madras 99

SADASIVA AIYAR AND SPENCER, JJ.

(*Adusumalli*) *Venkataratnam*—Plaintiff—Petitioner.

v.

Senkarayanna—Defendant—Respondent.

Civil Misc. Petn. No. 1573 of 1913, Decided on 26th January 1914, for amendment of High Court's order in Misc. Appeal No. 30 of 1912 (Execution Proceedings No. 75 of 1908 of Dist. Judge, Kristna).

(a) Civil P. C. (1908), S. 152—Arithmetical errors.

Arithmetical errors made in the lower Court and repeated in the High Court must and will be corrected. [P 100 C 1]

(b) Civil P. C. (1882), Ss. 212 and 244—Appeal against order under Ss. 212 and 244—Pleader's fees will be allowed at one and quarter per cent.

In an appeal against an order under the old S. 244, read with the old S. 212, a pleader's fee will be allowed, under R. 32, Civil Rules of Practice, only at the rate of one and one-fourth per cent. [P 100 C 1]

V. Ramadoss—for Petitioner.

P. Nagabhushanam—for Respondent.

Order.—The petitioner (plaintiff) wants an amendment of the order issued by this Court in Civil Miscellaneous Appeal No. 30 of 1912 on the ground that the order as drawn up by this office contains clerical and arithmetical errors. The judgment of this Court in the said Civil Miscellaneous Appeal decided that the defendants are entitled to a deduction of Rs. 4 per acre in respect of the claim for mesne profits made by the decree-holder in Execution Proceedings No. 75 of 1903 in the lower Court. The judgment of this Court begins by saying: "The District Judge is wrong in not making allowance for the cultivation expenses incurred by the defendants."

The District Judge's finding, as appears from p. 8 of the printed papers, is

that "defendants 1 and 2 took away in January 1904 almost all the heaped grain that plaintiffs 1 and 2 had harvested in fasli 1313." We take this finding to mean that, without incurring expenses for cultivation in fasli 1313, defendants 1 and 2 took away almost all the produce raised and harvested by plaintiffs 1 and 2 in that fasli. It appears also from other records in the suit that the total harvest raised was 60 candies, of which the plaintiff had taken away only 4 candies and that the remaining 56 candies were taken away by defendants 1 and 2. The order of this Court which allows cultivation expenses incurred by defendants 1 and 2 cannot therefore relate to fasli 1313.

As regards the other faslis, the arithmetical errors made in the lower Court and repeated in this office in drawing up the order of this Court are not denied and those errors must and will be corrected. With regard to the pleader's fee allowed to the petitioner, the petition out of which the appeal against Order 30 of 1912 was filed in this Court was a petition put in under the old S. 244, read with the old S. 212, and it is therefore a petition in execution proceedings in respect of which, under R. 32, Civil Rules of Practice, a pleader's fee at the rate of one and quarter per cent can be allowed. The prayer for allowing 5 per cent as a vakil's fee is therefore rejected.

The order drawn by this office will be amended in accordance with the above minutes.

There will be no order as to the costs of this petition.

S.N./R.K. *Amendment allowed.*

A. I. R. 1914 Madras 100 (1)

MILLER, J.

Malaya Pillai Nadan—Petitioner.

v.

Venganan Chetty and others—Respondents.

Civil Revn. Petn. No. 50 of 1913, Decided on 28th November 1913, from decree of Sub-Judge, Madura, in Small Cause Suit No. 1446 of 1912.

Provincial Small Cause Courts Act (1887), Sch. 2, Art. 31—Suit against agent for value of goods not accounted for is cognizable by Court of Small Causes.

A suit against an agent for the value of goods received and not accounted for by him is not a suit for account and is cognizable by the Court of Small Causes. [P 100 C 2]

K. B. Ranganatha Iyer—for Petitioner.

M. Narayanaswami Iyer—for Respondents.

Facts.—The respondents, who were merchants at Dindigul, sent some dried chillies to the petitioner at Madura to be sold by him as their agent. The petitioner did not fully account for the goods entrusted to him, and was thereupon sued for the value of the goods not accounted for. The defendant, while admitting that he sold only a smaller quantity than was received by him, accounted for the difference by saying that there was a shortage on account of the chillies having dried up. The Subordinate Judge passed a decree for plaintiffs as prayed. The defendant applied to the High Court in revision.

Judgment.—It is contended that this is a suit for an account and so not cognizable by a Small Cause Court. On the plaint the suit is not a suit for an account; but it has not been decided on the allegation in the plaint but on admission made by the defendant in the trial.

The defendant admitted that he received 45 bags of chillies weighing 189 maunds and sold on the plaintiffs' behalf 39 bags containing 177 maunds and alleged that the diminution was due to drying. Even if the suit be taken to be based on a claim for the price of 12 maunds, not remitted to the plaintiffs, it will not be a suit for an account.

The claim was therefore cognizable by the Small Cause Court and on the admission of the defendant that less was sold than was delivered for sale, he had to show how he had disposed of the balance and the Subordinate Judge has disbelieved his explanation.

I cannot interfere under S. 25, Small Cause Courts Act, and I dismiss the petition with costs.

S.N./R.K. *Petition dismissed.*

A. I. R. 1914 Madras 100 (2)

SADASIVA AIYAR, J.

In re. Palani Gownden—Accused.

Criminal Revn. No. 252 of 1914 and Case Referred No. 27 of 1914, Decided on 7th April 1914, on reference by Dist. Magistrate, Coimbatore, D/. 2nd April 1914.

Criminal P. C. (1898), S. 438—Reference on point of law in pending case is invalid.

A District Magistrate is not competent to refer to a High Court, under S. 433, a point of law actually arising in a case pending before him. [P 101 C 1]

Order.—I wish to express my opinion that until the report of the District Magistrate is considered, a report on which legal action can be taken in revision, no case ought to be put up before me as if it had already become a revision case.

Section 438, Criminal P. C., no doubt authorizes the District Magistrate to make reports to the High Court on examination of the records of the proceedings of an inferior criminal Court, but such reports should be made only in a case where the proceedings are not themselves the subject of a revision case or an appeal case pending before the District Magistrate, whose duty it has therefore become himself to pass a judicial order on that case. S. 438 was not intended to enable the District Magistrate to get the opinion of the High Court on a question of law arising in a case pending before him or to transfer the decision of a difficult case pending before him to the High Court.

As I understand the report of the District Magistrate, there is a petition under S. 125, Criminal P. C., pending before him and he feels a doubt as to how it has to be decided and he refers a question of law for the opinion of the High Court.

I regret to have to decline such a reference as unauthorized by law.

S.N./R.K. *Reference declined.*

A. I. R. 1914 Madras 101

WHITE, C. J., AND OLDFIELD, J.

Sornammal—Appellant.

v.

Official Assignee, Madras—Respondent.

Original Side Appeal No. 65 of 1913, Decided on 2nd April 1914, from order of Bakewell, J., D/- 27th March 1913.

Presidency Towns Insolvency Act (1909), S. 36—Jurisdiction given by S. 36 does not include power to determine question of title as between Official Assignee and stranger where title is prima facie in stranger.

The jurisdiction given by S. 36 does not include a power to determine questions of title as between the Official Assignee and a stranger to the insolvency, where, prima facie, and until the contrary is proved, the title is in the stranger. [P 105 C 1]

Where therefore an Official Assignee, applying for the administration of the deceased insolvent's estate under S. 108 comes by way of a notice of motion and applies under S. 36 of the Act for delivery to him of property standing in the name of persons other than the deceased insolvent, and an order is made under S. 36, the order is one made without jurisdiction and must be set aside: *In re Hewitt; Ex parte Hannah and Walter Hewitt*, 15 Q. B. D. 159; *Ex parte Official Receiver*, and *In re Gould*, 19 Q. B. D. 92, Foll. [P.105 C 1]

Nugent Grant for *P. Subbayya Chetty*—for Appellant.

D. Chamier for *G. A. Duke*—for Respondent.

White, C. J.—In this case the South Indian Export Company—I will refer to them hereafter as the Company—applied to the Court for an order under S. 108, Insolvency Act, that the estate of one Muruga Pillai deceased should be administered in insolvency. The application states that the deceased at the time of his death was indebted to the Company in the sum of about Rupees 50,000. It also states that by three agreements the deceased had hypothecated skins and other things and also deposited with the Company the title-deeds of certain properties to secure the repayment of the amount due to the Company, but that the Company were informed that the value of the security held by them did not exceed Rs. 30,000 and they claimed to be unsecured creditors for the balance. An order was made on this application. The order was under S. 109. S. 109, sub-S. (1), provides:

“Upon an order being made for the administration of a deceased debtor's estate under S. 108, the property of the debtor shall vest in the Official Assignee of the Court, and he shall forthwith proceed to realize and distribute the same in accordance with the provisions of this Act.” Sub-S. (2), provides: “With the modification hereinafter mentioned all the provisions of Part 3, relating to the administration of the property of an insolvent, shall so far as the same are applicable apply to the case of such administration order in like manner as to an order of adjudication under this Act.” Shortly after the making of this order a notice of motion was taken out by the Official Assignee. It was served on two parties. One of them is the widow of the deceased; the other is said to be the brother of the widow. We are not concerned

to-day with the transaction in which the brother of the widow is said to have taken part. We are not concerned with the widow. The notice of motion is dated 4th December 1912, and it asks for an order as against the widow declaring that certain properties were purchased by the deceased benami in her name and were in reality the property of the deceased and as such were vested in the Official Assignee. The notice of motion was made returnable on 9th December 1912. There is appended to the notice of motion this note: "This notice of motion was taken out by the Official Assignee and will be based on his report and oral testimony of witnesses." I do not propose to say anything with regard to the question as to how far the report of the Official Assignee is evidence. We have discussed this question in another case. It may however be pointed out that the notice of motion is returnable on 9th December and the report is dated the 14th. If the motion had come on for hearing on the day on which it was returnable it is difficult to see how the widow could have had an opportunity of meeting the report. However we are told that, as a matter of fact, the notice of motion did not come on for hearing until February.

Mr. Chamier, who appeared in support of the learned Judge's order, contended before us that the application was made on behalf of and in the interest of the general body of creditors. The general body of creditors are no doubt interested in seeing that the Company's security is upheld because if the security is upheld the amount which the Company would be entitled to prove against the estate would be so much the less and the balance available to the general body of creditors if there are any assets at all would be so much the more. That is the only interest so far as I can see which the general body of creditors had in the success of the application made by the Official Assignee. On the other hand, it is obvious that the Company had a very substantial interest in the order which the Official Assignee asked for being made because their security was in jeopardy and the order made by the learned Judge was in effect an order that their security was good. The actual

finding of the Judge in regard to this matter was: "I am of opinion that the evidence establishes that Sornammall (that is the widow) held the property benami for the insolvent." Therefore one cannot help thinking—we have no information one way or the other—that this application at any rate in the first instance was not conceived as being, as Mr. Chamier suggests it was, in the interest of the creditors, but was made for the purpose of establishing by an order of the Court in insolvency that the security which the Company hold over the property of the deceased was a good security on which they could realize.

The state of things as I understand it when the notice of motion was launched, was this: the Company held a mortgage over the property which constituted them as they contended secured creditors. The house property referred to in the notice of motion is included in the mortgage and the mortgage was executed by the deceased and by his widow. The title-deeds stand in the name of the widow. In that state of things I confess I do not understand why the Company did not proceed under S. 12 of the Act and if they were not willing to relinquish their security, give an estimate of the value of their security and prove for the balance, and having done so, proceed to realize their security. The widow being a party to the mortgage the fact that the title-deeds stood in her name would not have been, as I understand the case, an obstacle in the way of the Company when they sought to realize the security. If the Company had sought to realize their security it would no doubt have been open to the widow to set up a case that her signature to the mortgage was obtained by fraud; but until she was able to substantiate that, the Company were in the position of ordinary secured creditors and were entitled to realize their security. However that course was not taken. When the motion came on for hearing, Mr. Grant, who appeared for the widow, did not argue the case on the merits; but he said there was no jurisdiction to make this order. So far as the notice of motion goes, it does not appear under what section of the Act the jurisdiction of the Court was invoked. But I do not think it is contended that, as a

matter of fact, the Court was asked to make the order under any other section than S. 36. The learned Judge in his judgment refers to that section. He says that "under S. 36 the Official Assignee can apply to the Court in a summary manner for an order that the property may be delivered to him." Then the learned Judge goes on to refer to S. 7.

As regards S. 36, our view of that section, as we have had occasion before to observe, is that it is a discovery section. It enables the Official Assignee to get an order which will help him in discovering the existence of property which belongs to the insolvent, or which will enable him to acquire information on which, on adopting the appropriate procedure he may be in a position to ask the Court for an order that property, which *prima facie* belongs to somebody else, forms part of the estate of the insolvent. In my view the section does not authorize the Court to make an order determining any question of title as between the insolvent and a third party where a third party sets up a title which Official Assignee desires to call in question. Other sections of the Act provide for the procedure whereby these questions of title are to be determined. We have specific sections such as the voluntary settlement section and the fraudulent preference section, and in addition there is the general power of the Court to set aside a transaction, if a proper application is made in that behalf, on the ground that it is fraudulent, or against the policy of the Insolvency Act. That being my view of the construction of the section—and I think that is the construction which has been placed upon the corresponding English section, namely, S. 27, of the English Act of 1883—the learned Judge, in my opinion, had no power to make the order under S. 36.

Then Mr. Shenai has contended on behalf of the Official Assignee that the learned Judge had jurisdiction to make the order under S. 7. Now S. 7 is taken word for word from S. 102 of the English Act. As regards S. 7 it seems to me that three questions arise: first, does S. 7 apply to administration proceedings at all? Secondly, if it does, the general question: Is there power to deal with a question arising between the Official

Assignee and a stranger, where the Official Assignee sets up no larger right than the insolvent had, on motion in the insolvency? Thirdly, if S. 7 applies to the specific question, was there jurisdiction to make this particular order in view of the circumstances in which it was made?

Now as regards the first question does S. 7 apply to administration proceedings at all? The provisions of S. 125 of the English Act are reproduced in S. 108, and 109 of the Indian Act. Sub-Ss. (1) and (2), S. 109 of the Indian Act correspond to sub-Ss. (5) and (6), S. 125 of the English Act. In the case of *In re Hewitt; Ex parte Hannah and Walter Hewitt* (1) the question arose as to whether the provisions of S. 27 of the English Act of 1883, which corresponds to S. 36 of our Act, applied to the administration of the estate of a person dying insolvent and it was held that they did not. The ratio decidendi of that case was that as S. 27 was not one of the provisions of Part 3 of the English Act that particular section was not applicable in the administration of the estate of a deceased insolvent. Cave, J. puts it thus: "This question depends primarily on the language of S. 125. Sub-S. 6 of that section" (that is sub-S. (2), S. 109 of our Act) "applies with the modifications after-mentioned all the provisions of Part 3 of the Act relating to the administration of the property of a bankrupt so far as the same are applicable. There is, therefore, an express enactment that the provisions of Part 3 with certain modifications shall apply to the administration in bankruptcy of the estate of a person dying insolvent. The terms of sub-S. 5" (that is Sub-S. (1) of our S. 109) "cannot, as it seems to me, be relied upon as extending the provisions of sub-S. 6." Wills, J. says: "By sub-S. 6, S. 125, the legislature has specifically pointed out certain sections of the Bankruptcy Act which are to be applied to the administration of the estates of persons dying insolvent. According to the ordinary rules of interpretation, unless there are strong reasons to the contrary, when they provide that the provisions of Part 3 shall be applicable, they must be considered to mean that other parts of

(1) [1886] 15 Q. B. D. 159.

the Act shall not be applicable." The learned Judge also observes: "There is no reason afforded by the use of the language referred to why any other provisions than those of Part 3 should be applicable to the administration of estates under S. 125." If we apply the ratio decidendi of that decision to the question before us, there can only be one answer to the question. There is another authority which throws light on the question and that is *Ex parte Official Receiver, In re Gould* (2). There it was held that S. 47, Bankruptcy Act of 1883, which avoids certain voluntary settlements executed by a bankrupt, does not apply to the administration of the estate of a deceased insolvent by the Court of Bankruptcy. According to the English decisions, the fact, that the provision which is sought to be applied to administration proceedings does not form part of Part 3, is conclusive on the question as to whether that provision is applicable. On the other hand the fact that it does form part of Part 3 is not conclusive. The judgment of Fry, L. J., is instructive, because he traces the history of the jurisdiction. There he makes this observation: "It is argued that the use of the words 'administration according to the law of bankruptcy,' in sub-S. 1, show that the estate of the deceased debtor is to include the property of third persons. In my judgment those words apply only to the mode of administration, and not to the subject-matter which is to be administered. In my opinion, if it had been intended to arm the Court with the power of administering the property of third persons as part of the estate of a deceased insolvent-debtor—a power which had never been possessed by the Court of Chancery—the legislature would have expressed their intention in clear and unambiguous language." Again "What is an administration order? It is an order for the administration of the deceased debtor's estate, and of nothing else. So many, therefore, of the provisions of Part 3 as are applicable to such an administration are imported into S. 125, and no others." I do not think there is any case (at any rate our attention has not been called to any case), in which it has been held that on a motion in proceedings for the

administration of the estate of a deceased insolvent, the Court has power to hold that property which prima facie belongs to somebody else forms part of the estate of the insolvent. For the purposes of the case before us to-day, I do not think it necessary for us to express any final opinion in this matter. But I find it difficult to suggest any grounds for holding that the decision in *In Re Hewitt* (1) does not govern the question.

Assuming for the purposes of this judgment that S. 7 applies to administration proceedings there is the further question, the general question: Is there power to deal with this class of cases on notice of motion? That, of course, depends upon the construction of S. 7, which is taken word for word from S. 102 of the English Act. No doubt the words are very wide. "Subject to the provisions of this Act, the Court shall have full power to decide all questions of priorities, and all other questions whatsoever, whether, of law or fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case", that is to say, in any case of insolvency coming within the cognizance of the Court.

The effect of S. 102 of the English Act has been the subject of a great many decisions which I do not propose to discuss now. But the effect of the decisions is thus stated by Vaughan Williams, L. J., in his book on Bankruptcy, 9th Edn. p. 342. He points out various considerations and then goes on: "All" (that is all these considerations) "seem to point to an intention by the legislature that the High Court in bankruptcy should now exercise that jurisdiction between the trustee and strangers which the cases under the old Act decided that the Court of Bankruptcy, as then constituted, could not, or ought not, to exercise." Applying that summary of the law I should have been disposed to hold, although I do not think it necessary to give a final decision on the question, that the question which was raised in this notice of motion was a

(2) [1887] 19 Q. B. D. 92.

question which could be determined as between the Official Assignee and the stranger on a notice of motion, and that it was not necessary that the Official Assignee should bring a suit for the purpose of having the question determined.

That brings me to the last question, the specific question: In view of the fact that the learned Judge purported to make the order under S. 36, can we say that he had jurisdiction to make the order? The learned Judge says: "Under S. 36 the Official Assignee can apply to the Court in a summary manner for an order that the property may be delivered to him." He refers to S. 7 as giving him power to decide all questions arising in a case of insolvency. I understand that the learned Judge decided the question of title and ordered delivery of possession in exercise of the powers which he considered he possessed under S. 36. As I have already said, in my opinion the jurisdiction given by S. 36 does not include a power to determine questions of title as between the Official Assignee and a stranger to the insolvency, where *prima facie*, and until the contrary is proved (and this is the footing on which this case was argued), the title is in the stranger.

I think we must hold that this order was made without jurisdiction. The order, in so far as it relates to the properties described as items 1 and 2 in the schedule attached to the notice of motion is set aside with costs here and before Mr. Justice Bakewell, the costs to be taxed on the original side scale. The costs of Mr. Grant's client and of the Official Assignee may be paid out of the estate.

Oldfield, J.—I agree.

S.N./R.K. Order partly set aside.

A. I. R. 1914 Madras 105

BAKEWELL, J.

In the matter of *Vijiaraghavalu Pillai* and in the matter of *the Madras City Municipal Act 3 of 1904* and of *the Specific Relief Act of 1877*.

Decided on 6th February 1914.

(a) *Specific Relief Act (1877)*, S. 45—Contents of application for mandamus stated.

An application for mandamus should point out clearly the specific act or forbearance and

the individual against whom it is directed.

[P 106 C 1]

(b) *Madras City Municipal Act (1904)*, Ss. 33 and 52—Objection to inclusion of name in list of candidates for election rejected by Corporation President, but allowed by Presidency Magistrate—No direction however to strike off his name—Application to High Court to continue his name cannot be granted under *Specific Relief Act (1877)*, S. 45.

Where an objection made against the inclusion of the applicant's name in the list of candidates, qualified for election as Municipal Commissioners, was rejected by the President of the Corporation, but was allowed by the Presidency Magistrate, who decided that the persons objected to was not qualified for election, but gave no direction as to his name being struck off the list, an application by that person to the High Court, under S. 45, *Specific Relief Act*, for an order that his name do continue in the list cannot be granted.

[P 106 C 1]

(c) *Criminal P. C. (1898)*, S. 439—Orders of Magistrate considering irrelevant matters cannot for that reason be reviewed.

If a Magistrate considers irrelevant matters, he cannot be said to have acted outside his office so that his order may be reviewed under the *Criminal Procedure Code*. [P 106 C 1]

S. Srinivasa Iyengar and *T. Ethirajalu Mudaliar*—for Appellant.

K. Srinivasa Iyengar—for Respondent.

Judgment.—The name of the appellant has, under S. 46 of the *Madras City Municipal Act of 1904*, been entered in the list of persons qualified for election as a commissioner for one of the Divisions of the city of Madras; and under S. 52 the list is conclusive as to his qualifications to be elected, subject to certain procedure for its amendment.

This applicant has been nominated as a candidate for election, and his name has been published in the list of candidates. Objection was made to the inclusion of the applicant's name in this list, and was rejected by the President of the Corporation, under Cl. 5 of the rules framed by the Local Government by virtue of S. 413 of the Act. Under the same clause a petition for revision of the President's decision may be presented to the Presidency Magistrate, whose decision is to be final, and one Appaswami Pillai, an elector, presented a petition. It is alleged that upon hearing this petition the Magistrate considered an objection to the inclusion of the applicant's name in the list of persons qualified for election, and that this objection was irrelevant to the inquiry before him, which should

have been confined to objections to the preparation of the list of nominations. The Magistrate allowed the objection and decided that the applicant was not qualified for election as a commissioner under S. 33 of the Act, which prescribes the necessary qualifications. He does not appear to have directed the applicant's name to be struck off the list, or indeed to have passed any order with reference thereto, but to have contented himself with a mere declaration of opinion as to the applicant's qualifications.

The present application which is based on S. 45, Specific Relief Act of 1877, prays for an order that the name of the applicant do continue to remain in the list of persons qualified for election as Municipal Commissioners for the City of Madras notwithstanding the order of the Magistrate. S. 45 of that Act empowers the High Court to make an order requiring a specific act to be done or forbore by a person holding a public office or by any Corporation or inferior Court.

The application does not specify the person or Court who should be ordered to act or forbear, and it is not clear with what irregular act or forbearance he is threatened. The application does not relate to the list of candidates for election, but to the list under S. 33, as to which it is not alleged that any action is threatened either by the President of the Corporation or the Magistrate. The Magistrate has not directed the list of candidates to be amended, and it does not appear that the President has taken, or threatened to take, any step affecting that list.

An application for mandamus, such as this virtually is, should point out clearly the specific act or forbearance and the individual against whom it is directed, and this the applicant has failed to do.

Assuming that the applicant's contention be correct, and that the Magistrate has considered irrelevant matters, it cannot be said that he has acted outside his office or that there is any other reason why his procedure should be reviewed by the Court in accordance with the provisions of the Procedure Code: See Specific Relief Act, S. 45 (d). The application is dismissed with taxed costs.

S.N./R.K. *Application dismissed.*

A. I. R. 1914 Madras 106

SADASIVA AIYAR AND SESHAGIRI
AIYAR, JJ.

Chokkalingam Pillai — Defendant—Appellant.

v.
Mahalingam Pillai — Plaintiff—Respondent.

Second Appeal No. 2562 of 1912, Decided on 10th March 1914, from decree of Dist. Judge, Madura, in Appeal Suit No. 314 of 1911.

Civil P. C., (1908), S. 100—First appeal Court not giving as much weight to certain circumstances as High Court might have done if it were first appeal Court—Finding of first appeal Court based also on other facts cannot be called illegal.

The finding of a District Judge cannot be called illegal simply because he does not indicate sufficiently that he gave as much weight in defendant's favour and against plaintiff to the circumstance of plaintiff's non-production of a deed as the High Court might have given to that circumstance, if it had been the Court of first appeal, especially when the Judge has relied on other circumstances which in his opinion strongly justified his finding.

[P 106 C 2]

C. S. Venkatachariar—for Appellant.

K. S. Ganapathi Iyer — for Respondent.

Judgment.—The learned District Judge seems to have, in his judgment, referred rather in too casual a manner to the fact that the plaintiff did not produce the rent deed on which defendant 1 (appellant before us) alleged that the payment of Rs. 525 made by him was endorsed. We cannot, however, say that his finding that the alleged payment is false is illegal because he relies on other circumstances which, in his opinion, are strongly against the said plea of payment and because he does not indicate sufficiently 'that he gave as much weight in defendant's favour and against plaintiff to the circumstance of plaintiff's non-production of the rent deed as we might have given to that circumstance if we had been the Judges in the Court of first appeal.'

We dismiss the second appeal with costs as we do not think that it is really founded on any question of law.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 107

SADASIVA AIYAR AND SESHAGIRI
AIYAR, JJ.

Narayana Aiyar—Defendant—Appellant.

v.

Sankaranarayana Aiyar and another
—Defendants—Respondents.

Second Appeal No. 2293 of 1912, Decided on 6th March 1914, from decree of Dist. Judge, Tinnevely, in Appeal Snit No. 405 of 1911.

(a) **Transfer of Property Act (1882), S. 51—Purchaser from guardian of Hindu minor not making sufficient inquiry — Purchaser effecting improvements on property can be said to have believed in good faith that he was the full owner.**

Though the negligence of the buyer in making due and sufficient inquiries affects his title to immovable property purchased from the guardian of a Hindu minor, it does not follow that the purchaser did not believe in good faith that he was the full owner when he effected the improvements on the property purchased. [P 107 C 2]

(b) **Transfer of Property Act (1882), S. 51—"Good faith," meaning explained.**

"Good faith," required by S. 51 to entitle a person to compensation for the value of improvements, does not mean more than an honest belief in the validity of his title. Even negligent belief will amount to honest belief for the purpose of that section: 36 *Mad.* 194, *Foll.* [P 107 C 2]

M. D. Devadoss—for Appellant.

T. R. Krishnaswami Iyer for *T. R. Ramachandra Iyer*—for Respondents.

Facts.—This was a suit by a Hindu male, on attaining majority, to set aside a sale, executed during his minority, by his mother, as his guardian, in favour of the defendants. The latter contended that the sale was binding on the plaintiff and that in any event they were entitled to be paid the value of the improvements effected by them. The lower Courts found that there was no necessity for the sale and it was therefore not binding on the minor and decreed possession of the lands to the plaintiff on payment of Rs. 50, the amount of purchase-money actually paid by defendant 1. As regards the question of improvements, the lower appellate Court found that the appellant did not believe that he was the full owner at the time he made the improvements and so was not entitled to the value thereof. Defendant 1 then preferred this second appeal and the plaintiff filed a memorandum of cross-objections against that portion of the

decree which directed payment of Rs. 50 to defendant 1.

Judgment.—There is nothing in the memorandum of objections and it is dismissed with costs.

As regards the second appeal, we are unable to interfere with the finding of the lower appellate Court that Rs. 50 of the purchase-money (Rs. 100) entered in defendant 1's (appellant's) sale deed was not received by plaintiff's mother (who was plaintiff's guardian then) for the plaintiff's benefit and that defendant 1 did not make proper and sufficient inquiries as to the existence of the necessity to raise that Rs. 50. But simply because defendant 1's negligence in making due and sufficient inquiries affects his title to the property which he purchased, when such title is put into question by the plaintiff, it does not follow (as assumed by the learned District Judge in the first sentence of para. 5 of his judgment) that defendant 1 did not believe in good faith that he was the full owner when he effected improvements on the purchased property.

As pointed out in *Mathunsa Rowthan v. Apsa* (1), the good faith required by S. 51, T. P. Act, to entitle a person to get compensation for improvements effected by him "does not go beyond an honest belief in the validity of his title" and we think that such an honest belief is proved in this case, though that honest belief might be a negligent belief, and hence did not suffice to properly protect his title, as against the plaintiff.

We, therefore, modify the lower appellate Court's decree by adding Rs. 200 to the Rs. 50 made payable to defendant 1 by the plaintiff.

Time for payment of the total Rs. 250 is extended to six months from to-day.

The parties will bear their respective costs in all Courts except as regards the costs of memorandum of objections already adjudicated upon in the beginning of this judgment.

S.N./R.K.

Decree modified.

A. I. R. 1914 Madras 108 (1)

BAKEWELL, J.

Kuppammall—Plaintiff.

v.

Kuppanachari—Defendant.

Civil Suit No. 186 of 1913, Decided on 3rd February 1914.

(a) **Hindu Law—Marriage—Suit for restitution of conjugal rights by wife—Her ill-health or inability to afford all marital rights of husband is no ground to refuse her protection.**

In a suit for restitution of conjugal rights brought by the wife, the plaintiff's ill-health is no ground for the refusal of the husband to give her his protection and afford her the shelter of his house, and the defendant is bound to do so notwithstanding that the wife may not be able to afford him all the rights of a husband. [P 108 C 1]

(b) **Hindu Law—Marriage—Refusal by parents of wife to give custody is no ground for subsequent refusal by husband to reconstitute conjugal relations.**

The fact that the parents of the girl at one time refused to give him the custody of the child is no reason why he should subsequently refuse to perform his duty. [P 108 C 1]

V. Visvanatha Sastri—for Plaintiff.*G. Krishnaswami Iyer*—for Defendant.

Judgment.—This is a suit by a wife for restitution of conjugal rights. The plaintiff was 12 years of age at the date of the presentation of the plaint on 4th August 1913 and sues by her father as next friend. It is alleged by the defendant that the parents of the girl in April last resisted his attempt to obtain possession of his wife on the ground that her health did not permit of their cohabitation, and he now maintains that she has not proved that her health has been re-established or that she is able to cohabit with him. It appears that the spouses have never lived together. I think it is clear that ill-health of a wife is no ground for the refusal of the husband to give her his protection and afford her the shelter of his house, and that the defendant is bound to do so notwithstanding that the wife may not be able to afford him all the rights of a husband.

The fact that the parents of the girl at one time refused to give him the custody of the child is no reason why he should now refuse to perform his duty.

I think that the written statement discloses no defence and there will be a decree that the defendant do receive the plaintiff into his house as his wife and pay the costs of this suit. There will be no order as to jewels; as the guardian of

his wife defendant will be entitled to have the custody of them.

S.N./R.K.

Suit decreed.

A. I. R. 1914 Madras 108 (2)

SANKARAN NAIR, J.

(A. S. P. L. Vr.) *Veerappa Chetty*—Petitioner.

v.

Mudali and others—Respondents.

Civil Revn. Petns. Nos. 591 to 610 of 1911, Decided on 27th October 1912, against order of Temporary Sub-Judge, Ramnad, D/- 21st August 1911, in S. C. Suits Nos. 237 to 256 of 1911.

(a) **Madras Estates Land Act (1908), S. 8—Merger of occupancy rights by transfer or succession under Cls. (1) and (2) cannot convert ryoti land into private land.**

Under S. 8 (3) the merger of an occupancy right by transfer or succession under Cls. (1) and (2) has not the effect of converting ryoti land into private land. [P 108 C 2]

(b) **Madras Estates Land Act (1908), S. 8 (4)—Cl. 4 applies only to tenants in possession after Act.**

The provisions of S. 8 (4) apply only to tenants let into possession after the Madras Estates Land Act was passed and not to tenants in possession before and at the time of the passing of the Act. [P 109 C 1]

S. Sundararaja Iyengar—for Petitioner.

Judgment.—The Subordinate Judge has held on the admitted facts that the suit is not cognizable by a civil Court.

It is argued before me that this is private land and therefore according to S. 19, Madras Estates Land Act, the provisions of the Act that the landlord may bring suits before the Collector, S. 77 (1), and that such suits are exempted from the jurisdiction of the civil Courts, S. 189, do not apply.

Plaintiff alleges in his plaint that his predecessor purchased from the tenants the kudivaram right and was in possession of it. It is contended that he thereby became absolute owner of the property which must for this purpose be therefore treated as his private land.

Under S. 8, Cl. (3), merger of the occupancy right by transfer or succession under Cls. (1) and (2) has not the effect of converting ryoti land into private land. But under Cl. (4) in cases where such merger takes place by transfer for valuable consideration before the passing of the Act the landholder has the right of admitting any person to the possession of the land on terms that may be agreed upon between them.

In this suit, it is true, the plaintiff alleges purchase of the kudivaram right and he may have the right of letting in a tenant within 12 years of the passing of this Act, if he legally dispossesses the tenant now in possession. The tenant so let into possession will not have any occupancy right conferred under S. 6 or the right to acquire the same under S. 46. Their rights and obligations will be regulated by the contract. Even in that case there is no provision that land becomes "private land" according to the definition.

But the defendants were tenants not let into possession after the Act was passed. It is admitted they were in possession before and at that time. They do not come therefore within the provision of S. 8, Cl. (4).

Not being private land and the plaintiff being clearly a landholder, S. 19 does not, and Ss. 77 (1) and 189, do, apply.

I dismiss the petition.

S.N./R.K.

Petition dismissed.

A. I. R. 1914 Madras 109

AYLING AND SESHAGIRI AIYAR, JJ.

Zamindari of Vegayammampeta Estate
—Plaintiff—Appellant.

v.

Secy. of State—Defendant — Respondent.

Second Appeal No. 35 of 1908, Decided on 19th March 1914, from decree of Sub-Judge, Cocanada, in Original Suit No. 23 of 1905.

(a) Madras Water Cess Act (1865), S. 1—Extent of Government's right to make rules under S. 1 stated.

Under S. 1, Government's right to make rules, having the force of law, is only with respect to the rates at which water-cess should be levied and the manner in which it should be collected, and it does not extend to the decision of the question whether there is an engagement exempting any landholder from liability to the tax. Civil Courts alone have jurisdiction to decide that question.

[P 110 C 2]

(b) Madras Water Cess Act (1865), S. 4—Proprietor is entitled to exemption from water-cess respecting lands classed as wet at "Permanent Settlement"—Government cannot cut existing sources.

A proprietor is entitled to exemption from water-cess in respect of land classed as wet at the Permanent Settlement, which must for this purpose be treated as an "engagement" within the meaning of S. 4 of the Act; and the Government cannot cut off existing sources of supply to these lands by their anicut system.

[P 111 C 1]

Nagabushanam—for Appellant.

Government Pleader—for Respondent.

Judgment.—The plaintiff, the proprietrix of the permanently settled estate of Vegayammampet, instituted the suit against the Secretary of State for India in Council for a declaration that a certain definite extent in each of a number of her villages is not liable to the payment of water-cess under Act 7 of 1865 to Government and to recover the amount paid by her under protest on account of water-tax for the fasli year 1314. The defendant denied the right to the exemption claimed. The suit was dismissed by the Subordinate Judge of Cocanada and the plaintiff has preferred this appeal. The plaintiff alleged in her plaint that prior to the introduction of the anicut system of irrigation by Government, the villages mentioned in the plaint were cultivated with wet crops by means of old and independent sources of irrigation; that these were interrupted and rendered unfit for irrigation by the construction of river embankments and other works connected with the anicut system by Government and that Government is, therefore, bound to compensate the proprietrix for the loss caused by the destruction of the old sources of irrigation. The plaint further states that in 1880 Mr. Johnson, the then Sub-Collector, settled the extents of the lands in the villages in question which were deprived of the old sources of irrigation and that his settlement amounts to an engagement on the part of Government not to collect water-tax for those extents. The plaintiff claims exemptions also for a certain extent of land in the village of Nedasanametta which was not allowed by Mr. Johnson. The plaint then impeaches as invalid and unjust subsequent proceedings of the defendant deciding that she was not entitled to the exemption allowed by Mr. Johnson but only to less extents in some of the plaint villages and none at all in the others. The defendant put the plaintiff to the proof of any engagement under which the plaintiff is entitled to any exemption from water-cess and denied the engagement said to be constituted by Mr. Johnson's settlement.

The Subordinate Judge while setting in detail the history of the disputes

Advocate High Court

Jammu & Kashmir

It has been pointed out that Ex. B did not deal directly with the suit land. It was unnecessary for it to do so, because the plaintiffs' father's suit was brought, as Ex. A as the Principal Assistant Collector's judgment shows, for the office and emoluments in defendant 1's possession failed. But there is no reason for doubting that it did so indirectly, that the Collector dealt with the office and land together, and though he referred explicitly only to the former, he was declaring reversionary right of the plaintiffs' family to both. This and the conclusive character of Ex. B have not been disputed. The facts to which the law must be applied are therefore that the family held the office and land up to 1865, that their right fell into abeyance owing to the special circumstances of defendant 1's appointment and that it was recognized in Ex. B as entitled to prevail at a vacancy.

The statute law applicable, Madras Act 8 of 1869, is not referred to in the judgment under appeal, nor the authorities earlier than *Pingala Lakshmipathi v. Bommireddipalli Chalamayya* (1). Under it nothing contained in any inam title-deed shall be deemed to affect the interest of any person other than the inam holder named in it and though this is applicable in terms only to deeds issued before the Act, the same principle must, as observed in the case cited, be also applied to deeds after it, such as Ex. 1. And accordingly the statute law fully justifies the plaintiffs' contention that their right, which existed before and was declared in Ex. B, was not affected by the subsequent issue of Ex. 1 in defendant 1's name. Ex. 1, at most, imposes on plaintiffs the burden of proving their title against him and they have discharged it.

The course of the more recent decisions is fully consistent with this. In the majority, no doubt, that are already referred to, *Gunnaiyan v. Kamakchi Ayyar* (2), *Vangala Diskshatulu v. Vanghala Gavaramma* (3) and *Subbaroya Chetty v. Aiyaswami Aiyar* (4), the dispute, as the lower Court observed, was not, as it is here, between two families, or two branches of one family, but was

regarding the nature of the estate after the enfranchisement, whether the property was partible or impartible or held with full or limited powers of alienation. This however involves no distinction relevant to the present argument, since the ground of decision was throughout what the plaintiffs here require, that there was no new grant and creation of a fresh title, but only the confirmation of the existing one, freed from the obligation of service. No reasoning is available to the defendants in the present case other than that rejected in those enumerated; and the result must be the same.

The defendants contend that actual possession of the office, or, at last, of the inam, at the date of the enfranchisement, is the important fact and that such a mere declaration of the right of the plaintiffs' family as Ex. B contains is useless since it did not necessarily entail that any member of that family would obtain the appointment and therefore become entitled to the land at any future date. But it is unnecessary to decide whether this and the assumption involved in it, that the land and office are inseparable, are sound, because in this case plaintiff 2 has established his right to the latter. One case relied on, *Devaguptapu Peda Satyanarayana v. Gogulaparti Narasamma* (5), can be distinguished on this ground. For there the plaintiff was still a minor and had in his favour only registration of his heirship under S. 13, Madras Act 2 of 1894. This decision, moreover, contains no reference to Madras Act 8 of 1869 or the earlier cases cited above and is based only on *Venkata v. Rama* (6), the authority of which, as embodying any general principle, is questioned in them. In *Venkata v. Rama* (6) the facts differed materially from those in the present case. For, there, proof that the land belonged to the plaintiffs' ancestors was wanting, the possession of some of it by the plaintiffs' alleged predecessors being unexplained (vide judgment of Turner, C. J.), and there was no such adjudication in favour of his right to the office or land as Ex. B to be considered, and those considerations, not any creation of any new title

(1) [1907] 30 Mad. 434 (F. B.).

(2) [1903] 26 Mad. 339.

(3) [1905] 28 Mad. 13.

(4) [1909] 32 Mad. 86.

(5) [1908] 31 Mad. 526.

(6) [1885] 8 Mad. 249.

by enfranchisement, are the basis of the majority of the judgments, even that of Brandt, J., though it contains some expressions, consistent with the present defendants' case, being founded on the inability of civil Courts to adjudicate impliedly on the right to the office and on the absence of any revenue adjudication such as is available here in Ex. B. This case in no way impairs the force of the plaintiffs' contention based on statute and clearer authority. We allow the appeal. The decree of the lower appellate Court must be reversed and that of the Court of first instance restored with costs throughout.

S N./R K.

*Appeal allowed.***A. I. R. 1914 Madras 113 (1)**

AYLING, J.

Nagoor Rowthar — Defendant—Petitioner.

v.

Akbar Alisha Sathguru Samiar and another—Plaintiff and Defendant—Respondents.

Civil Revn. Petn. No. 951 of 1912, Decided on 5th March 1914, from decree of Dist. Munsif, Trichinopoly, in Small Cause Suit No. 1987 of 1912.

Land Acquisition Act (1894), Ss. 31 and 32—Extent of land in tenant's possession diminished by acquisition under Land Acquisition Act—Tenant is entitled to reduction of rent if no lands are given in exchange—Landlord and Tenant.

Where the extent of land in the occupation of a tenant has become diminished by the acquisition of a part under the Land Acquisition Act, the tenant is entitled to a proportionate reduction of rent, if he is given no other lands in exchange; and the fact that the amount awarded as compensation is not drawn from Court does not affect the question. [P 113 C 2]

S. T. Sreenivasa Gopalachariar—for Petitioner.

K. S. Ganesa Aiyar—for Respondents.

Judgment.—The suit land is a religious inam land belonging to a mosque of which respondent (plaintiff) is manager, and leased by him on a perpetual cowle. It is admitted that prior to the period for which rent is now sued for, a portion of this land was acquired under the Land Acquisition Act. The compensation amount was deposited in Court under Ss. 31 and 32 of that Act and still remains in deposit, no land having been purchased therewith for assignment in lieu of that acquired.

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It appears to me that petitioner is clearly entitled to a reduction of rent proportionate to the value of the property acquired.

The award of the Land Acquisition Officer (Ex. 4) shows that the owner of the land acquired is the mosque, and whatever right as a tenant petitioner might possess in the land to be assigned in exchange, it is clear, both from this order and from Ex. 1 that the re-letting of that land rested with plaintiff and not with him. It does not appear that plaintiff has taken any steps in the matter; certainly it is not suggested that he has procured the allotment of any such land during the period for which rent is claimed.

The rent claimed in the plaint must be reduced in proportion to the value of the land taken up under the Land Acquisition Act. The lower Court will determine the amount of the reduction, and pass an amended decree in place of the one already passed, which is hereby set aside.

Costs will be provided for in the ultimate decree.

S.N./R K.

*Case remanded.***A. I. R. 1914 Madras 113 (2)**

TYABJI AND SPENCER, JJ.

(Sakhireddy) Appalaswamy—Plaintiff—Appellant.

v.

(Sakhireddy) Venkanna and others—Defendants—Respondents.

Second Appeal No. 1496 of 1912, Decided on 9th April 1914, from decree of Temporary Sub-Judge, Rajahmundry, in Appeal Suit No. 1 of 1912.

Hindu Law—Alienation—Widow—Alienation of husband's estate to pay interest on his debts binds reversioners when income is not sufficient to pay it.

An alienation by a Hindu widow of her husband's estate to pay off interest on her husband's debt is binding on the reversioners when she could not pay it from the current income: 18 I.C. 275; 18 Mad. 113, *Foll.* [P 114 C 1]

T. V. Muthukrishna Aiyar—for Appellant.

V. Ramadoss—for Respondents.

Judgment.—The only question arising in this appeal is whether the alienation evidenced by Ex. 3 is binding upon the appellant. Ex. 3 was executed by a widow having a life-interest in her deceased husband's estate. It is now conceded that debts for Rs. 500 were due by the deceased and that to the extent to

which Ex. 3 was executed for payment of those debts it is binding on the appellant. It is argued however that the widow was not entitled to alienate property belonging to her husband for the purpose of paying the interest on debts due by him; that the interest on such debts is primarily payable out of the income of the property in which the widow has a life-estate though she may alienate part of such property for the purpose of discharging the interest if it is shown that there was no surplus income available for the payment of the interest. *Boddu Jaggayya v. Goli Appala Raju* (1) and *Ramasami Chetti v. Mangaikarasu Nachiar* (2). The findings of both the lower Courts are that Ex. 3 was executed in favour of a bona fide purchaser and that it is binding to the full extent on the appellant. The District Munsif does consider the question of there being any income out of which the interest could have been paid. But it is true that neither Court expressly differentiates between the two parts of the consideration for Ex. 3, namely, (1) the principal debt due by the deceased, (2) interest payable thereon. Under these circumstances, the appellant asks us to call for a definite finding on the question.

Our attention is drawn to the fact however that point was not taken in the lower Courts in this form. It is clear that neither the issues nor the grounds of appeal to the lower Court or to this Court distinctly raise the question. Nevertheless it is a point of law and refers to the mode in which the Court should have considered the evidence and adjudicated upon the rights of the parties and we might have called for a finding, were it not for the fact that the District Munsif has expressed himself against the credibility of the plaintiff's witnesses as regards the fertility of the lands, on which depended the question of sufficiency of means for paying the interest; it is also abundantly clear, that the purchaser was a bona fide transferee and that if the question had to be critically examined from that aspect there are several indications that the decision of the lower Courts would be in favour of the validity of the alienation. It would therefore be a futile formality to call

for a finding and we will dismiss this second appeal with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 114

SADASIVA AIYAR AND SESHAGIRI
AIYAR, JJ.

Rangappa—Plaintiff—Appellant.

v.

Thammayappa and others — Defendants—Respondents.

Second Appeal No. 1464 of 1909, Decided on 5th March 1914, from decree of Sub-Judge, Bellary, in Appeal Suit No. 245 of 1906.

(a) Transfer of property Act (1882), S. 58—Simple mortgage.

A covenant to pay is an essential element of a simple mortgage. [P 115 C 1]

(b) Deed — Construction — Mortgage or charge.

In a mortgage deed the mortgagor said: "Whenever we pay the same to you, you shall shall receive it and give back the deed".

Held: (Per Sadasiva Aiyar, J.)—that there was no covenant to pay and the document only created a charge [P 115 C 1]

(Per Seshagiri Aiyar, J.)—That there was a covenant to pay, and a mortgage was created and not a charge only.—(Obiter). • [P 115 C 2]

M. D. Devadoss and W. Lubech—for Appellants.

D. R. Swaminadhan — for Respondents.

Sadasiva Aiyar, J.—The plaintiff is the appellant in this case. He brought the suit out of which this second appeal has arisen for the recovery of the amount due under a document dated 30th June 1900 executed by defendants 1 and 2. The lower appellate Court dismissed the plaintiff's suit on the finding that in accordance with the terms of the above document the plaintiff was put in possession of one of the three lands mentioned in the document as security for the amount mentioned in the same, and that according to the terms of the bond and the law applicable to the case, the plaintiff was not entitled either to bring a suit for sale of the properties charged for the amount due under the plaintiff bond, or to obtain a personal decree against the executants. It is often very difficult in some of these cases to decide what the nature of the document sued on is.

So far as the plaintiff document affects that property which was intended to be and was put in the possession of the plaintiff, it seems to me reasonably clear that the document is a document of

(1) [1913] 18 I. O. 275.

(2) [1895] 18 Mad. 113.

usufructuary mortgage. As regards the other two lands mentioned in the documents the question is whether the document is a document creating a simple mortgage over those two lands or whether the document merely creates a charge upon the two lands. In *Balasubramania Nadar v. Sivagurusari* (1) Krishnaswami Aiyar, J., says as follows on pp. 568, 569. "I have been in considerable doubt during the course of the argument as to whether we have succeeded in getting hold of any principle by means of which we could distinguish a mortgage from a charge. But having heard the matter fully discussed by Mr. Srinivasa Aiyangar, I have been able to make up my mind and I wish to express the conclusion at which I have arrived. I think a covenant to pay is an essential element of a simple mortgage." In this case I do not think that I could gather from any of the words used in the plaint document that the defendants 1 and 2 covenanted to pay the amount mentioned in the bond executed in favour of the plaintiff.

The language of the document to be construed in this case seems to me even less favourable to the plaintiff than it was in the case of *Gopalasami v. Arunachella* (2), where it was held that there was no covenant to pay the mortgage money by the mortgagor. If there is no such covenant in the plaint document, then the document, so far as the other properties are concerned, created only a charge on those properties and did not give a simple mortgagee's right to plaintiff over those properties. If there is only a charge, then S. 100, T. P. Act, applies. That section says that "all the provisions as to a mortgagee instituting a suit for the sale of the mortgaged property shall, so far as may be, apply to the person having a charge." Some of those provisions governing the questions relating to the institution of a suit by a mortgagee are contained in S. 68, T. P. Act. That section says that "the mortgagee has a right to sue the mortgagor for the mortgage money in the following cases only", and then there follow three Cls. (a), (b) and (c), Cl. (c) consisting of two paragraphs. In this case the plaintiff has not proved any facts bringing his case within any of these three

clauses and he was therefore not entitled on the date of the suit to sue for the recovery of the mortgage money from defendants 1 and 2 personally or by the sale of the property charged. I therefore, confirm the decree of the lower appellate Court and dismiss the second appeal with costs.

Seshagiri Aiyar, J.—I am not prepared to differ. Speaking for myself I am inclined to think that there is a covenant to pay when the mortgagor says: "Whenever we pay the same to you, you shall receive it and give back the deed." I am prepared to hold that there was an understanding on the part of the mortgagors to pay the amount. The non-fixing of a period for payment does not make it the less a covenant to pay. But this Court in *Gopalasami v. Arunachella* (2) held that such an undertaking does not amount to a covenant to pay. With the greatest deference to the learned Judges I think the question requires re-consideration. I must also differ with considerable hesitation from the opinion at which my learned colleague has arrived, that there is only a charge created in respect of the other two items. The document itself says that a mortgage is being executed and there is nothing in the body of the document which indicates that the parties had in mind only a charge especially having regard to the fact that on four previous occasions there was undoubtedly a simple mortgage with respect to these properties. But the plaintiff came into Court with a false case. He said that he was deprived of possession by the defendants and it is found that he is still in possession. That was the cause of action and I am not prepared to stretch a point in his favour and to allow him to base his suit upon the language of the document which, in my opinion, does contain a covenant to pay. That may necessitate a reference to a Full Bench whether *Gopalasami v. Arunachella* (2) was rightly decided. I therefore do not differ from the conclusion at which my learned colleague has arrived, and the second appeal will be dismissed with costs.

S.N./R.K.

Appeal dismissed.

(1) [1911] 11 I. C. 629.

(2) [1892] 15 Mad. 304.

A. I. R. 1914 Madras 116 (1)

SADASIVA AIYAR, J.

A. Gaebler—Petitioner.

v.

Ramayi Ammal—Respondent.

Civil Revn. Petn. No. 384 of 1913, Decided on 5th February 1914, from order of Dist. Munsif, Cuddalore, in I. A. No. 749 of 1912, D/- 12th March 1913.

Civil P.C., (1908), S. 115—High Court will not interfere in revision with interlocutory order attackable in appeal from decree.

The High Court will not interfere in revision with an interlocutory order which can be attacked by the party aggrieved by appeal against the decree in the suit if it goes against him.

[P 116 C 1]

V. Purushothama Iyer for *T. R. Venkatarama Sstri*—for Petitioner.

G. S. Ramachandra Iyer—for Respondent.

Facts.—The plaintiff and the defendant 1, were undivided brothers and the defendant 13 was their mother. Plaintiff alleged that the defendant 1, had illegally and without consideration alienated all the joint family properties to defendants 2 to 12 and that the alienations were not binding on him. He therefore sued for the recovery of his half-share. Defendant 13 was added as having a right to maintenance. Pending the suit, defendant 1 died and some days after the plaintiff also died. Ten months after plaintiff's death, defendant 13 (the mother) applied to be brought in as the legal representative of the plaintiff. This was opposed by defendants 2 to 12, who contended that the suit had abated and that the cause of action did not survive to the mother. The Munsif held against the latter contention, set aside the abatement and brought in the mother as the legal representative of the deceased plaintiff. The defendant thereupon applied to the High Court in revision.

Judgment.—The District Munsif's order may be illegal and the reasons he gives for excusing delay unsound. But the order can be attacked by the petitioner by appeal against the decree in the restored suit, if it goes against him, and hence I refuse to interfere under S. 115, Civil P. C., following several recent rulings in this Court, *Devata Sri Ramamurthi v. Venkata Sitaramachandra Row* (1). There will be no order as to costs.

S.N./R.K.

Petition dismissed.

(1) [1914] 22 I. C. 279.

A. I. R. 1914 Madras 116 (2)

SANKARAN NAIR AND AYLING, JJ.

Droupadi Ammal—Plaintiff—Appellant.

v.

S. I. Ry. Co. Ltd. and *others*—Defendants—Respondents.

Appeal No. 65 of 1912 and Civil Revn. Petn. No. 157 of 1912, Decided on 10th February 1914, against order of Sub-Judge, Trichinopoly, D/- 1st November 1911, in Misc. Petn. No. 1798 of 1911.

Civil P. C. (1908), O. 17, R. 2—Evidence adduced by plaintiff—Default in producing succession certificate on adjourned date—Suit should not be dismissed under R. 2 but decided under R. 3—Civil P. C. (1908), O. 17, R. 3.

After a plaintiff has adduced all the evidence on which he intends to rely but has failed to produce a succession certificate as to a part of his claim at the adjourned hearing, his suit ought not to be dismissed under O. 17, R. 2 but decided on merits under O. 17, R. 3.

[P 116 C 2; P 117 C 1]

S. Subaramania Aiyar—for Appellant.

David, Brightwell and Moresby—Attorneys for Respondents (Ry. Co.)

Judgment.—On the death of the original plaintiff in the case his widow was substituted on the record as his legal representative and the suit was continued by her. Both parties adduced their evidence, and in the course of the final argument the Subordinate Judge came to the conclusion that it was necessary for the widow to produce a succession certificate in order to continue the proceedings. Accordingly he passed the following order on 1st August 1911: "Case argued in part for plaintiff. It now turns out that succession certificate should be produced at least as regards one item of claim. Plaintiff's vakil wants time now to apply for succession certificate to District Court, Tinnevely. Adjourned to 1st September 1911." On 1st September 1911, when the case was taken up, the plaintiff was not present and her vakil said he had no instructions. He evidently meant that he was not able to produce the certificate and his client had not given him any information about it, and there was nothing therefore for him further to do in the case. In the circumstances the case is one which should have been disposed of under O. 17, R. 3, Civil P. C. The suit should have been dismissed on the ground that the succession certificate had not been produced, or, if the Sub-

ordinate Judge was of opinion that it was necessary that the succession certificate should be produced for a part of the claim only, then that portion of the claim ought to have been dismissed and a decision should have been passed on the merits with reference to the rest of the claim. It is not a case which falls under O. 17, R. 2, Civil P. C.: see *Ningappa v. Gowdappa* (1). The Subordinate Judge, instead of proceeding under that rule, dismissed the suit under O. 17, R. 2, Civil P. C., and directed plaintiff 2 to pay the costs of defendant 1 and also the court-fee due to Government. We must set aside that decree or order and direct him to restore the suit to his file and to pass fresh orders under O. 17, R. 3, Civil P. C. All costs hitherto incurred will be provided for in the final order.

S.N./R.K.

Order set aside.

(1) [1905] 7 Bom. L. R. 261.

A. I. R. 1914 Madras 117 (1)

TYABJI, J.

Subramania Pillai and another—
Plaintiffs—Petitioners.

v.

*Paramasivan Pillai—*Defendant 2—
Respondent.

Civil Revn. Petn. No. 1014 of 1912, Decision on 2nd April 1914, from decree of Sub-Judge, Tinnevely, in Small Cause Suit No. 1838 of 1912.

Contract Act (1872), S. 135—Time given by creditor in consideration of part payment—Surety is still liable.

A surety is not exonerated from liability if the creditor gives time to the principal debtor in consideration of part payment of the debt by the latter, [P 117 C 2]

*S. T. Sreenivasa Gopalachari—*for
Petitioners.

*N. A. Krishna Iyar—*for Respondent.

Judgment.—The question is whether defendant 2 ought to have been exonerated from his suretyship under S. 135, Contract Act.

Damodar Das v. Muhammad Hussain (1) is relied upon by the petitioner to show that the promise to give time must be for consideration. However, it seems

that the facts in the present case were to the following effect: defendant 1 asked for time; defendant 2 agreed to give it and on this, defendant 1 paid part of the debt. This part payment may be taken to be the consideration for the promise to give time. If this is so then the learned Judge below was right and the petition will be dismissed but without costs.

S.N./R.K.

Petition dismissed.

A. I. R. 1914 Madras 117 (2)

WALLIS AND AYLING, JJ.

*Abdul Karim Sahib and others—*De-
fendants—Appellants.

v.

*Timmaraya Chetty—*Plaintiff—Res-
pondent.

Appeal No. 107 of 1912, Decided on 4th March 1914, from appellate order of Dist. Court, North, Arcot, D/- 23rd July 1912, in Appeal Suit No. 161 of 1912.

Civil P. C. (1908), O. 21, R. 95—Failure of decree holder purchaser to proceed under R. 97 within time under Lim. Act, Art. 167—Fresh application for possession under R. 95 is not barred—Civil P. C. (1908) O. 21, R. 97.

The failure of the decree-holder purchaser to take proceedings under O. 21, R. 97, within the time limited by Art 167, Lim. Act, does not prevent him from putting in a fresh application for delivery of possession under O. 21, R. 95: 13 Mad. 504, Foll. [P 117 C 2]

*A. Krishnaswami Ayyar—*for Appel-
lant.

*Muthiah Mudaliar—*for Respondent.

Judgment.—The failure of the decree-holder purchaser to take proceedings under O. 21, R. 97, Civil P. C., within the time limited by Art. 167, Lim. Act, does not prevent him from putting in a fresh application for delivery of possession under O. 21, R. 95; *Muttia v. Appasami* (1).

This appeal is dismissed with costs.

S.N./R.K.

Appeal dismissed.

(1) [1890] 13 Mad. 504.

(1) [1900] 22 All. 851.

A. I. R. 1914 Madras 118 (1)

SANKARAN NAIR AND AYLING, JJ.

Muthusami Chetty—Appellant.

v.

Chunammal—Respondent.

Civil Appeal No. 113 of 1912, Decided on 9th February 1914, from order of Dist. Judge, Chingleput in Appeal Suit No. 483 of 1911.

Hindu Law—Joint family—Attachment followed by decree precludes title by survivorship in case debtor dies after attachment and decree.

An attachment followed by a decree precludes the accrual of the title by survivorship in the event of the death of the judgment-debtor after attachment and decree but before the order for sale. [P 118 C 1]

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar*—for Appellant.

B. Govinda Nambiar—for Respondent.

Judgment.—It has been repeatedly decided by this Court that attachment alone without an order for sale precludes the accrual of the title by survivorship in the event of the death of the judgment-debtor after attachment and before the order for sale: *Bailur Krishna Rau v. Lakshmana Shunbhogue* (1). It is true that an attachment before judgment has been declared not to have that effect in the event of the judgment-debtor dying before decree: *Ramanayya v. Rangappayya* (2). The reason is that the attachment before judgment is only intended to protect the property from alienation. But when a decree is passed subsequently it is unnecessary to attach the property again and the prior attachment renders the property available for sale in execution. An attachment followed by a decree, therefore, precludes the accrual of the title by survivorship for the same reasons as an attachment after the decree. For these reasons we reverse the orders of the Courts below, direct the Munsif to restore the application to his file and pass fresh orders. The appellant is entitled to his costs in this and the lower appellate Court. The costs in the Court of first instance will be provided for in the final order.

S.N./R.K.

*Order reversed.***A. I. R. 1914 Madras 118 (2)**

SADASIVA AIYAR AND SPENCER, JJ.

Ramaswamy Iyer—Plaintiff—Appellant.

v.

Ganapathia Pillai—Defendant—Respondent.

Letters Patent Appeal No. 52 of 1913, Decided on 25th November 1913, from judgment of Bakewell, J. D/- 7th March 1913, in Civil Revn. Petn. No. 892 of 1912.

Civil P. C. (1908), S. 100—Finding of fact based on no positive evidence but on probabilities—High Court will not still interfere.

The High Court cannot interfere on a finding of fact simply because that finding rests on no positive evidence in the case but on probabilities and circumstances as disclosed by the evidence. [P 119 C 1]

K. S. Jayarama Iyer for *G. S. Ramachandra Iyer*—for Appellant.

C. V. Ananthakrishna Iyer—for Respondent.

Facts.—The suit was on a promissory note executed to the plaintiff's endorser by the defendant for the value of jewels sold to him.

The defence was that the note was executed for immoral purposes and was not supported by consideration and that the plaintiff was not a bona fide holder in due course. The Subordinate Judge found that no consideration was paid by the defendant for the said promissory note and that the defendant was not a bona fide holder. In revision, Bakewell, J. dismissed the petition. Hence this Letters Patent appeal.

Judgment.—We are not prepared to hold that the Subordinate Judge was not aware of the law as to burden of proof or of the legal presumptions, enacted in S. 118, Cls. (a) and (g), Negotiable Instruments Act, 1881, when he came to his conclusions on the evidence let in on both sides, that Ex. A was not supported by consideration and that the plaintiff was not a holder in due course.

It is usually almost impossible to prove by direct evidence that a holder is not a holder in due course, and it is only by the probabilities and the circumstances, the mutual positions of the plaintiff and the defendant and by the demeanour of the witnesses who speak to the consideration for the endorsement to the holder, that a Court could arrive at a conclusion on that question.

(1) [1882] 4 Mad. 302.

(2) [1894] 17 Mad. 144.

of fact after, of course giving due weight to the legal presumptions arising in the case.

We think that this Court cannot interfere on a finding of fact simply because that finding rests on no positive evidence in the case but on probabilities and circumstances as disclosed by the evidence, and we, therefore, dismiss the Letters Patent Appeal with costs.

S.N./R.K. Appeal dismissed.

A. I. R. 1914 Madras 119 (1)

WALLIS AND SADASIVA AIYAR, JJ.

Vavuttu Naicken—Defendant—Appellant.

v.

Venkata Sesha Aiyar and another—Plaintiffs—Respondents.

Letters Patent Appeal No. 92 of 1913, Decided on 20th March 1914, from judgment of Ayling, J., in Second Appeal No. 239 of 1912.

Trusts—Lands belonging to temple—Suit for rent by some out of several trustees is not maintainable.

A trustee of a temple, although in management of the property, cannot bring a suit for rent without making the other co-trustees parties to it: 3 Mad. 234, *Foll.*; 18 I. C. 77; *Dist.* [P 119 C 1]

C. V. Ananthakrishna Aiyar and A. Viswanatha Aiyar—for Appellant.

M. V. Krishnaswami Aiyar—for Respondents.

Judgment.—We think that the plaintiffs, who are some of the trustees of the Devasthanam and are in management of some of the Devasthanam properties and have granted leases as such managers, are not entitled to sue the tenants without making the other managers parties: see *Kanna Pisharody v. Narayanna Somayajipad* (1). As pointed out in that case, when a tenant has dealt with a co-owner as sole landlord he may, by so dealing, be estopped from denying the title of the person who let him into possession. If the decision in *Raja Ram v. Ram Boy* (2) goes further than this, we are unable with great respect to agree with it. No estoppel arises in the present case. We must, therefore, allow the appeal and remand the case to the Court of first instance with a direction that the plaintiffs may be afforded an opportunity of joining such of the other trustees as are willing

as co-plaintiffs and the rest as defendants.

Costs will be costs in the cause.

S.N./R.K. Suit remanded.

A. I. R. 1914 Madras 119 (2)

SADASIVA AIYAR AND SESHAGIRI AIYAR, JJ.

Muthuvana Chirutha and others—Defendants—Appellants.

v.

Muthuvana Velan and others—Plaintiffs—Respondents.

Second Appeal No. 860 of 1912, Decided on 4th March 1914, from decree of Dist. Judge, North Malabar, in Appeal Suit No. 296 of 1910.

Malabar Law—Karar among members of tarwad—Karnavan authorized to appoint heir—Suit in ejectment from tarwad property will not lie against person so affiliated.

Where under the authority of a karar between himself and the other members of a tarwad, the karnavan appoints an heir to certain property kept as "common tarwad property," the appointment is no more than an affiliation of a stranger into the tarwad, and no suit in ejectment will lie against the person so affiliated, from the tarwad property in regard to which the affiliation was made.

[P 119 C 2, P 120 C 1]

T. R. Ramachandra Aiyar—for Appellants.

T. V. Ananthakrishna Aiyar—for Respondents.

Judgment.—We think that the legal effect of one of the provisions in the registered karar, Ex. A, executed by Thoori and the three then surviving members of his tarwad has not been properly construed by the lower Courts. That provision is to the effect that Thoori "may appoint any person he likes as the heir" (or avakashee) to a certain property which was kept as "general tarwad property" by Thoori and the other three parties to Ex. A. Ex. A is dated in August 1903. We think [following *Vasudevan v. The Secretary of State for India* (1)] that when the members of a Malabar tarwad speak of the appointment of an heir, they mean the present affiliation of a stranger into the tarwad and do not mean an alienation of the property by will or gift-deed to take effect after the death of all the existing members.

We therefore hold that Thoori was entitled to affiliate defendant 3 under the terms of Ex. A into his tarwad, and

(1) [1881] 2 Mad. 234.

(2) [1918] 18 I. C. 77.

(1) [1893] 11 Mad. 157.

not merely to give to her rights in the plaint property to come into existence after the death of all the four parties to the agreement Ex. A, and that by Ex. 15 (April 1908) he validly affiliated defendant 3 into the tarwad and that defendant became co-owner of the plaint paramba and the house thereon with the then survivors among the parties to Ex. A. If so the house being the ancestral family house of the tarwad the karnavan (defendant 1) is not entitled to eject defendant 3 therefrom though he is entitled to get possession of the Paramba round the house as head of the tarwad from defendants 1 and 2. The lower appellate Court's decree will be modified by awarding a decree in ejectment to plaintiff 2 as against defendants 1 and 2 alone; as regards all the plaint property plaintiff 2 to get into possession of the paramba on behalf of the tarwad; and by dismissing the plaintiff's claim so far as it seeks to eject defendant 3 also from the house and by deleting the provision in the lower appellate Court's decree directing her to pay the plaintiff's costs. Plaintiff 2 after ejecting defendants 1 and 2 from the house, will be in joint possession of the same with defendant 3's children. As defendant 3 supported in her written statement the validity of the devise to defendants 1 and 2 by Thoori and has valued her second appeal memorandum on the paramba also, there will be no order as to costs of this second appeal.

S.N./R.K.

*Decree modified.***A. I. R. 1914 Madras 120**

SADASIVA AIYAR, J.

Narasinga Patro — Defendant—Petitioner.

v.

Bhagavan Sabuto — Plaintiff — Respondent.

Civil Revn. Petn. No. 251 of 1912, Decided on 30th April 1914, from decree of Dist. Munsif, Berhampore, D/- 18th September 1911, in Small Cause Suit No. 1118 of 1910.

Civil P. C. (1908), O. 2, R. 2—In redemption suit all claims between mortgagor and mortgagee should be settled.

In a suit for redemption all claims between the mortgagor and the mortgagee should be settled. A mortgagee cannot therefore bring a separate suit in a Small Cause Court to recover the value of the crops standing on the mortgaged land on the ground that the mortgagor

had misappropriated the same: 30 All. 36; 30 All. 225 and 13 Mad. 15, *Foll.* [P 120 C 2]

Mir Zynuddin—for Petitioner.*T. Ramachandra Rao*—for Respondent.

Judgment.—The plaintiff in this small cause suit is a mortgagee who, as defendant in a previous original suit brought by the mortgagor (the defendant in the present small cause suit) for redemption, was directed to give up possession of the mortgaged land which was in his enjoyment as usufructuary mortgagee.

In so delivering the possession of the land in execution of that redemption decree to the present defendant the land was delivered with the crops thereon (raised by the plaintiff) on 1st day of December 1908.

The plaintiff's present small cause suit is founded on the contention that according to the real rights of the parties as settled by the previous mortgage-decree, the defendant ought to have been given possession of the land without the standing crops thereon, that the defendant should therefore be treated as having illegally misappropriated the standing crops belonging to plaintiff and that plaintiff is therefore entitled to recover the value thereof.

I think that all the claims as between a mortgagor and a mortgagee should be settled in the suit for redemption itself either before or after decree in that suit, that is all such claims as relate to the possession of the property, the amounts to be paid, the accounts to be taken, the enjoyment of the property, etc., connected with the reciprocal rights and obligations flowing from the mutual relationships of mortgagor and mortgagee and decree-holder and judgment-debtor: *Kashi Pershad v. Bajrang Prashad* (1), *Ram Din Bhup Singh* (2) and *Ramalinga v. Samiappa* (3).

This separate small cause suit therefore by the mortgagee judgment-debtor for the value of the profits alleged to have been wrongly put into defendant's possession in execution of the prior mortgage decree is unsustainable.

The lower Court's decree is set aside and the suit will stand dismissed. There will be no order as to costs as the petitioner did not raise the point in the

(1) [1907] 30 All. 36.

(2) [1908] 30 All. 225.

(3) [1900] 13 Mad. 15.

lower Court. The ten rupees (day costs) given to the respondent by my order of 9th December 1913 will be retained by him and need not be returned.

S.N./R.K.

Decree set aside.

A. I. R. 1914 Madras 121 (1)

AYLING, J.

In re Nalli Veerathevan and another—Accused.

Criminal Revn. No. 91 of 1914 and Case Referred No. 10 of 1914, Decided on 23rd April 1914, on report by Sess. Judge, Coimbatore, D/- 29th January 1914.

Penal Code (1860), S. 411—Person in possession of stolen property agreeing with owner for restoration—Thief not brought to justice—Conviction under S. 411 is valid and not under Penal Code (1860), S. 215.

A person in possession of stolen property entering into an agreement with the owner for the restoration of such property without actually helping to bring the thief to justice, cannot be convicted of an offence under S. 215, but only of an offence under S. 411: 23 All. 81, Foll. [P 121 C 1]

Public Prosecutor—for Government.

Order.—The evidence certainly justified the conviction of accused 2 in the alternative under S. 379 or S. 411, I. P. C., and also the conviction of accused 1 under S. 215, I. P. C. I agree with the Sessions Judge that the evidence does not support the conviction of accused 1 under S. 379 or S. 411, I. P. C.

The legality of accused 2's conviction under S. 215 has next to be considered. It has been held in *Queen-Empress v. Muhammad Ali* (1) that this section was not intended to apply to the actual thief, but to some one who, being in league with the thief, receives some gratification on account of helping the owner to recover the stolen property without at the same time using all the means in his power to cause the thief to be apprehended and convicted. Whether the principle of the ruling would apply where the receiver of the gratification was also in dishonest possession of the stolen property under S. 411, but not the actual thief, is open to argument. I express no opinion. But in the present case accused 2 has been convicted in the alternative of an offence under S. 379 or S. 411, I. P. C., and I think the spirit of the ruling

(1) [1901] 28 All. 81.

should apply, and the conviction under S. 215 should be set aside.

I see no reason to order a retrial on the ground of misjoinder of charges; for the evidence of close association between the accused persons justifies the inference that the theft and retention of the cattle and their restoration on payment were all part of one plot and one transaction within the meaning of S. 239, Criminal P. C.

I set aside the conviction of accused 1 under Ss. 379, 411 and 75, I. P. C., and that of accused 2 under S. 215.

The sentences are reduced to six months' rigorous imprisonment for each accused.

S.N./R.K.

Sentences reduced.

A. I. R. 1914 Madras 121 (2)

SADASIVA AIYAR AND SPENCER, JJ.

Ayyakutti Mankondan—Plaintiff—Appellant.

v.

Periasami Koundan and others—Defendants—Respondents.

Second Appeal No. 1282 of 1922, Decided on 15th October 1913, from decree of Dist. Judge, Madura, in Appeal Suit No. 389 of 1910.

(a) Limitation Act (1908), Art. 11—Art. 11 and Civil P. C., O. 21, R. 103 do not bar plea of sub division when only symbolical possession was delivered—Civil P. C. (1908), O. 21, R. 103.

Article 11 of the Limitation Act and O. 21, R. 103, Civil P. C. do not bar the setting up of a plea of division when only symbolical possession was delivered, and such order cannot amount to a dispossession as against third parties: 1 C. W. N. 243; 30 Cal. 710; 33 Cal. 487; 7 W. R. 87; 27 Mal. 67 (F. B.) and 27 Mad. 262, Cons. [P 123 C 1]

(b) Registration Act, S. 49—Mere memorandum of partition does not require to be registered and is admissible to prove a divided status.

Per Spencer, J.—Where a document purports merely to be a memorandum and is imperfect as a deed, it does not require to be registered though it recites the partition and shares between the joint owners and is receivable in evidence, and in any view it is admissible to prove a divided status.

[P 122 C 1, P 123 C 1]

(c) Civil P. C. (1882), S. 335—Where order in execution refers the party concerned to suit for actual possession, it must be taken to be unfavourable to him.

Where an order in execution is not final but refers the party concerned to a suit for recovery of actual possession, such order, though it grants him symbolical possession, must be taken to be unfavourable to him: 9 M. L. J. 175 Foll. [P 123 C 2]

(d) Registration Act, Ss. 17 and 49—Document declaring parties to have no longer joint interest in immovable property is not admissible to prove even divided status unless registered.

Per *Sadasiva Aiyar, J.*—Where a document declares that the parties thereto have no longer a joint interest as regards certain immovable properties with right of survivorship, it requires to be registered and, if not registered, is not receivable in evidence even for proving a divided status: 3 I. C. 321; *Diss. from*; 17 M. L. J. 469; 13 Mad. 281 and 6 I. C. 346, *Foll.* [P 123 C 2, P 124 C 2]

(e) Civil P. C. (1882), S. 335—Symbolical possession given after inquiry—There is no refusal to pass order.

Where an executing Court grants symbolical possession after holding an inquiry its order cannot be treated as a refusal to pass an order: 9 M. L. J. 175, *Dist.* [P 125 C 2]

V. C. Seshacharri—for Appellant.

T. V. Muthukrishna—for Respondents.

Spencer, J.—The appellant, who was the plaintiff in the first Court, is the purchaser from one Kuppana Nadan of his interests in the suit property which he had obtained by purchase in Court auction in execution of his decree in Original Suit No. 317 of 1903 on the file of the District Munsif's Court, Dindigul. That suit was brought against one member of an undivided family for his one-third share in four items and for one item of self-acquisition; respondents 1 and 3 in the second appeal are brothers of the defendant's father in that suit. The plaintiff in that suit, having purchased these items in Court auction on the 9th September 1905, applied for delivery of possession of the same and was referred to a regular suit by an order of the District Munsif of Dindigul on 7th September 1906. He sold his rights to the present plaintiff on 11th December 1907. This suit was brought on 12th October 1908 for possession of the plaintiff's one-third share in four items after partition and for the whole of item 5, those being the properties which were purchased by Kuppana Nadan in Court auction subject to the hypothecation rights of one Subban Chetty. The present appellant, having obtained a decree in the Court of first instance, additional evidence was admitted by an order of the appellate Court with the result that the appeal was allowed and the suit was dismissed.

The first objection taken here is that the lower appellate Court should not

have called for a report from the District Munsif on the additional evidence recorded by him. We feel satisfied that the District Judge who disposed of the appeal did not allow his mind to be prejudiced by the act of his predecessor or by the finding recorded by the District Munsif in consequence of the order. He observes in para. 3 of his judgment: "Objection has been taken that a revised finding is not authorized by the Procedure Code in such cases. As far as I am concerned, the point is not material as an independent consideration of the evidence is in any case necessary."

The next point that has been argued is that Ex. 8 being an unregistered document should not have been admitted in evidence. The question is whether this document is an instrument operating or purporting to create, declare, assign, limit or extinguish any right, title or interest to or in immovable property within the meaning of S. 17, Registration Act. A reference to Ex. 8 shows that it is composed, first, of lists of properties which were in possession of the different members of the undivided family before division and thus were available for division. At the end all the properties are clubbed together and the total value is stated as well as the value of each share. Then a note follows: "In the presence of the witnesses named hereunder we divided." Below this all the three members of the family have signed, and the signatures of the witness follow beneath. It appears to be a record or memorandum of the property subjected to a division that, according to the oral evidence, took place on the date on which it was written. But it can hardly be said to create or declare any right over any specific immovable property, or to declare anyone's separate title in a divided portion which was previously undivided, as the immovable property which fell to the share of particular members is not described. There is nothing in this document from which we can gather what was the separate share of any member who took part in the partition. In fact it is imperfect as a deed and one which, if presented for registration, would, I think, have been rejected for vagueness. It is, moreover in evidence that the

parties contemplated executing a regular partition-deed, but that no such document was executed.

A number of authorities have been quoted in which the liability to registration, or to stamp duty of documents which might be construed as partition-deeds, has been decided. These decisions afford but little guidance to us for deciding this case, as each document must be adjudicated with reference to its contents. I think that Ex. 8 did not require registration. The respondents also rely on the decision in *Subramania Aiyar v. Savitri Ammal* (1), as showing that the document was admissible for proving the divided shares of the family and assert that this is the only use that the Judge has made of it. There can be no doubt that a document which merely declares the divided status of a family, would not require registration. In this view also the objection to the want of registration of Ex. 8 appears to be unsustainable.

The third ground of appeal taken in the arguments before us is that the question as regards division became final by the order in execution proceedings passed by the District Munsif of Dindigul on 7th September 1906, which was not appealed against within one year. This point was not taken in the plaint, and after hearing the arguments addressed to us in support of it I do not think that it can be sustained.

Article 11, Lim. Act and O. 21, R. 103, Civil P. C., do not bar the respondents from setting up the plea of division in the suit. A perusal of the District Munsif's order (Ex. B) shows that he did not finally decide the question of partition, or in fact form any decided opinion as to the respective claims of the parties to the properties sought to be put in the possession of the decree-holder and auction-purchaser. The District Munsif merely observed that under the circumstances he was not prepared to hold that the counter-petitioners who are now the respondents (respondents 1 and 3) had established that there was a completed and valid partition as alleged by them. The proceedings are described in the order as being summary, the evidence was not considered in detail, and allusion is made to the necessity of filing

a regular suit for partition before the decree-holder, Kuppana Nadan was entitled to ask for actual possession. The order was in its result unfavourable to him to the extent that he was not allowed to get actual possession under S. 318 of the old Civil Procedure Code but it was not altogether unfavourable to the respondents. The case is therefore similar to that of *Alwar Iyenger v. Zelleveger* (2)

In the result I consider that the second appeal should be dismissed with costs.

Sadasiva Aiyar, J.—During the arguments my mind was not quite settled on the question whether the document Ex. 8 is or is not "an instrument operating or purporting to create, declare, assign, limit, or extinguish any interest to or in immovable property." As I interpret the document, it clearly declares that as regards certain immovable properties, the parties to the document have no longer a joint interest therein with rights of survivorship. Its clear result according to its terms seems to be that no portion of the lands mentioned in it is thereafter jointly owned by all the parties to it. No doubt, it does not state which particular land was thereafter to be enjoyed separately by which particular coparcener, or whether the entire land was taken by one or more coparceners, or alone separately or in separate rights or as tenants-in-common, but it does extinguish the joint rights in immovable property which formerly existed. I am, therefore inclined to hold that Ex. 8 requires registration.

Next, it is contended by respondent, relying on *Subramania Aiyar v. Savitri Ammal* (1) that, even if the document required registration, its not being registered, has only this legal effect namely, that it cannot affect the immovable property comprised therein and cannot be received as evidence of any transaction affecting such property (see S. 49, Registration Act), but that it can be received as evidence of the fact that the parties to it have become divided in status. I feel very doubtful whether this argument is sound. If the documents cannot affect the joint rights in the lands which belonged to the members of the joint family and if survivorship

(1) [1909] 3 I. C. 321.

(2) [1899] 9 M. L. J. 175.

therefore, still subsists among the members of the joint family so far as these lands are concerned, it is difficult to see how a divided status could be established between the parties to the document.

In *Subbayya v. Madduleiah* (3) it was held that an unregistered permanent lease is inadmissible in evidence to prove the nature of the possession which the lessee had. In *Lakshmana v. Kameswara* (4) it was held that although the deed in question in that case showed that the execution of another deed with reference to the right in immovable property dealt with by the deed in question was in contemplation, yet the deed in question was not admissible in evidence even as regards the moveable property comprised in it, as the document required registration owing to the immovable property comprised in it being of the value of Rs. 100. The learned Judges say: "The transaction evidenced by the agreement is therefore one and indivisible and the partition of the moveable property cannot be separated from the partition of the rest. I think that the division of status created by Ex. 8 in this case cannot be logically or appropriately separated from the extinction of joint rights in immovable property effected by the same document and if Ex. 8 is inadmissible in evidence so far as proof of such extinction of rights is concerned, it cannot also be admitted in evidence as regards the creation of a divided status among the family members. In *Upendra Nath Banerjee v. Umesh Chandra Banerjee* (5) it was held that, where the defendant in a suit sought to use an unregistered partition deed to prove that the property covered thereby ceased to be joint property the document was inadmissible under S. 49, Registration Act. As the learned Judges say (see p. 378 of 15 C. W. N.) "title to such property has been altered by the partition transaction, without proof of which the property would still retain all the incidents of joint property." I am inclined to hold that the case of *Subramania Aiyar v. Savitri Ammal* (1) is inconsistent with the principle of the

decision in *Sambayya v. Gangayya* (6) and I would with the greatest respect, dissent from the opinion expressed in *Subramania Aiyar v. Savitri Ammal* (1).

Coming to the other question, namely whether the order passed by the District Munsif of Dindigul on 7th September 1906 became final as not having been set aside within a year, this question again is one of great difficulty. The order Ex. B was passed in a proceeding which, though initiated under S. 334 of the old Civil P. C., was treated as a petition filed under S. 35, (see para. 33 of the order). Under para. 1 of S. 35, the Court may pass "such order on the petition as it thinks fit," the petition in this case being a complaint by the purchaser at the Court auction-sale that he was resisted and obstructed in his attempt to get actual possession of the properties by a person other than the judgment-debtor claiming in good faith the right to the possession of the property. The order which the Court passed was that the purchaser should get symbolical or constructive possession of one-third share in items 1 to 4 and also constructive possession of the equity of redemption of item 5, such possession to be given in the manner provided for by S. 319, Civil P. C. Hence actual possession of items 1 to 4 was not given. As regards item 5 it was in the possession of the mortgagee and he could not be actually dispossessed and hence formal possession was ordered to be given of item 5 also. Para. 2 of S. 335 says that the party against whom an order is passed under para 1 may institute a suit to establish the right which he claims to present possession of the property but, subject to the result of such suit if any, the order should be final. The question raised is whether when no actual dispossession of the obstructing and resisting party has taken place in consequence of the order passed by the Court in favour of the purchaser and when the Court auction-purchaser has been given only symbolical or constructive possession, the obstructing or resisting party is bound to bring a suit within one year to set aside the order giving symbolical, formal or constructive possession and whether if he fails to do

(3) [1907] 17 M. L. J. 469.

(4) [1890] 13 Mad. 281.

(5) [1910] 15 C. W. N. 375=6 I. C. 346.

(6) [1890] 13 Mad. 308.

so, he is bound by the findings on which the order was based in any suit between himself and the Court auction-purchaser which may be subsequently brought. As I said, the question is not free from difficulty. That question cannot arise under the new Civil Procedure Code as by O. 21, R. 99, the only order on the petition of the decree-holder which can be passed, if the Court finds that the obstruction was not on behalf of the judgment-debtor, is an order for dismissal of the petition and not "such order as the Court thinks fit" as it was under the old S. 335. In *Kishori Lal Goswami v. Lala Sahib Lal* (7) it was held that the delivery of possession of a land under S. 319, Civil P. C., to a purchaser in execution does not cause dispossession of the actual possessor within the meaning of S. 335, Civil P. C., and that the person in the actual possession cannot complain under S. 335.

This case seems to show that no order can be passed under S. 335 except an order for actual possession or actual dispossession, and that an order for possession of an undivided share by a proclamation through beat of drum, etc., is not an order passed under S. 335. If a tenant in possession is directed to pay rent to the Court auction purchaser and does attorn in pursuance of the possession given under S. 319, that might amount to actual dispossession of the resister or obstructer in some cases. In *Ibrahim Mullick v. Ramjadu Rakshit* (8) this case in *Kishori Lal Goswami v. Lala Sahib Lal* (7) was followed. The case of *Brajabala Devi v. Gurudas Mundle* (9) really dissents from the opinion expressed in the above two cases of *Kishori Lal Goswami v. Lala Sahib Lal* (7) and *Ibrahim Mullick v. Ramjadu Rakshit* (8), though it professes to distinguish those cases by pointing out that the actual decisions in those cases are correct because there was no actual dispossession of the persons in possession by the symbolical possession given to the purchaser in Court auction. In *Chidambara Patter v. Ramaswami Patter* (10) it was held by the Full Bench that S. 293 of the old Code and Art. 11, Lim. Act did apply to a suit brought more

than a year after the claim to attached debt had been disallowed. The learned Judges held that the word "possession" was used in Ss. 278 to 282 in its legal technical sense so as to cover constructive possession and possession in law. The learned Judges also refer to S. 355, Civil P. C., in which the word "possess" is used as applicable not only to tangible property but also to debts and other intangible property. In the case of *Alwar Iyengar v. Zelleveger* (2) the Munsif in an inquiry under S. 335 concluded his order thus: "Under these circumstances, I think it is useless to hold a summary inquiry as to the present possession of the land." The learned Judges say: "It is possible that the Munsif meant to say that he did not think it necessary to take more evidence."

The reasonable view would seem to be that the District Munsif for some reason or other declined to give a decision on the matter on which he has to decide under the section. If this view is correct, it follows that the order is not one that required to be set aside by a suit." Can we say in the present case that, in the order Ex. B, the District Munsif declined to hold a summary inquiry as to the right to possession? I am inclined to think that he did hold an inquiry and further held that the plaintiff was entitled to symbolical possession of a one-third share in items 1 to 4 and to possession of the equity of redemption in item 5. The only case which, though not exactly in point, is based on somewhat similar facts is the case of *Fidaye Shikdar v. Oozeooddeen* (11). There S. 269 Act 8 of 1859 was relied upon by the plaintiff as barring the defendant from contesting the plaintiffs' title to possession, as the defendant had not set aside by suit within one year the order passed in favour of the Court auction purchaser putting him in possession of the right title and interest of the judgment-debtor in the plaint lands after overruling the objection of the defendants who were in actual possession. The learned Judges of the Calcutta High Court held that S. 269, Act 8 of 1859 which combines the provisions of S. 335, of the last Civil P. C., and Art. 11, Lim. Act, does not contemplate that the party in ac-

(7) [1897] 1 O.W.N. 842.

(8) [1908] 30 Cal. 710.

(9) [1903] 33 Cal. 487.

(10) [1904] 27 Mad. 67.

(11) [1867] 7 W.R. 87.

tual possession should sue regularly to get possession within one year. In *Kocherlakota Venkatakrishna Row v. Vadrevu Venkappa* (12) very instructive observations occur on the question of possession. Where physical possession is not given, the giving of symbolical and formal possession, though it might be as good as the giving of actual possession so far as the judgment-debtor was concerned, could not be availed of against the third persons in actual possession. On the whole (though after much hesitation) I have come to the conclusion that mere formal possession of an undivided share or of a mere equity of redemption in lands which are in the actual possession of others will not constitute such a dispossession of any person other than the judgment-debtor as would oblige such a person to bring a suit within a year of the order passed in the auction purchaser's favour under S. 335, at the risk of his being bound by the findings in that order if such a suit was not brought.

Having regard to my finding on the first point however, that Ex. 8 should not have been admitted in evidence for any purpose and that that document and the evidence of D. W. 5, which was admitted on remand by the first Court, and the further evidence of of defendant 1, recalled and again examined on remand were improperly admitted and considered by the lower appellate Court I would remand the case to the lower appellate Court to submit a revised finding on issue 4 after rejecting from consideration Ex. 8 and the said additional oral evidence. As however my learned brother is of opinion that the lower Court's decree be confirmed his judgment dismissing the appeal with costs will prevail under S. 98, Cl. 2.

S.N./R.K.

*Appeal dismissed.**** A. I. R. 1914 Madras 126****Full Bench**WHITE, C. J., AND SANKARAN NAIR
AND OLDFIELD, JJ.*Yellammal*—Appellant.

v.

Ayyappa Naick—Respondent.

Letters Patent Appeal No. 166 of 1912, Decided on 19th January 1914, from decision of Sundara Aiyar, J., D/- 30th August 1912, in Second Appeal No. 101 of 1911.

* (a) Limitation Act (9 of 1908), Art. 29—Attachment of debt due to judgment-debtor by creditor is not wrongful seizure within Art. 29—Meaning of "seizure" explained—Civil P. C., O. 21, R. 46.

"Seizure" involves something in the nature of a transfer of possession, actual or symbolical. Therefore the attachment by a decree-holder of a debt due to his judgment-debtor does not constitute a "wrongful seizure of moveable property" within the meaning of Art. 29, Lim. Act, inasmuch as such an attachment is not effected by seizure actual or constructive but by a written order prohibiting the creditor from receiving the debt and the debtor from making payment thereof until the further order of the Court. Nor is there a "seizure" if the debtor of the judgment-debtor, after the debt due from him has been attached in the said manner applies to the Court by way of an interpleader proceeding and pays the debt into Court in pursuance of, as well as in consequence of, an express order of the Court giving leave to pay in. [P 127 O 1, 2]

(b) Limitation Act (9 of 1908), Arts. 62 and 120—Debt due to judgment-debtor attached by decree-holder—Money paid into Court by latter paid to creditor—Person claiming to be assignee of debt before attachment suing creditor—Case was held to be governed either by Art. 62 or 120, Arts. 29 and 36 being inapplicable—Limitation runs from date of receipt by creditor of money paid into Court—Limitation Act, (9 of 1908), Art 29—Limitation Act (9 of 1908), Art 36.

A debt due to a judgment-debtor was attached by his decree-holder and when the debtor paid the money into Court, it was paid out to the attaching creditor. A third person who claimed to be an assignee of the debt before its attachment by the decree-holder sued the latter for recovery of the money.

Held: (1) that neither Art. 29 nor Art. 36 applied to such a case;

(2) that the case was governed either by Art. 62 or Art. 120;

(3) that limitation in this case began to run not from the date of attachment of the debt but from the date on which the attaching creditor received the money from Court. [P 128 O 1]

T. R. Venkatarama Sastri—for Respondent.

White, C. J.—The question for determination in this appeal is: Is the plaintiff's suit barred by limitation?

The material facts and dates are as follows :

On 4th July 1905 defendant 4, who had obtained a decree against one Perumal Naik, attached a debt alleged to be due to Perumal Naik by defendant 1.

On 29th July 1905 the alleged debt became payable. On 6th November 1905 defendant 1 obtained an order of Court giving him leave to pay the amount of the debt into Court. On 15th June 1906 defendant 1 paid the money into Court. On 3rd October 1906 the money was paid out to defendant 4.

On the attachment of the debt the plaintiff had put in a claim petition alleging that the debt was payable to him as having been assigned to him by Perumal Naik prior to the attachment. This petition was dismissed. He then instituted a suit under S. 283, Civil P. C., of 1882. He failed in the Court of first instance but succeeded on appeal.

On 15th September 1908 he instituted a suit for the recovery of the money which had been paid out of Court to defendant 4.

If the period of limitation is three years and runs from the date of the attachment of the debt (4th July 1905) the suit is time barred. If it is three years and runs from the date of the payment out of Court to defendant 4 (3rd October 1906) the suit is in time.

The appellant has contended that the appropriate article is Art. 29 and that the suit is time barred. It is not necessary to consider whether the suit is for compensation within the meaning of the article. Assuming it is, the question is : Did the attachment of the debt constitute a "wrongful seizure of moveable property under legal process" within the meaning of the article. There is no doubt there was a "legal process," but was there any "seizure" thereunder? I am of opinion that there was not.

The procedure in connexion with the attachment of a debt not secured by a negotiable instrument is regulated by O. 21, R. 46 : see S. 263 of the old Code. The attachment is made by a written order prohibiting the creditor from receiving the debt and the debtor from making payment thereof until the further order of the Court. In the case of moveable property, the broad distinction seems to be that when the

property is in the possession of the judgment-debtor at the time the order of attachment is made the procedure is by seizure actual or constructive : see, for instance O. 21, R. 43, (moveable property other than agricultural produce), R. 44 (agricultural produce). When the property is not in the possession of the debtor the procedure is by way of prohibitory order. The only exception to the general rule appears to be in the case of a negotiable instrument (R. 51). In the case of any negotiable instrument to which that rule applies the attachment must be made by actual seizure whether the instrument is in the possession of the judgment-debtor or not. Under the English law the question whether an act of the Sheriff constitutes a seizure is one of fact, the test being whether an act has been done sufficient to intimate to the judgment-debtor or his servant that the goods have been seized. See the case cited in Halsbury's Laws of England, Vol. 15, para. 108. See too, *Multan Chand Kanyalal v. Bank of Madras* (1).

As it seems to me "seizure" involves something in the nature of a transfer of possession, actual or symbolical. Not only is no transfer of possession effected by the making of a prohibitory order in the case of a debt due to the judgment-debtor under R. 46, but the order contemplates possession not by the judgment-creditor but by the judgment-debtor's debtor, pending the further order of the Court.

The appellant in this case cannot rely on the payment into Court by defendant 1 (the judgment-debtor's alleged debtor) on 15th June 1906, as a "seizure" under legal process. The payment was a voluntary payment made by way of an interpleader proceeding. I do not think that the payment of money into Court "in consequence of a legal process of attachment" is in all cases enough to constitute a seizure." In the present case the payment was, no doubt, made in pursuance of, as well as in consequence of an express order giving leave to pay in (the actual order is not before us). But the order was made on the application of the judgment-debtor's alleged debtor who wished to have the protection of the order of the Court. There is no reason to suppose that any order

(1) [1904] 27 Mad. 346.

for leave to pay the money in would have been made against the judgment-debtor's alleged debtor if he had not asked to be allowed to make the payment. In *Jagjivan Javherdas v. Gulam Jilani Chaudhari* (2) the question whether the attachment of the debt constituted a seizure does not seem to have been considered.

On behalf of the appellant it has been contended, in the alternative that Art. 36 applies. I am clearly of opinion that it does not.

I think this case is distinguishable from *Damaraju (Narasimha Rau v. Thadinada Ganagaraju* (3), where the majority of the Court were of opinion that Art. 29 applied. There the attached property was ordinary moveable property.

I am of opinion that either Art. 62 or Art. 120 applies and I would dismiss the appeal with costs.

Sankaran Nair, J.—I agree.

Oldfield, J.—I agree.

S.N./R.K.

Appeal dismissed.

(2) [1884] 8 Bom. 17.

(3) [1908] 31 Mad. 41.

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SANKARAN NAIR AND AYLING, JJ.

Muthu Ramkrishna Naicken—Defendant—Appellant.

v.

Marimuthu Goundan and others—Plaintiffs—Respondents.

Letters Patent Appeal No. 98 of 1913, Decided on 6th March 1914, against decision of Miller, J., D/- 17th April 1913, in Second Appeal No. 1619 of 1912.

Hindu Law—Stridhan—Property acquired by woman by her own exertions during coverture is her own property which devolves on her heirs—Property acquired by earnings of husband and wife is joint property—Wife's share descends to her heirs.

The property acquired by a woman for herself by her own exertions during coverture is her own property which she is entitled to hold independently of her husband and it devolves on her heirs.

Therefore the property acquired with profits earned by both husband and wife is their joint property and on the death of the wife her heirs are entitled to her share [P 129 C 1]

Sankaran Nair, J.—The plaintiffs sue as the legal representatives of one Mottaya Goundan to recover possession of the plaint lands from defendant 1, who held them as his lessee. The lease is admitted, but the main contention is that the lands belonged to Mottaya

Goundan's wife Ayyammal, from whose alleged heir, defendant 2 has purchased them and is now in possession. It is found by both the Courts that the properties were acquired with the profits earned by Mottaya Goundan and his wife Ayyammal, in a trade which was carried on by both of them. Both the husband and wife were "equally working together." It is also stated that among the Padayachi community, to which Ayyammal and Mottaya Goundan belonged, the wife worked along with the husband "for the purpose of the maintenance of the family and development of the family properties." The District Munsif decided, however, that according to the strict theory of the Hindu Smritis even the separate property of a woman earned by mechanical arts is subject to her husband's control, and that therefore the money with which the plaint lands were acquired was not Ayyammal's peculium. He held that though the properties were acquired in the name of Ayyammal, that is due to the fact that Mottaya Goundan wanted to shield his properties from the claims of his brothers and possibly also to the fact that Ayyammal was more intelligent than her husband. He further held that, assuming that Ayyammal and Mottaya Goundan must be deemed to have jointly acquired the plaint lands, on the death of Ayyammal, it became the sole property of Mottaya Goundan and as the plaintiffs are admittedly entitled to claim as the representatives of Mottaya Goundan, he passed a decree directing the defendants to surrender them to the plaintiffs. In appeal the Subordinate Judge confirmed the District Munsif's decision. His decision was confirmed by Miller, J. This is an appeal from his judgment.

In the lower Courts the main question that was argued appears to have been that the properties belonged solely to Ayyammal. In second appeal before us the main contention was that, on the facts proved, it cannot be held that the property belongs only to the husband.

If properties are acquired jointly by two persons, both of them males, the two would be joint owners. The question then is whether the fact that the properties in suit were acquired jointly by husband and wife makes any differ-

ence. If it was open to the wife to acquire property for herself by her own exertions during coverture, it would seem to follow that, if she acquired the property along with her husband, then they must be deemed to be joint owners. According to the Mitakshara, which is the leading authority in this Presidency, property, however acquired by a woman is her stridhanam and on her death her heirs take it. This view is no doubt directly opposed to the view maintained by the Dayabhaga and certain other authorities, according to which that alone is stridhanam which the wife has power "to give, sell or use independently of her husband's control:" see Mayne's Hindu Law (Edn. 7), para. 610. Gifts to a woman in her capacity of bride or wife or given by her husband or by her relations or by her husband's relations are admittedly her exclusive property with the doubtful exception of gift of immovable property by the husband in certain circumstances. It is now also settled law in Bengal and Madras that the property inherited by a woman is not her exclusive property. Her right with reference to the property otherwise acquired, according to Mitakshara, "by inheritance, purchase, partition, seizure, or finding," has been the subject of much discussion. It has now been settled that she may acquire property by gift from strangers during coverture and that it would devolve on her heirs: see *Ramaswami Padeiyatchi v. Viraswami Padeiyatchi* (1). It has also been held that property may be given to husband and wife jointly and that property may also be purchased by them jointly. Her husband's interest in such property would devolve on his heirs and her interest in the property would devolve on her heirs: see *Madavarayya v. Tirtha-Sami* (2). Property may also be devised to them jointly: see *Muthumeenakshi Ammal v. Ohendra Sekhara Iyar* (3). This is also the conclusion arrived at in *Salemma v. Lutchmana Reddi* (4). There an inam land was enfranchised in favour of a woman and the question was whether it was her stridhanam property descendible to her heirs or not. The texts were reviewed and it was held

that the Mitakshara should be followed, unless there is such a consensus of opinion among the commentators prevalent in Southern India as to suggest that the mitakshara has been departed from, or, in other words, that it is open to a female to acquire ownership in any of the modes in which it is open to males, and all such property, with the exception of that acquired by inheritance, is her stridhanam, devolving on her own heirs. The learned Judges accordingly held that a wife's earning and gifts to her by strangers are her stridhanam property descendible to her heirs. This is a direct decision on the point and is in favour of the appellant. But as our learned colleague has apparently taken a different view, we propose to review the Hindu law texts on this point, though neither the texts nor the cases above referred to, we are informed, were cited before the learned Judge. The question, as we have already stated, is whether a married woman's earnings are her exclusive property. Mr. Mayne adduces passages from the Vedas to show that in early times married women pursued independent occupations and acquired gains by them: see Mayne's Hindu Law, Edition 7, para. 656. According to Manu (Ch. 7, Sloka 416), however a wife is declared to have no property. The wealth which she acquires is said to be acquired for him to whom she belongs. Four of the commentators of Manu, and among them Medhatithi, take this to mean only that she is unable to dispose of her property independently of her husband. Another commentator, according to Mr. Buhler, the editor, seems to indicate that he took it to refer to her incapacity to earn money by working for others: see *Sacred Books of the East*, Vol. 25, p. 326.

The text that is generally referred to with reference to a woman's earnings is that of Katyayana which is thus translated by Colebrooke in his Digest, Vol. 2, p. 589, Sloka 470: "But whatever wealth she may gain by arts, as by painting or spinning or, may receive on account of friendship from any but the kindred of her husband or parents her lord alone has dominion over it. Of her other property she may dispose without first obtaining his assent." The commentator Jagannatha states that "'arts' in this text is ex-

(1) [1866-68] 8 M. H. C. 272.

(2) [1878] 1 Mad. 507.

(3) [1904] 27 Mad. 498.

(4) [1898] 21 Mad. 100.

pressed in the plural number with the sense of, 'and the rest.' We have already pointed out that this text has not been followed in this Presidency as regards gifts from others than her husband's or her own kindred. In the Dayabhaga this text is understood to imply that "though the wealth be hers, it does not constitute woman's property because she has not independent power over it." The Dayakrama Sangraha (Stoke's Hindu Law Books, p. 490) is to the same effect. Ch. 2, S. 2, Sloka 29, states: "Notwithstanding the woman has ownership in both descriptions of property, she has not independent power in regard to it" as the husband's permission for its disposal is necessary. In the Viramitrodaya we find the same proposition laid down in Ch. 5, Part 1, Slokas 2 and 7.

The ownership of the woman in the properties is acknowledged; it is only her power of alienation that is declared subject to the husband's control. It is said: "The denial is not of their being woman's property, but of its consequence, such as distribution, etc." Devala also mentions a woman's gains as part of her separate property over which she has exclusive control and which her husband cannot use except in times of distress. Mr. Mayne thinks that the word is apparently used by Devala in the sense of gifts. Mayne's Hindu Law, Edition 7, para 663. All the texts therefore recognize the wife's ownership in the property acquired by her own labour. They only restrict her right of alienation and make it subject to the wishes of her husband. Mr. Mayne considers the question in para. 663 and his conclusion is that these texts with reference to the husband's control do not seem to convey anything more than a moral precept, while the texts asserting her absolute power are "express and unqualified." It is unnecessary to express any opinion as to the husband's right to control any alienation by his wife, as that question does not arise in this case. But we think that Mr. Mayne is right in his view that the property acquired by a woman by her own exertions during coverture is her own property which she is entitled to hold independently of her husband and that it devolves on her heirs. The Mitak-

shara is clear in favour of this conclusion and the other texts also recognize her ownership, though they convey an injunction that she is not to alienate the property without her husband's consent. This is due to general incapacity of women to deal with property. These texts do not override the express provision of the Mitakshara which declares her self-acquisition to be her own stridhanam and we are confirmed in this view by the decisions cited.

We think therefore that the property in suit was the joint property of Ayyammal and her husband. If it formed joint property, there is no reason for holding that, on the death of Ayyammal, her interest survived to her husband. In *Madaviraya v. Tirthasami* (2), which we have already cited the theory of survivorship was not recognized, and it was held that the woman's own heirs were entitled to her undivided interest. Ayyammal's daughters therefore are the persons entitled to her property. They became co-owners with their father Mottaya Goundan on Ayyammal's death. There is no finding that their right has been lost by adverse possession. Mottaya's possession cannot be deemed adverse to his daughters who were co-owners with him.

On this finding the plaintiffs, who claim under Mottaya, are only co-owners with his (Mottaya's) daughters. Defendant 1 admittedly got into possession as lessee under Mottaya, the plaintiffs are co-owners, and no objection was taken in the lower Courts that they alone cannot maintain the suit; but defendant 1 set up the title of defendant 2, who is found by the District Munsif to have no title, as he purchased the property from Velayuda Goundan, who is not the heir of Ayyammal. Though the suit is one in ejectment, a decree for joint possession may be passed. In the circumstances, we set aside the decree of the lower Courts, direct the District Munsif to restore the suit to his file, make the daughters or other representatives of Ayyammal parties to the suit, and pass a decree in accordance with law. The costs hitherto incurred will abide the result.

Ayling, J.—I agree.

S.N./R.K

Decree set aside.

* A. I. R. 1914 Madras 131

WHITE, C. J., AND SANKARAN NAIR, J.
U. Kesavulu Naidu—Plaintiff—Appellant.

v.

Arithulai Ammal and others—Defendants—Respondents

Appeal No. 90 of 1910, Decided on 14th November 1912, from decree of Dist. Judge, Chingleput, in Original Suit No. 8 of 1909.

* (a) Contract Act (9 of 1872), S. 16—Court will not interfere with contract and reduce high rate of interest in pro-note unless stipulation as to high rate was obtained by undue influence.

It is not open to a Court on general equitable grounds to interfere with a contract and reduce the high rate of interest (60 per cent in this case) in a promissory-note unless the Court is satisfied that the contract was brought about and the stipulation as to high interest obtained by the exercise of undue influence as defined in S. 16, Contract Act: 28 All. 570 (P.C.), Foll; 29 All. 303, Diss. from. [P 132 C 2]

* (b) Contract Act (9 of 1872), S. 16—(Per White, C. J.)—High rate of interest is evidence of unconscionable nature of bargain and also of domination of party consenting to exorbitant rate—(Per Sankaran Nair, J.)—Excessive interest is not in itself ground of relief—It may be evidence of unfair advantage by creditor over debtor if circumstances allow it.

Per White, C. J.—The high rate of interest may be evidence not only of the unconscionable nature of a bargain, but also of the fact that the will of the party who consented to pay the exorbitant rate of interest was dominated. [P 133 C 1]

Per Sankaran Nair, J.—Excessive interest in itself may not be a ground for relief, but it may be evidence of the fact that the debtor must have been in a very helpless condition to accept the terms imposed by the creditor. It may also be evidence that the latter must have used it to obtain unfair advantage over the former if the position of the parties is such that the Court may fairly presume that otherwise the debtor would not have accepted those terms. [P 135 C 1]

M. Narayanaswamy Ayyar—for Appellant.

T. Ramachandra Rao and S. V. Padmanabha Ayyangar—for Respondents.

White, C. J.—This is a suit brought by the endorsee of a promissory note of Rs. 1,500 which provided for the payment of interest at the rate of 60 per cent per annum. The makers of the note were five ladies. Two issues were raised: Is the note genuine? Is the rate of interest provided in the note enforceable? The Judge found that the note was genuine but that the rate of interest was not enforceable and in lieu of

the interest provided for in the note he gave the plaintiff interest at the rate of 24 per cent per annum. The plaintiff appeals against this. There is no cross-appeal as regards the genuineness of the note. The contesting defendants are defendants 1, 6, 7 and 8. They plead that the note was fraudulent and that the rate of interest high and unconscionable. There is no plea that the note was procured by the exercise of undue influence on the part of anybody. There is no issue as to this and there is no finding of the District Judge as to this. Consequently, I suppose it must be taken that the District Judge, although he was not prepared to find, or although, at any rate, he did not consider it necessary to find that the execution of the note was procured by undue influence, was of opinion that he could give relief to the defendants by way of reducing the rate of interest provided for in the note to what he considered an equitable rate in all the circumstances of the case.

Now it seems to me, and I speak only for myself, that it was not open to the District Judge on general equitable grounds to interfere with the contract between the parties unless he was satisfied that the contract was brought about by the exercise of undue influence. As the Judge has given the plaintiff a decree on the note it must, of course, be taken that the Judge did not consider that it was vitiated by fraud. In support of the contention that the learned Judge can, on general equitable grounds interfere with the contract rate of interest, our attention has been called to several authorities. *Poma Dongra v. William Gillespie* (1) was cited to us. There the Court granted equitable relief on the ground that the agreement appeared to be of an unconscionable character. It would seem, in that case, the learned Judge (Davar, J.) was of opinion that the agreement was brought about by undue influence. He says: "I have no doubt in my mind that, when the defendant executed the two promissory notes in this suit, undertaking to repay the loans with interest at 75 and 60 per cent. per annum, the plaintiffs were in a position to dominate his will." That observation is obviously made with reference to S. 16, Contract Act. Then we have the Allahabad decision

(1) [1907] 31 Bom. 348.

of *Balkishan Das v. Madan Lall* (2). In that case the learned Judges confirmed the judgment of the District Judge reducing the rate of interest, although in that case there was the finding by the Court below which was accepted in the High Court that it was not a case in which it could be said that undue influence was brought to bear. All I can say with regard to that case is, speaking with all respect, that it seems to me to be impossible to reconcile it with the decision of the Privy Council in *Dhanipal Das v. Maneshar Bakhsh Singh* (3), a case, I think I am right in saying, which was not brought to the notice of the learned Judges of the Allahabad High Court. In that case the Subordinate Judge held that it was not one of fraud or undue influence but of inequitable dealing and he decided to interfere in the enforcement of the hard terms of the contract and accordingly allowed simple interest at 18 per cent but not compound interest. In dealing with this judgment Lord Davey, in delivering the judgment of the Privy Council, said: "The Subordinate Judge was wrong in deciding the case in accordance with what he supposed to be English equitable doctrine. He ought to have considered the terms of the amended S. 16 only. He also mistook the English law.

Apart from a recent statute an English Court of equity could not give relief from a transaction or contract merely on the ground that it was a hard bargain, except perhaps where the extortion is so great as to be of itself evidence of fraud which is not this case. In other cases there must be some other equity arising from the position of the parties or the particular circumstances of the case. But, although he was wrong in the reasons for his judgment, the Subordinate Judge may be right in his findings of fact." This, so far as I know, is the latest decision of the Privy Council with regard to this question. The principle of this decision was applied by this Court in *Ranee Annapurni Nachiar v. M. Ar. Ar. Swaminathan Chetty* (4). There are no doubt earlier cases of the Privy Council in which equitable relief has been granted and the rate of interest has been cut down without any finding,

express or implied, that the agreement was brought about by undue influence. I may refer to the cases of *Kamini Sunduri Chaodhrani v. Kali Prosunno Ghose* (5) and *Raja Mokham Singh v. Raja Rup Singh* (6). Both these cases were decided after the passing of the Contract Act, of 1872 and before the amendment of S. 16 of the Act of 1899. The object of the amendment was to extend the scope of the section and does not affect the question we are now considering. With regard to the latter case it may be observed that the language of their Lordships is somewhat guarded. They conclude their judgment by saying: "A decision thus arrived at ought not to be set aside on appeal unless it clearly appears to be wrong." It may be that the last decision of *Dhanipal Das v. Rajah Maneshar Bakhsh Singh* (3) is difficult to reconcile with the two earlier decisions. It seems to me we ought to apply the principle as laid down in the latest case; and applying that principle I am of opinion that it was not open to the District Judge to reduce the rate of interest unless he was of opinion (and in the absence of any issue of finding I do not think we can assume he was of opinion) that the stipulation as to interest was procured by the exercise of undue influence as defined by S. 16. We have a state of things in which the District Judge has found, we must take it, against the plea of fraud; because if the plea of fraud was made out, he, of course, would not have given the plaintiff a decree for the amount of the principal with interest at the rate which he thought was equitable. We must take it that he finds against the plea of fraud, that he finds that the document was a genuine document in the sense that it was executed by the parties by whom it purports to have been executed and that he does not find that it was brought about by undue influence. In these circumstances, I think that his judgment that the rate of interest ought to be cut down cannot be supported.

Then I assume for the purposes of this appeal and only for the purposes of this appeal, that it is open to us to deal with this case as if there had been the plea of undue influence raised and to con-

(2) [1907] 29 All. 303.

(3) [1906] 28 All. 570=33 I. A. 118 (P.C.).

(4) [1910] 6 I. C. 439=34 Mad. 7.

(5) [1886] 12 Cal. 225=12 I. A. 215 (P.C.).

(6) [1893] 15 All. 352=20 I. A. 127 (P.C.).

sider whether, on the evidence, the plea is established. On the evidence it seems to me clear that that plea is not established. The transaction was carried out by the fifth witness for the plaintiff, who is the father of defendants 4 and 5 and the husband of defendant 2 and who acted under a power of attorney which was given to him by his own daughters and by the other defendants in the case, the executants of the note. The difficulty, about the case is, to say who is the party who exercised the domination and who is the party whose will was dominated. The fifth witness for the plaintiff, the agent, was acting under a power of attorney and there is no evidence to support the suggestion that his will was dominated in that he entered into a transaction which he knew was inequitable or which he knew was contrary to the interests of his principals, the parties who gave him the power of attorney. The ladies were very anxious to raise the money for the purposes of saving the estate from sale, but there is no evidence from which we can draw the inference that their agent brought pressure to bear upon the ladies or that they were in a position of helplessness. Then, can it be suggested that his will was dominated?

There is no evidence to show that he entered into an agreement by which the original payee, who is the first witness for the plaintiff, agreed to advance the amount of Rs. 1,500. It is not found that this Rs. 1,500 was not advanced. The original payee in turn endorsed the note to the plaintiff. It is not found that the plaintiff did not advance Rs. 1,500 to the original payee. I can find no evidence in the case, at any rate our attention has not been called to any, which would, in my opinion, warrant us in holding that the wills of the executants of the note were dominated by anybody or that the will of their agent was dominated by anybody so as to bring in the provisions of S. 16, Contract Act. No doubt, the rate of interest is high, and it may be that a very high rate of interest is not only evidence of the unconscionable nature of a bargain, but is also evidence that the will of the party who consented to pay the exorbitant rate of interest was

dominated. Here we have the rate of interest at 60 per cent. In the circumstances of this case it seems impossible to hold on that alone that the contract was brought about by undue influence and, in my opinion, there is really no other evidence in the case which would warrant us in coming to that conclusion. There is a further question that I need not discuss, i. e., as to the rights of the plaintiff as the holder of the note by indorsement from the original payee. Then there is another defence put forward; so far as I understood it, it was that the payee was a mere name-lender for the fifth witness for the plaintiff who held the power of attorney and that the benefit of the transaction was to be enjoyed by this fifth witness. If there was any evidence at all that there was anything like collusion or conspiracy as between the payee and the fifth witness for the plaintiff that they would be sharers of the spoils, then, of course, we should have to consider whether we could allow the transaction to stand. But so far as I can see, there is no evidence. This defence seems to me merely a suggestion which is quite unsupported by the evidence. For these reasons I think we must allow the appeal and give the plaintiff a decree for the amount of the principal and interest at the rate provided for in the note. We modify the decree of the lower Court by substituting the rate of interest as provided for in the promissory note for the interest at 24 per cent. Interest at 6 per cent after the date of the plaint will be allowed. The plaintiff will have costs here and in the lower Court to be paid by defendant 1 and defendant 2's legal representatives.

Sankaran Nair, J.—Under S. 16, Contract Act 9 of 1872, before it was amended, a contract which was entered into by one party under undue influence as defined therein was voidable by him. The following is the definition of undue influence. "Undue influence is said to be employed in the following cases:

(1) When a person in whom confidence is reposed by another, or who holds a real or apparent authority over that other, makes use of such confidence or authority for the purpose of obtaining an advantage

over that other, which but for such confidence or authority, he could not have obtained.

(2) When a person, whose mind is enfeebled by old age, illness, or mental or bodily distress, is so treated as to make him consent to that, to which, but for such treatment he would not have consented, although such treatment may not amount to coercion." *Srimati Kamini Sundari Chaudhrani v. Kali Prosunno Ghose* (5) was decided while this provision of law was in force. That was a suit for the recovery of money due under a mortgage bond. The plaintiff was the mukhtear of the defendant who was a purdanashin lady; and the question was whether with regard to the rate of interest it was an unconscionable bargain in which undue advantage was taken of the lady by her mukhtear, the plaintiff. Their Lordships of the Privy Council accepted the finding of the lower Court against fraud and undue influence and they were of opinion that the whole transaction could not be therefore set aside. But assuming the validity of the mortgage, the question was argued before them whether the agreement about the rate of interest was not an unconscionable bargain such as a Court of Equity could relieve against. They followed the English law as laid down by the Master of the Rolls in *Beynon v. Cook* (7), and quoted the following passage with approval: "The point to be considered is: Was this a hard bargain? The doctrine has nothing to do with fraud It has been laid down in case after case that the Court, wherever there is a dealing of this kind, looks at the reasonableness of the bargain, and if it is what is called a hard bargain, sets it aside It was obviously a very hard bargain indeed, and one which cannot be treated as being within the rule of reasonableness which has been laid down by so many Judges." Following this judgment they held that the compound interest charged was exorbitant and unconscionable and as the purchaser took full notice of these circumstances it should not be allowed and accordingly reduced it. The decision establishes that though the agreement is valid so far as the Contract Act is concerned, though there is neither

fraud nor undue influence, it will not be enforced if it is such as will be relieved against in a Court of equity. Their Lordships say: "The finding of the lower Court against fraud and undue influence must now be accepted; a contrary finding would have avoided the whole transaction. But assuming the validity of the mortgage, a question arises whether, under the circumstances, the rate of interest exacted did not amount to a hard or unconscionable bargain such as a Court of equity will give relief against" and accordingly reduced the interest as pointed out above. Similarly in another case where the plaintiffs had, in the belief that the defendant's claim to an estate was well founded, advanced the sums necessary to enable him to prosecute the successful appeal to the Privy Council it was held that the reward stipulated for was in the circumstances, excessive and unconscionable. The Judicial Committee of the Privy Council held that it was so and they accordingly set aside the agreement and awarded the plaintiff reasonable damages: see *Rajah Mokham Singh v. Rajah Rup Singh* (6).

It will be observed that relief was awarded to the plaintiffs in these cases not on the ground that they were procured by undue influence as defined by S. 16, Contract Act, but on the broad grounds on which relief was awarded by the English Courts of equity. In *Dhanipal Das v. Rajah Maneshar Bakshi Singh* (3), Lord Davey is however reported to have said: "The Subordinate Judge was wrong in deciding the case in accordance with what he supposed to be English equitable doctrine. He ought to have considered the terms of the amended S. 16 only." This would be in direct conflict with the judgment of *Srimati Kamini Sundari Chaudhrani v. Kali Prosunno Ghose* (5), already cited, unless we are to assume that by amending the Act the legislature intended to embody in S. 16 the rules enforced in this respect by the English Courts of equity and among them the rule that a transaction may be so unconscionable and the extortion so great as to be evidence of undue influence. I am of opinion that the amendment was made for that purpose and that the substituted definition of undue influence includes within its scope cases which

(7) [1975] 10 Ch. A. O. 389.

did not fall within the section as it originally stood. According to this section there are two elements necessary. One of the parties to the contract must be in a position to dominate the will of the other and he must have used that position to have obtained unfair advantage over the other. Now excessive interest in itself may not be a ground for relief but it may be evidence of the fact that the debtor must have been in a very helpless condition to accept the terms imposed by the creditor. The exorbitant nature of the interest itself may be evidence of that. It may also be evidence that he must have used it to obtain unfair advantage over the other if the position of the parties is such that we may fairly presume that otherwise the debtor would not have accepted those terms. In the present case the contract rate of interest is 60 per cent. The debtors were women who were not able to enter into the transaction themselves. They had applied for loans in other quarters and they had failed. The properties were going to be sold. If therefore these facts had stood alone it might be fairly presumed that unless the defendants were in a distressed condition and utterly helpless in the matter, and the plaintiff had not taken advantage of this position, they would not have cared to pay this interest.

In this case however it appears that the loan was negotiated by the plaintiff's witness 5, Sitapathi Naidu, who had a power of attorney from all these defendants. It is impossible to hold that he was in any condition of helplessness and that his mind was in any way dominated by that of the creditor. It was suggested in argument before us that the creditor, the payee, was only the benami holder but the evidence does not support this suggestion. It was also argued that he was in some way interested in the loan. That also has not been established whereas we have the facts admitted that some of the debtors in this case are his own daughters and that the promissory-note was attested by the husband of another female debtor. I am therefore clearly of opinion that one of the conditions necessary for the granting of relief does not exist in this case. Though, as I have pointed out above, the rate of interest provided

in the promissory-note in itself might, in the circumstances, show that the transaction was unconscionable and that the plaintiff used his position to dominate the will of the defendants, in this case such presumption is rebutted. I am therefore of opinion that the defendants are not entitled to any reduction of interest and I agree in the decree proposed, by his Lordship the Chief Justice.

S.N./R.K.

*Decree modified.***A. I. R. 1914 Madras 135**

MILLER AND TYABJI, JJ.

N. Venkataramier and another—Plaintiffs—Appellants.

v.

Vythilinga Thambiran Avergal—Defendant—Respondent.

Second Appeal No. 159 of 1913, Decided on 31st October 1913, from decree of Dist. Judge, Tinnevely, in Appeal Suit No. 218 of 1912.

(a) Madras Estates Land Act (1908), S. 213—Decree in suit under S. 213 appealed against—Second appeal from District Judge's decree lies to High Court—Madras Estates Land Act (1908), S. 192.

A second appeal in accordance with the provision of the Civil Procedure Code would lie to the High Court from an appellate decree of the District Judge passed on appeal from the decree of a Deputy Collector in suit under S. 213 of Madras Estates Land Act.

[P 136 C 2, P 137 C 1]

(b) Madras Estates Land Act (1908), S. 213—Cause of action respecting suit under S. 213 arises on date of distraint.

The cause of action in respect of which the suit under S. 213 Estates Land Act, is brought arises on the date of distraint and not on the day the property attached is released on payment of the money due. [P 137 C 2]

(c) Limitation Act (1908), S. 23—Wrongful distraint—Distraint is not a continuing wrong though injury continues.

Where the proceedings which give rise to the cause of action consist in wrongful distraint that distraint is not a continuing wrong though no doubt the injury continues, and not being a continuing wrong it will not give rise to a continuing cause of action under S. 23.

[P 136 C 2]

L. A. Govindaraghava Iyer—for Appellants.

S. Muthiah Mudaliar—for Respondent.

Miller, J.—This was a suit instituted under S. 213, Estates Land Act, before a Deputy Collector, decreed by him and dismissed by the District Judge on appeal. A preliminary objection is taken that no appeal lies to the High Court from the decree of the District Judge and is based on a contention that

S. 192 applies the provisions of the Civil Procedure Code only to the procedure in proceedings authorized by the Act and not so as to give an appeal which the Act does not give.

In my opinion this objection must fail. The language of S. 192 of the Act does not support it and there are two cases under the repealed Rent Recovery Act of 1865 which point the other way: *Ganne Kotappa v. Venkataramiah* (1) and *Veerasami v. Manager, Pittapur Estate* (2).

Reliance was placed on the recent case of *Rangoon Botatoung Co. Ltd. v. Collector, Rangoon* (3), in the Privy Council in which their Lordships held that no appeal lies as of right to His Majesty from a decision of the Chief Court of Lower Burma confirming the award of a Collector under the Land Acquisition Act in the town of Rangoon. That case seems to have turned on the question whether the decision was a decree or order of the Chief Court, and the Privy Council, as I understand the case, held that it was not a decree or order within the meaning of S. 109, Civil P. C., but was in the nature of an award. This case therefore does not help the respondent. In the present case the District Judge's decision is embodied in a decree and he was sitting in appeal. The provisions of Ch. 42, of the Code of 1882 are, by S. 192, made applicable to the matter and, as I have said, we cannot strike out those provisions which give the right of appeal and retain merely those which prescribe in what manner an appeal is to be heard and determined. It is not denied that the corresponding provisions of the present Civil Procedure Code apply where the old Code applied and the preliminary objection therefore fails. I have dealt with it as it was fully and ably argued for the respondent, but in my view the decision of the District Judge is right. He held that the suit under S. 213, Estates Land Act, is barred by limitation not having been instituted within three months of the cause of action.

In the appeal, as argued before us, the decision is attacked on the ground that plaintiffs had a continuing cause of action for the detention of their

property until they paid the money demanded and released it and that was within three months of the institution of the suit. The weight of authority in this Court is against the contention. The appellant may be said to receive some support from *Yamuna Bai Rani Sahiba v. Solayya Kavundan* (4), but that case is distinguished in *Pamu Sanyasi v. Zamindar of Jaypur* (5); and *Rajah of Veakata giri v. Isakapalli Subbiah* (6) is undoubtedly an authority against him. *Ram Narain v. Umrao Singh* (7) contains a dictum which supports the respondent. The present is not a case in which an order to restore the property had been made and the damages accrued owing to disobedience to the order, and I agree with the view taken in *Pamu Sanyasi v. Zamindar of Jaypur* (5) that where the proceedings which give rise to the cause of action consist in the wrongful distraint, that distraint is not a continuing wrong, though no doubt the injury continues; and not being a continuing wrong, it will not give rise to a continuing cause of action under S. 23, Lim. Act. In England the question what is 'a continuing cause of action,' seems to have arisen principally in regard to the point of time up to which damages can be assessed in any given action and then a "continuing cause of action" has been defined as involving a repetition of acts or omissions of the same kind as that for which the action was brought: *Hole v. Chard Union* (8). That definition if it can be used as a guide to a definition of a continuing wrong, does not help the appellants.

It seems to me that difficulties surround the case which the appellants urge upon us, and that we are on safer ground if we follow the authorities in this Court.

The appellants presented an alternative case thus: the claim is for return of the money paid by the plaintiffs to save their property from sale; such a suit is not cognizable by a Deputy Collector: therefore the suit is not competent and he should dismiss it on that ground leaving the plaintiffs to their rights in a civil Court.

(4) [1901] 24 Mad. 339.

(5) [1902] 25 Mad. 540.

(6) [1903] 27 Mad. 410.

(7) [1906] 29 All. 615.

(8) [1894] 1 Ch. 293.

(1) [1900] 10 M. L. J. 393.

(2) [1903] 26 Mad. 339.

(3) [1912] 16 I. O. 163=40 Cal. 21.

The answer is that this suit is not for recovery of the money paid; it is a suit for damages under S. 213, Estates Land Act, and if it bases a suit for the money in the civil Court that was for the plaintiffs to consider when they instituted it. They have not asked to be allowed to withdraw it. I need not deal with the other question raised, as in my opinion the appeal must be dismissed with costs on the question of limitation.

Tyabji, J.—It seems to me that S. 192, Madras Estates Land Act allows in this case an appeal to the High Court. *Rangoon Botatoung Co. Ltd. v. Collector, Rangoon* (3), seems to be distinguishable. It was decided in that case that no appeal lay to the Privy Council from an award under the Land Acquisition Act, as such an award was not a decree within the terms of S. 109, Civil P. C., 1908 (S. 595 of the Act of 1882). Here we have a decree, which seems to me to fall under the terms of that section.

On the point whether the suit as framed is barred I agree that it is. The plaintiff proceeds on the basis that the cause of action arose (within the meaning of Art. 21 of part 1 of the Schedule of the Estates Land Act) when the plaintiff was served with the notice under S. 95 of the said Act. Receiving such a notice would in itself cause no damage, for which alone a suit under S. 213 lies. The only other alternative on the allegations in the plaint seems to be that the cause of action in respect of which this suit is brought, arose on the date of the distraint. The payment made by the plaintiff after notice under S. 95 is not alleged in the plaint as giving rise (either by itself or in combination with the distraint) to the cause of action. The payment is referred to merely for assessing the damages claimed. It was suggested (though not admitted) in argument that rent was actually due and that this was the reason why the plaintiff did not wish the question of the payment to be raised in this suit. It was also argued that a suit on the payment would lie in a civil Court not before the Collector. But whatever their reasons, the plaintiffs did not frame their suit on the basis that the payment constituted a part of the whole of the cause of action. In *Pamu Sanyasi v. Zamindar of Jaypur* (5), it was held that continuance of a dis-

traint wrongfully made was not in itself a continuing wrong, distinguishing *Yamuna Bai Rani Sahiba v. Solayya Kavundan* (4) where the detention continued after the attachment had been set aside. See also *Rajah of Venkatagiri v. Isakapalli Subbiah* (6). The plaint before us however makes no allusion to any continuing wrong.

If my view of the effect of the plaint is right, the only cause of action shown in the plaint, if any is shown, is the distraint, and time must be taken to run from then. The suit is therefore barred and the appeal must be dismissed with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 137

MILLER AND SPENCER, JJ.

Dasappa Chetty—Petitioner.

v.

Chikathayee—Respondent.

Criminal Revn. No. 516 of 1913, and Criminal Revn. Petn. No. 416 of 1913, Decided on 9th January 1914, from order of First Class Sub-divisional Magistrate, Sankari Division, in Misc. Case No. 7 of 1913.

Criminal P. C. (5 of 1898), S. 488—Wife's refusal to attend panchayat inquiry into charge of adultery is no ground to reject application.

A wife's refusal to attend a panchayat convened to consider a charge of adultery against her, is no reason for rejecting an application for maintenance made by her under S. 488. [P 137 C 2]

K. S. Krishnaswami Aiyar for *T. Narasimha Aiyangar*—for Petitioner.

P. R. Narayanswami Aiyar—for Respondent.

Order.—The only ground argued is that the petitioner was excommunicated for refusing to attend a panchayat convened to consider her conduct, and that, it is argued, is a reason for refusing her a separate maintenance. This point does not seem to have been taken before the Magistrate, and we do not think that excommunication, under the circumstances alleged, is a ground on which the Magistrate was bound to reject the petition. We will not interfere with his order.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 138 (1)SADASIVA AIYAR AND SESHAGIRI
AIYAR, JJ.*Sudala Muthu Moopan and others—*
Defendant—Appellants.

v.

Sankara Narayana Aiyar and others—
Plaintiff and Defendants—Respondents.Second Appeal No. 2363 of 1913, De-
cided on 6th March 1914, against decree
of Dist. Judge, Tinnevely, in Appeal
Suit No. 404 of 1911.**Transfer of Property Act (1882), S. 51—**
What are not improvements stated.

Spending of a small sum of money every
year in the usual manuring and levelling of
the lands purchased for the purpose of
husbandman-like cultivation thereof, does not
entitle a person to recover the same as value
of improvements, when the sale, in pursuance
of which the lands were being enjoyed is
set aside as not binding on the plaintiff owing
to the person who actually sold the lands not
being authorized to do so. [P 138 C 2]

*M. D. Devadoss—*for Appellants.*T. R. Krishnaswami Iyer* for *T. R.*
*Ramachandra Iyer—*for Respondents.

Facts.—Suit was by a Hindu male,
on attaining majority, to set aside a
sale effected by his mother as his
guardian, during his minority. Both
the lower Courts found that the sale,
not being for any necessity, was not
binding upon the plaintiff. The defen-
dants, however, claimed the value of
improvements effected by them to the
property in dispute, which improve-
ments consisted in manuring and level-
ling the suit property. The lower
appellate Court negatived the claim,
holding that the defendants failed to
prove that any improvements had been
effected by them and that even if they
had spent anything at all, it was only
for the purpose of husbandman-like
cultivation of the property in suit. The
defendants then appealed to the High
Court.

Judgment.—The only arguable ques-
tion in this second appeal is whether
defendants 3 to 7 are legally entitled
to be reimbursed by the plaintiff the
costs of improvements effected by them
on the lands in their possession. But
even this question would arise only if
the defendants have proved that they
did effect such improvements and if
they also proved satisfactorily the value
thereof.

As we understand the judgment of
the learned District Judge, he finds

that the defendants 3 to 7 have not
proved that they have done anything
more than spending a small sum every
year in the usual manuring and level-
ling of the lands for the purpose of
husbandman-like cultivation thereof
and that they have not proved what
they have spent even on such usual
acts.

There is, therefore, no foundation for
the second appeal which is dismissed
with costs.

S.N./R.K.

*Appeal dismissed.***A. I. R. 1914 Madras 138 (2)**

SANKARAN NAIR AND AYLING, JJ.

Arumuga Mudali and another—Peti-
tioners.

v.

S. E. Koo, Perumalswamy Chetty and
*others—*Respondents.

Criminal Revn. No. 521 of 1913 and
Criminal Revn. Petn. No. 421 of 1913,
Decided on 17th December 1913, from
order of First Class Magistrate, Sankeri,
in Misc. Case No. 9 of 1913.

(a) Criminal P. C. (5 of 1898), S. 144—
Magistrate thinking force at his disposal
insufficient to prevent breach of peace can
pass temporary order under S. 144.

Where a Magistrate apprehends that, with
the force at his disposal, he cannot prevent a
breach of the peace, he has justification to
pass a temporary order under S. 144 stopping a
procession. [P 138 C 2]

(b) Criminal P. C. (5 of 1898)—Scope.

The fact that a procession is a luxury is
not a sufficient ground for passing an order
under S. 144. [P 138 C 2]

*T. M. Krishnaswamy Aiyar—*for Peti-
*tioners.**K. Jagannatha Aiyar—*for Respon-
*dents.**J. C. Adam—*for the Crown.

Order.—The Magistrate in the course
of a long judgment assigns two reasons
for his order: (1) that the annual pro-
cession desired by the Raikolars is of
the nature of a luxury and not a neces-
sity; (2) that it cannot be allowed with-
out grave danger of a breach of the
peace, with the force at the Magistrate's
disposal. The first is no ground for
passing the order. The second is a
good ground for passing a temporary
order under S. 144, Criminal P. C., and
we cannot say that this order is passed
without jurisdiction and, therefore, we
decline to interfere.

S.N./R.K.

Petition rejected.

A. I. R. 1914 Madras 139

AYLING AND SESHAGIRI AIYAR, JJ.

Venkatrama Iyer and others—Accused—Petitioners.

v.

Swaminatha Iyer—Complainant—Respondent.

Criminal Revn. No. 780 of 1913, and Criminal Revn. Petn. No. 631 of 1913, Decided on 1st May 1914 from order of 1st Class Sub-Divl. Magistrate, Kumbakonam, in Cr. Apps. Nos. 200 and 202 of 1913.

Criminal P. C. (1898), Ss. 15 and 16—Absence of some Bench Magistrates present at earlier stages, from later stages of trial does not vitiate trial.

The absence of some of the Bench Magistrates, who were present at the earlier stages of a trial, from the further stages of the trial and at the time of judgment, does not vitiate the trial or invalidate the conviction: 21 *Mad.* 246, *Foll.* 12 *Mad.* 113; 20 *Cal.* 870 and 23 *Cal.* 194, *Ref.* [P 139 C 1, 2]

T. Arumainatham Pillai—for Petitioners.

J. C. Adam—for Government.

Ayling, J.—The sole ground on which we are asked to revise the decision of the lower appellate Court in this case is that all the Bench Magistrates who were present at the earlier stages of the case did not take part in the decision thereof or sign the judgment. It is not denied that the two Magistrates who did sign the judgment were present throughout all the earlier hearings and heard all the evidence or that they constituted a legal quorum. I see no reason to differ from the view taken in *Karuppana Nadan v. Chairman, Madura Municipality* (1), which is clear authority for holding that the conviction is not illegal. This conflicts with no provision of law, and no consideration of justice or expediency. The contrary view would materially hamper the work of Benches of Magistrates in all but the very simplest cases. I do not think any argument can be based on a supposed analogy with the case of a jury or a body of arbitrators. The law and practice in England appears to be similar to what I hold to be legal here, vide S. 20, Summary Jurisdiction Act.

I would dismiss the petition.

Seshagiri Aiyar, J.—In this case the accused were charged with assault under S. 352, I. P. C., and convicted. The trial was before a Bench of Honorary Magistrates for the town of Kum-

bakonam. At the commencement of the trial six members of the Bench, including the President, took part. On adjourned hearings sometimes four and sometimes two only took part. The trial which was concluded on 19th June 1913 was attended by only two. They delivered the judgment in the case. It is conceded that these two Magistrates took part in the trial throughout. The question is whether the proceedings are vitiated by the fact that those who took part in the trial in the beginning and in the intermediate stages were not present to give their final decision in the case. S. 15, Criminal P. C., Cl. (1), empowers the Local Government to direct "two or more Magistrates to sit together as a Bench." If a Bench had been constituted in this manner it may well be argued that if any member of the Bench ceases to take part in the subsequent proceedings, the trial is not regular. In Cl. 2 of that section the legislature has provided that the powers of a Bench shall be "of the highest class conferred on any one of its members." If a Bench took cognizance of a case triable by a First Class Magistrate on the ground that one of its members was a Magistrate of the first Class can it be tried by the remaining members in his absence? The intention of the legislature apparently is that all the members before whom the case was begun should continue to take part in the proceedings until judgment. Therefore, if the matter were res integra, I would have felt considerable hesitation in holding that the proceedings in this case are regular. But it was decided in this Court in *Karuppana Nadan v. Chairman Madura Municipality* (1) that the absence of some of the Magistrates from the further stages of the trial and at the time of judgment will not vitiate the proceedings. I am unwilling to disturb a practice which has guided lower Courts for such a long period.

Ordinarily Honorary Magistrates will not sit continuously and it may result in undue prolongation of trials if they are required to attend throughout. The object of appointing Honorary Magistrates to hear cases is to ensure speedy disposal that will be defeated by insisting upon the attendance of all the members of the Bench from beginning to end. While thus alive to the difficul-

(1) [1898] 21 *Mad.* 246.

ties which may result from not following *Karupiana Nadan v. Chairman, Madura Municipality* (1), I would suggest that the Government under S. 16 of the Code should frame rules to obviate the difficulty. The Legislature must also make some change in the language of the section. The analogy of arbitrators is not in point. As pointed out by Mr. J. C. Adam for the Public Prosecutor the arbitrators derive their power under a contract and each of the referring parties is entitled to say that he has the right to the experience and guidance of every referee in deciding his case. *Thammiraju v. Bapiraju* (2) proceeds on that principle. Nor is the provision relating to the termination of the proceedings when one of the impanelled jurors is unable or unwilling to take part in the trial *pari materia* with this case. The minimum number of jurors has been fixed by the notification of the Government in the different Districts of the Presidency. The absence of one of the jurors will vitiate the trial as the required number does not take part in it. On the other hand, the rules promulgated in England for trials by Justices of the Peace (Halsbury, Vol. 19, S. 1259) seem to indicate that the trial will become invalid only if persons who did not take part in the taking of the evidence assisted in arriving at the final decision. *Hardwar Singh v. Kheda Ojha* (3) and *Damri Thakur v. Bhowani Sahoo* (4) proceed upon this principle. I agree with my learned colleague in dismissing this petition.

S.N./R.K.

Petition dismissed.

(2) [1889] 12 Mad. 113.

(3) [1893] 10 Cal. 870.

(4) [1896] 23 Cal. 194.

A. I. R. 1914 Madras 140

AYLING AND SADASIVA AIYAR, JJ.

Jagaveera Rama Venkateswara Ettappa Maharaja Iyer — Defendant—Petitioner.

v.

Suppanasarri and others — Respondents.

Civil Misc. Petns. Nos. 822, 977 to 980, 982 to 986, 988, 991 to 1004, 1006 to 1008, 1010 to 1025, 1027 to 1067, 1070, 1072 to 1102 of 1911, Decided on 6th August 1913.

(a) Civil P. C., S. 109 — Several decrees obtained in rent suits following single judgment — Total amount recoverable under

decrees exceeding Rs. 10,000—Special leave to appeal to Privy Council can be granted.

Where the decrees obtained in number of rent suits follow a single judgment and the total amounts recoverable under such decrees exceed Rs. 10,000, though the amount involved in each decree is very small, the conditions as to pecuniary value required for a certificate of fitness for an appeal to the Privy Council is satisfied and special leave to appeal can be granted: 8 M. I. A. 265 (P. C.), Ref.

(P 140 C 2)

(b) Civil P.C., Ss. 109 and 110—Important questions of law involved—Case was held to be otherwise fit for appeal to His Majesty.

Where more than one important and wide-reaching question of law is involved in the decision sought to be appealed against the case is otherwise a fit one for appeal to His Majesty in Council.

(P 140 C 2)

S. Srinivasa Aiyangar and *S. Ramaswami Aiyar*—for Petitioners.

P. R. Srinivasa Aiyangar—for Respondents.

Order.—We think that the decrees of the High Court in these 118 suits, following a single judgment, do involve directly in part and indirectly to a larger extent, claims to and respecting property of the value of Rs. 10,000 and upwards. The report of the Revenue Divisional Officer (which we accept) makes this clear. Their Lordships of the Privy Council gave special leave in a similar case, *Joykissen Mookerjee v. Collector of East Burdwan* (1). The conditions or some of the conditions under which special leave was being granted before 1875, seem to have been adopted by the Indian Legislature in the enactments passed by such legislature from and after 1875 dealing with appeals to the Privy Council as conditions to be kept in view by the High Courts in issuing certificates as regards the fitness of cases to be appealed to the Privy Council: see also Cl. 19, Letters Patent. Not only do these consolidated suits satisfy the conditions mentioned in para. 2, S. 110, Civil P. C., in other words, they do not only involve directly or indirectly claims worth more than Rs. 10,000, but there is more than one important and wide-reaching question of law involved in the decision sought to be appealed against, and we think that the case is (in the language of O. 45, R. 3) "otherwise a fit one for appeal to His Majesty in Council."

Let a certificate therefore issue mentioning both these grounds of fitness.

(1) [1859] 8 M. I. A. 265 (P. C.).

One certificate as regards the decisions in the seconds appeals in which the counter-petitioner (or their representatives in the cases where the deaths of parties have occurred) have been served (consolidating them for this purpose) will be issued.

S.N./R.K.

*Certificate issued.***A. I. R. 1914 Madras 141 (1)**

SANKARAN NAIR AND AYLING, JJ.

C. Karunakara Menon—Accused—Appellant.

v.

T. M. Nair — Complainant — Petitioner.

Criminal Appeal No. 491 of 1913, Decided on 23rd December 1913, against order of Third Presy. Mag., George Town, Madras.

Penal Code (1860), S. 500—Newspaper article ambiguous—It should be interpreted in favour of accused.

Where a newspaper article is ambiguous and capable of an interpretation making it both defamatory and innocent, it should be interpreted in favour of the accused and the more sinister interpretation should not be put on it.
[P 141 C 2]

R. Shadagopachariar — for Appellant.

Rosario—for Complainant.

Public Prosecutor—for Government.

Facts.—The accused, Mr. Karunakara Menon, is the Editor of the Indian Patriot, a daily newspaper in circulation in Madras. The complainant, Dr. T. M. Nair, is a medical practitioner in Madras and is a Municipal Commissioner for the City of Madras, representing the Tondiarpet Division. In the course of a private conversation between Dr. Nair and another Municipal Commissioner, Dr. Nair, when told of the grievances of his Division, replied to him, "Hang them on the nearest tree." It was doubtful whether this referred to the Municipal Commissioners as a body or to the residents of the Tondiarpet Division. This was repeated by one of the Municipal Commissioners at the meeting of the Councillors, and upon it an article appeared in the "Indian Patriot," commenting upon the conduct of Dr. Nair. Then Dr. Nair charged the Editor, Mr. Karunakara Menon, with defamation before the Third Presidency Magistrate. The accused was tried, convicted and sentenced to pay a fine of

Rs. 300. He appealed to the High Court.

Judgment.—The point of the defamation complained of lies in the imputation that Dr. Nair was indifferent, not to the opinion of his opponents, but to the sufferings of the inhabitants of Tondiarpet. The question is whether the article complained conveys this imputation. The wording is somewhat ambiguous, but on the whole we do not think the more sinister interpretation should be put upon it. We do not think it desirable that private conversation of this kind should be reported in an account of the proceedings of public bodies, but we are not satisfied that the criminal offence of defamation has been committed and we set aside the conviction and sentence. The fine if paid will be refunded.

S N./R.K.

*Conviction set aside.***A. I. R. 1914 Madras 141 (2)**

MILLER, J.

Ottapurakal Thayath Suppi and others —Defendants—Petitioners.

v.

Alabi Masahur Koya —Plaintiff—Respondent.

Civil Revn. Petn. No. 772 of 1912, Decided on 13th October 1913, from decision of Dist. Judge, North Malabar, in Civil Misc. Appeal No. 10 of 1912.

(a) Civil P. C., (5 of 1908), O. 39, R. 2 (3) —Disobedience to injunction order—Order refusing attachment is one under R. 2 (3) and appealable under Civil P. C., O. 43, R. 1 (r).

An order refusing to attach property for disobedience to an injunction order is an order passed under O. 39, R. 2 (3) and is appealable under O. 43, R. 1 (r).
[P 142 C 1]

(b) Civil P. C., (5 of 1908), O. 39, R. 2 (3). —Attachment of property is not necessary for order of detention of person in prison for disobedience under R. 2 (3).

Attachment of property is not a pre-requisite before an order to detain a person in prison for such disobedience under O. 39, R. 2 (3) can be passed.
[P 142 C 2]

(c) Civil P. C., (5 of 1908), S. 115—No question of jurisdiction—High Court will not interfere under Ss. 115 or 151—Civil P. C. (5 of 1908), S. 151.

Where the lower Court has acted with jurisdiction in passing an order, the High Court will not interfere either under S. 115, or 151.
[P 142 C 2]

J. L. Rosario and T. V. Seshagiri Ayer—for Appellants.

A. Sundaram—for Respondent.

Judgment.—I have no doubt that in this case an appeal lay to the District

Judge. The decision of *Venkataswami v. Stridavamma* (1) is an authority which is binding upon me. It was decided under the old Code in a case in which the Court below had refused to appoint a receiver under S. 503. O. 43. R. 1 (r) of the present Code provides that an appeal lies from orders under O. 39, R. 2, and if I follow the Full Bench case I must hold that an order refusing or declining to attach the property of a person who has disobeyed an injunction or to commit him to prison is an order under that rule. I am bound to follow that case and I must hold that an appeal lay.

Apart from that case the language of O. 43 suggests the same conclusion. Some of the sub-rules provide for appeals from orders refusing to make the order which is expressly provided for in the rules referred to in those sub-rules, and such orders are described as made under the rules to which they refer though they are not expressly provided for by those rules. That suggests that an order rejecting an application under O. 39, R. 2, is an order made under that rule. This is confirmed by the Full Bench decision.

It was further suggested that in the particular case of O. 39, R. 2, there should be no appeal against an order, which amounts to an order of acquittal of contempt of Court; that is based on this, an order of acquittal in a case of disobedience to an injunction is not against the interest of any party to the suit; if at all, it is only against the interest of the Court itself; nobody is injured by it and nobody ought to have a right of appeal from it. That, I think, is not so. It is clear to me that in many cases disobedience to an injunction may result in an injury to one or other of the parties to the suit and sub-R. 4 provides for compensation to be paid by the Court out of the proceeds of the sale of the attached property of the delinquent, a provision which to my mind makes it clear that the Court did not intend that the matter should be considered as one in which the parties had no interest. I have no doubt that, as a matter of fact, it is very much to the interest of the party who obtains the injunction to see that it is obeyed, and if the Court refuses in its

(1) [1887] 10 Mad. 179.

discretion to punish for disobedience, it is to the interest of the party to appeal and get punishment inflicted.

There is therefore nothing in this contention which would lead me to think that an appeal is not intended to be given. Nor do I think there is anything in S. 104 (h), against the competency of the appeal. S. 104 (h) provides in general terms, that when under the Code a sentence of imprisonment has been passed or a fine imposed, there shall be an appeal. It has nothing to do with cases in which a sentence is not passed, and does not suggest, at any rate, to my mind, that the rule should not provide for an appeal in such cases. I hold then that an appeal lay, and if the District Judge has rightly heard the appeal, I cannot interfere on his petition under S. 115 and, for some reason or other which I do not understand, under S. 151 also. No argument has been addressed to me on S. 151, and I am certainly unable to see that the sending of the disobedient party in this case to prison for disobedience to the injunction is a matter requiring my interference under S. 151. Nothing has been shown to me to suggest that the order of the District Judge works injustice of any kind. But to enable me to interfere under S. 115 it is contended that the order is illegal, because no attachment has been made of the property of the delinquent. That contention is based upon the words "and may also order such person to be detained" in O. 39, R. 2, sub-R. 3, and it is contended that this means that in addition to attachment the Court may order such person to be detained in the civil prison, and inasmuch as there is no attachment in this case, the order for detention is illegal and is an order which I must correct under S. 115, I have had some doubt, but on the whole I think it is not so. Though the language in the present Code is changed, the change has not, I think, effected a change of the law, at any rate, so as to make it incumbent to order attachment before ordering commitment. The phrase "may also commit" means I think, "shall also have the power to commit," that is to say, the rule gives two powers—power to attach and also power to commit: it does not expressly say that both may be exercised cumulatively and I need

not decide whether that is the law or not. The rule does, I think, necessarily imply that the powers may be exercised alternatively and that was allowed by the old Code.

That being my view of the case, there is nothing wrong in the order of the District Judge and I dismiss the petition with costs.

S.N./R.K.

Petition dismissed.

A. I. R. 1914 Madras 143 (1)

SADASIVA AIYAR AND SESHAGIRI
AIYAR, JJ.

Sankuratri Timmayya—Petitioner.

v.

*Upplapati Venkata Vijaya Gopalaraju
Bahadur Zamindar Garu*—Respondent.

Civil Revn. Petn. No. 23 of 1913, Decided on 6th March 1914, from order of Dist. Judge, Godavari, in I. A. No. 231 of 1912, in Appeal Suit No. 113 of 1911.

Civil P. C. (1908), S. 115—Vakeel's fee entered wrongly in decree owing to mistaken calculation—High Court can interfere.

Under S. 115, Civil P. C. the High Court can interfere and correct an incorrect figure entered in a decree as Vakil's fee owing to a mistaken calculation, but not an omission to enter proportionate costs which could have been corrected by an appeal. [P 143 C 1,2]

T. Prakasam—for Appellant.

P. Narayanamurthi—for Respondent.

Judgment.—The District Judge acted with material irregularity in not correcting the patent arithmetical error in the calculation of the vakil's fees and we correct that error by inserting Rs. 10 instead of Rs. 20 as the vakil's fees due to the respondent before us in his capacity of appellant in Appeal Suit No. 113 of 1911 in the Godavari District Court. Even if S. 115, Civil P. C., does not apply we think that such patent clerical or arithmetical errors committed by the lower Courts could be corrected by us under the general powers of superintendence vested in us under the Charter Act, S. 15.

As regards the District Judge's having awarded proportionate costs in the District Munsif's Court also, on Rs. 600 odd, though the District Munsif awarded the vakil's fees alone to the respondent on that amount and the respondent had not appealed to the District Court in respect of the other costs (such as process-fees, etc.) disallowed by the Munsif, the District Judge justifies such award of excess costs under the

powers vested in the appellate Court under O. 41, R. 33.

Even if he was wrong in that opinion, that is not an error which could be corrected under S. 115, Civil P. C., especially as S. 115 applies only to cases "where no appeal lies" to the High Court, and the appellant could have appealed against the order awarding the excess costs passed by the District Judge. This petition is allowed as regards the Rs. 10 and is dismissed in other respects. The parties will bear their own costs in this petition.

S.N./R.K.

Order modified.

A. I. R. 1914 Madras 143 (2)

MILLER, J.

Chapalamadugu Pedda Balliah and another—Accused—Petitioner.

v.

Muthiyalu Venkatasami—Complainant—Respondent.

Criminal Misc. Petn. No. 122 of 1914, Decided on 29th April 1914.

Criminal Trial—Charge in criminal case, defence in civil suit—Criminal proceeding should be stayed 7 only if civil suit is to end soon.

Where the charge in a criminal case is a defence to a civil suit, criminal proceedings should be stayed only if there is a likelihood of the civil proceedings ending soon. [P 143 C 2]

A. Viswanatha Aiyar—for Appellants.

T. Rama Chandra Row—for Respondent.

Order.—I think it is admissible to stay the criminal proceedings. The charge comes up by way of defence to the suit, and it seems on the whole better that the two proceedings should not go on at the same time. But the possibility that the civil litigation may be unduly protracted is not to be disregarded, and it would be wrong to stay proceedings by an order made now for all the time that may be necessary to obtain a final decision in the civil suit. It is said that the suit is proceeding under O. 37, Civil P. C., in the District Munsif's Court, and if so, it should not take a very long time in that Court. I will stay proceedings until disposal of the suit by the District Munsif or for six months from this date, whichever is earlier, after which, if no further order is passed, the case in the Magistrate's Court may proceed.

S.N./R.K.

Petition allowed.

A. I. R. 1914 Madras 144 (1)

SANKARAN NAIR AND AYLING, JJ.

Rajavelukoti Muthukrishna Yajendra Bahadur Varu Zamindar of Tirupasur—Appellant.

v.

Chetty and others—Respondents.

Letters Patent Appeal Nos. 238 to 242 of 1912, Decided on 12th February 1914, from judgment of Sadasiva Aiyar, J. in Second Appeals Nos. 673, 671, 670, 669, and 672 of 1912.

Madras Estates Land Act (1908), S. 153—Ryot in possession under lease when Act came in force is "an occupancy ryot"—Ejectment suit cannot lie under S. 153.

A ryot let into possession under a lease for a period of one year and in possession on the date the Estates Land Act came into force is "an occupancy ryot" and no suit for his ejectment can lie under S. 153. [P 144 C 1]

L. A. Govinda Raghava Aiyer for *B. Govindan Nambiar*—for Appellant.

K. N. Gopal—for Respondents.

Judgment.—The suits were for ejectment under S. 153, Madras Estates Land Act.

Section 153, Madras Estates Land Act applies only to non-occupancy ryots and the question for decision is whether the respondents (defendants) are non-occupancy ryots.

They are ryots who were in possession of their holdings at the commencement of the Act and are, therefore, occupancy ryots, unless they come within some provision of the Act to the contrary. It is contended by Mr. L. A. Govinda Raghava Iyer that the defendants are tenants who were let into possession in 1907 under leases for a definite period of one year and that, therefore, they are non-occupancy tenants, and he relies upon the proviso to S. 153 to the effect that nothing in that section shall affect the liability of a non-occupancy ryot to be ejected on the ground of the expiry of the term of a lease granted before that Act.

Sections 151 and 152, Madras Estates Land Act refer to suits for ejectment of occupancy ryots. S. 153 and the proviso refer to suits for ejectment of those who are non-occupancy ryots under the Act. It is only when it is shown that a person is a non-occupancy ryot that the S. 153 can be applied. It cannot be invoked to cut down the provisions of the section which defines occupancy ryots. Mr. Govinda Raghava

Iyer contends that the proviso could have, in contemplation, only ryots like the defendants in these cases, because the only other class of cases of non-occupancy ryots contemplated by the Act are ryots holding "old waste" and their case is provided for in S. 157 which we may point out, refers to non-occupancy tenants. We are not satisfied that ryots holding "old waste" are the only non-occupancy ryots contemplated by the Act. There may be others: see S. 6, Cl. 5 and 6 Madras Estates Land Act. Even otherwise, as already pointed out, it is not permissible to cut down the occupancy rights conferred by S. 6 by inferences drawn from another section which deals exclusively with the ejectment suits of non-occupancy ryots.

We allow this contention and dismiss the Letters Patent Appeal No. 241 of 1912 with costs and the other Letters Patent appeals without costs.

S.N./R.K.

*Appeal dismissed.***A. I. R. 1914 Madras 144 (2)**

SADASIVA AIYAR AND SPENCER, JJ.

In re Authoor Valappil Syed Ahmad Musaliyar—Appellant.

Criminal Appeal No. 9 of 1914, Decided on 27th February 1914, from order of Sess-Judge, South Malabar Divn., in Case No. 62 of 1913.

Penal Code (1860), Ss. 471 and 469—Abettor of forgery cannot be convicted of offence under S. 471.

An abettor of the forgery of a document cannot be convicted of the offence of using it as genuine: 23 All. 84; 26 P. R. 1901 Cr. Foll. [P 144 C 2]

S. Swaminadhan—for Appellant.

T. C. Adam—for Government.

Judgment.—Following *Queen-Empress v. Umrao Lal* (1): see also *Mokand Lal v. Emperor* (2) and Mayne's Criminal Law, para. 608, we set aside the conviction and sentence under S. 471, I. P. C., as the prisoner was the person who abetted the forgery of the document sought to be used by him as genuine. On the facts we uphold the conviction under Ss. 467 and 109, I. P. C. We reduce the sentence under the circumstances to one of 18 months' rigorous imprisonment.

S.N./R.K.

Sentence reduced.

(1) [1901] 23 All. 84.

(2) [1901] 26 P. R. 1901 Cr.

A. I. R. 1914 Madras 145

WHITE, C. J., AND OLDFIELD, J.

Abdul Rahiman Haji Fakir Mahomed and others—Plaintiffs—Appellants.

v.

D. Rangiah Goundan and others—Defendants—Respondents.

Second Appeal No. 132 of 1911, Decided on 10th October 1913, from decree of Sub-Judge, Nilgiris, in Original Suit No. 28 of 1910.

(a) Contract Act, S. 220—Agent employed for procuring sale to principal for specific sum—Vendor's willingness to transaction withheld from principal—Acceptance of secret commission for bringing about sale amounts to breach of duty.

Where an agent, who is employed for the single purpose of procuring the sale to his principal of certain property for a specified sum, withholds from his principal the fact that on the date of his employment the vendor was willing to part with the property for that sum, and accepts from the vendor a secret commission for bringing about the sale, commits a gross breach of duty towards his principal, so as to disentitle him to any remuneration: *Hippesley v. Knee Bros.*, (1905) 1 K. B. 1, *Dist. Andrews v. Ramsay Co.*, (1903) 2 K. B. 635, *Foll.* [P 146 C 1, 2]

(b) Contract Act, S. 74—Contract providing payment of 24 per cent interest—In absence of default interest at 12 per cent was to be payable—Payment of higher rent is not by way of penalty.

Where a contract of mortgage provides that the mortgagor shall pay interest at the higher rate (24 per cent.) with a proviso that if no default is made and the instalments are paid punctually interest at the lower rate (12 per cent.) shall be payable, the provision as to the payment of the higher rate of interest is not by way of penalty and is recoverable: 18 I. C. 417 (*F. B.*); *Wallis v. Smith*, 21 Ch. D. 243; 5 I. C. 665 *Foll.* 20 Mad. 371, *Foll.*; [I 148 C 1]

(c) Principal and Agent—Agent retaining money as interest on principal sum subsequently found not due from principal—Principal must be credited with interest retained and interest on the same at contract rate.

Where an agent retains in his hands, a sum of money as interest, on the principal amount subsequently found not to be due from the principal to the agent, the principal is entitled to be credited with the amount of interest on principal amount thus retained by the agent in his own hands and the principal is also entitled to be credited with interest on the principal amount thus retained at the contract rate: 16 Bom. 141, *Dist.* [P 148 C 1]

(d) Deed—Construction—Principal amount to be paid by instalments—Higher interest

was to be charged on failure to pay "on due date"—"Due date" refers to all instalments becoming due.

Where there is a provision in a document that the principal amount secured thereby should be paid in instalments on failure to pay on "due date" higher rate of interest should be charged, the words "due date" should be construed as referring not to two instalments only but to all the instalments when they become due. [P 147 C 1, 2]

T. Richmond, K. S. Ganapathy Aiyar, S. Varada Chariar and S. A. Walkar—for Appellants.

T. R. Ramachandra Aiyar, T. Ethiraja Mudaliar, H. Balakrishna Rao and A. Atchuta Menon—for Respondents.

White, C. J.—The first point for determination in this appeal is whether the consideration for a mortgage executed by the firm of the 1st and the deceased Manjaya Gounden defendant to the plaintiffs on 3rd March 1898 (Ex. B) failed to the extent of the sum of Rs. 20,000. It is common ground that this Rs. 20,000 forms part of a total sum of Rs. 1,20,000 which is stated in the deed to be the consideration for the mortgage. This sum of Rs. 20,000 represents remuneration which plaintiff 1 says defendant 1 (I will refer to them hereafter as the plaintiff and the defendant) was liable to pay to him for work done by the plaintiff as the defendant's agent. Out of this Rs. 20,000, Rs. 19,200 is a fixed sum said to be payable by the defendant to the plaintiff for work done by the plaintiff in carrying out a certain transaction as the defendant's agent. The transaction was the arranging for a sale by a Mr. Leishman to the defendant of Mr. Leishman's share in two firms which carried on business as brewers. Whilst acting as the defendant's agent the plaintiff accepted a sum of Rs. 5,000 from Mr. Leishman during the course of the negotiations. Mr. Richmond, who appeared for the appellants, contended that there was no relation of principal and agent as between the plaintiff and the defendant until February 1898, when the defendant wrote the letter, Ex. J., agreeing to pay Rs. 19,200 to the plaintiff if he could get Mr. Leishman to accept a sum of Rs. 80,000 for Mr. Leishman's share in the two breweries. I think, however, upon the evidence there can be no doubt that the plaintiff had become the defendant's agent for the purpose of carrying out

this transaction prior to the writing of this letter. It seems to me that the receipt of this sum of Rs. 5,000 by the plaintiff from Mr. Leishman at the time when he was conducting the negotiations on behalf of the defendant is in itself sufficient to disentitle the plaintiff to claim the remuneration.

The general principle is well known. Mr. Richmond's argument, as I understood it, was that, inasmuch as the plaintiff was agent to carry through the transaction for a sum which had already been fixed by his principal, there was nothing to prevent him from accepting remuneration from Mr. Leishman. I cannot possibly accede to this contention. The case of *Hippesley v. Kneebros*. (1) really has no bearing on the question I am now considering. The retention of the discounts in that case by the plaintiff could not have in any way embarrassed the agent in the discharge of his duties to his principal, and there was no conflict between the agent's duty to his principal and his personal interest. In my opinion the present case comes within the principle of the decision of *Andrews v. Ramsay and Co.*, (2). There an agent to sell property sold the property, but received a secret profit. It was held that not only must he account for that profit to the principal, but he was not entitled to receive any commission from his principal. There, the agent of the vendor received a secret profit from the purchaser; here the agent of the purchaser received a secret profit from the vendor, but the principle is of course the same. It seems to me that the receipt of this Rs. 5,000 in itself disentitles the plaintiff to claim the remuneration. But we have more than this. On 3rd February 1898 the defendant wrote to the plaintiff the letter to which I have already referred, in which he agreed to pay the plaintiff a bonus of Rs. 19,200, if he could get Mr. Leishman to accept Rs. 80,000 for his share in the two breweries. Three days prior to this Mr. Leishman had written to the plaintiff a letter in which he said that if the plaintiff could arrange with the defendant to pay Mr. Leishman Rs. 80,000, on certain terms he would sell his share in the breweries for Rs. 80,000. Therefore, when the plaintiff took an undertaking from his principal

that the principal would pay him (the plaintiff) Rs. 19,200 if he could get Mr. Leishman to accept Rs. 80,000 the plaintiff was aware that Mr. Leishman was ready and willing to accept that sum. In view of the relations between the plaintiff and the defendant when the letter of 3rd February was written it seems to me perfectly clear that the plaintiff in not informing his principal that Mr. Leishman was willing to take the Rs. 80,000, committed a gross breach of his duty to his principal, and that the principal is not liable to pay him the agreed remuneration. The plaintiff's case is that a sum of Rs. 800 the difference between Rs. 19,200 and Rs. 20,000 was the sum agreed to be paid by the defendant to the plaintiff as further commission for further services rendered by the plaintiff. Mr. Richmond has argued that inasmuch as this sum admittedly forms part of the alleged consideration for which the mortgage was executed, the onus is on the defendant to show that no further remuneration was promised or that no further services were rendered. This point is not taken in the grounds of appeal and it does not seem to have been argued in the Court below that, assuming the consideration quoad Rs. 19,200 failed, failure of consideration was not proved as regards the sum of Rs. 800. In these circumstances I am not prepared to differ from the finding of the learned Judge that there is a failure of consideration as regards the whole of this Rs. 20,000.

It was further argued that the Rs. 19,200 represented remuneration not only for arranging for Mr. Leishman to sell his share in breweries but represented, in part, commission of remuneration for financial assistance rendered by the plaintiff to the defendant. There are no means of apportioning the amount but Mr. Richmond suggested that one-half should be allocated for remuneration to the particular transaction and one-half to commission for financial assistance. I see no reason for allocating the amount in this way. I do not think it necessary to consider how far the question is governed by the principle of S. 24, Contract Act. The amount of Rs. 19,200, is in round figures half the difference between Rs. 80,000, the amount which Mr. Leishman agreed to take, and Rs. 1,20,000 which at one stage it would seem he hoped to get. The fixing of the

(1) [1905] 1 K. B. 1.

(2) [1900] 2 K. B. 635.

amount at Rs. 19,200 would seem to indicate that the remuneration agreed upon was remuneration for carrying out the particular transaction and nothing more. So far I do not think the case presented any difficulties.

The next matter to be considered is the construction of the covenants in the mortgage to which I have referred (Ex. B) and in an earlier mortgage (Ex. A) executed by defendant 1's company dated 30th May 1893, with reference to the payment of interest. The covenant in question is set out in para. 19 of the judgment of the Subordinate Judge. The construction of this covenant as pointed out by the Subordinate Judge is by no means free from difficulty. The learned Judge, however has come to the conclusion that it was the intention of the parties that interest should continue to be payable after the date when the last instalment of Rs. 40,000 became payable, on the sum due under the mortgage which was not discharged on that day. So far I agree with him. As regards the rate at which what has been called post diem interest is payable, I regret I am unable to agree with him. The question is really one of construction. In a case reported as *Nityananda Patnayudu v. Sri Radha Cherana Deo* (3), interest was allowed at the higher rate up to the date when the mortgage money became re-payable and post diem interest was allowed at the lower rate. There however the lower rate was the rate under the contract and the higher rate only became payable on failure by the mortgagor to pay the agreed rate on a specified date. The agreement in the present case is to pay at the higher rate (Rs. 24 per cent) with the proviso that if no default is made and the interest is paid punctually, interest at the lower rate (Rs. 12 per cent) shall be payable. Then we have the provision that the lower rate shall remain the rate on any principal money which remains unpaid "after due date with the consent of the mortgagees." It seems to me that the inference to be drawn from the special provision that the lower rate should remain the rate on 'money unpaid' with the consent of the mortgagees is that the contract rate of Rs. 24 per cent is payable where the principal money remains unpaid without the consent of the mortgagees. I am unable to accept the con-

struction which Mr. Ramachandra Aiyar asks us to adopt that 'due date' only includes the dates for the payment of the first two instalments of Rs. 40,000, and does not include the date for the payment of the final instalment of Rs. 40,000. I am not prepared to construe the words 'in the meantime' as restricting the obligation on the part of the mortgagor to pay interest at the rate of Rs. 24 per cent. subject to the proviso for reduction for Rs. 12 per cent on 'principal payment to the period which came to an end when according to the deed the final instalment of Rs. 40,000, became payable. In Appeal No. 27 of 1909, a covenant in similar though not identical terms came before the same learned Subordinate Judge and before this Court on appeal; and the covenant was construed both by the learned Judge and by this Court as imposing on the mortgagor an obligation to pay post diem interest at the higher rate. It is true that in that case the question of liability to pay post diem interest at the higher rate was not argued, the argument being that the covenant was a stipulation by way of penalty. As regards the mortgage of 30th May 1893, (Ex. A), I think post diem interest was payable at the rate of Rs. 24 per cent. and I do not think the agreement to pay post diem interest at this rate was a stipulation by way of penalty.

A memorandum of objections has been put in by respondent 1. It was contended (1) that the lower Court should have allowed post diem interest on the mortgage executed by the defendants on 3rd March 1898 (Ex. B) at the rate of Rs. 12 per cent. and not at the rate of Rs. 24 per cent per annum; (2) that a certain sum of Rs. 5,000 which had come into hands of the plaintiff should have been allocated by him in part discharge of the mortgage debt and (3) that in taking the accounts the defendant, the mortgagor, should be credited with interest on a sum of Rs. 19,000 odd with which he had been credited in the taking of the accounts.

I agree with the construction pleaded by the learned Judge on the covenant with regard to the payment of interest in Ex. B. Mr. Ramachandra Aiyar did not contend that that construction was wrong. He argued that the covenant to pay post diem interest at the rate of Rs. 24 per cent was a stipulation by way

of penalty. The mortgagors covenanted to pay the principal amount on a specified date with interest at the rate of Rs. 24 per cent per annum with the proviso that if they paid punctually, the mortgagees would accept the reduced rate of Rs. 12 per cent. The covenant then goes on, "in default of payment of the principal sum or any part thereof on the due date the interest shall be calculated thereon at the rate of Rs. 24 per cent per annum from the date of default with the consent of the mortgagees their heirs or legal representatives or assignees." The words "with the consent of the mortgagees etc." are apparently quite meaningless. The covenant is that on default of payment on the due date interest at the rate of Rs. 24 per cent shall be payable. On the authority of the Full Bench decision in *Arathani Muthukrishnier v. Sankaralingam Pillai* (4) it would be open for us to consider whether this is a stipulation by way of penalty. The mortgage was obviously drafted so as to get the benefit of the English rule. As pointed out in *Wallis v. Smith* (5) the rule depends entirely on form and not on substance but I am not prepared to say that the English rule is not applicable in this country. This point was considered by the Allahabad High Court in *Kutubuddin Ahmad v. Bashiruddin* (6) and it was held that the rule was applicable. The legislature, if they so desired in enacting S. 74, Contract Act of 1872 could have abrogated the English rule. They did not think fit to do so then, neither did they think fit to do so when S. 74 was amended in 1899. I desire to limit my judgment to the facts of this particular case and I express no opinion. Whether the rate of interest on default of paying the principal amount had been, say, Rs. 75 per cent as in Illus. (a) to S. 74 the stipulation would not have been one by way of penalty. Here the rate of interest though undoubtedly high, cannot be said to be exorbitant. I do not think it was intended by the decision of the Full Bench in *Arathani Muthukrishnier v. Sankaralingam Pillai* (4) to lay down anything more than that where there is no provision for interest till default but there is a stipulation for the payment of

an excessive rate of interest after default such a stipulation may be treated as a penalty. In that particular case the higher rate of interest amounted to no less than Rs. 180 per cent.

As regards the second point raised in the memorandum of objections it is not necessary for me to consider whether if I accepted his finding of fact I should agree with that, for the reasons stated the defendants are not entitled to get credit for this sum towards the mortgage debt. I am not prepared to hold upon the evidence that the sum in question was in fact payable to the defendant.

Only one other matter remains. In working out the amount due on the two mortgages the learned Judge credits the defendant with a sum of Rs. 25,000 odd. This represents the amount disallowed from the principal on the 2nd mortgage on the ground of there having been a failure of consideration to that extent. He also credits the defendant with a sum of Rs. 19,000 odd. This represents interest paid by the defendant on the sum of Rs. 25,000 odd from 15th February 1898 to 1st August 1904. The defendant is of course entitled to be credited with this sum of Rs. 19,000 as an amount, which with findings in this case he was not liable to pay, paid by him as interest on so to speak non-existing principal. The plaintiff however has retained this sum and, as I understand the case, had allocated it towards payments of interest on its mortgage debt which fell due subsequently to 15th February 1898. It seems to me that if he retained moneys which had been overpaid in order to meet future instalments of interest he was using the defendant's money and ought to pay interest therefor. The amount on which interest is payable would of course be automatically diminished as amounts were allocated for payment of interest. It will therefore be necessary to amend the decree by giving the plaintiffs interest at Rs. 24 per cent instead of at Rs. 12 per cent for post diem interest on the first mortgage. It will also be necessary to amend the decree so as to credit the defendant with the amount of interest on the sum of Rs. 19,000 odd. Mr. Richmond has contended that the rate of interest to be allowed on this sum of Rs. 19,000 should be only Rs. 6 per cent and he has referred us to *Haji Abdul Rahman v. Haji*

(4) [1913] 18 I. C. 417=36 Mad. 229.

(5) [1882] 21 Ch. D. 243.

(6) [1910] 5 I. C. 665=32 All. 448.

Noor Mahomed (7). There it was held that a surplus in the hands of the mortgagee after a sale of the mortgaged property was held by him as trustee for the mortgagor and that he was liable to pay interest thereon at Rs. 6 per cent and not at the mortgage rate. In the present case the money was in the mortgagee's hands not as the result of the taking of an account or of a decree but as a payment by the mortgagor in respect of interest on a portion of the alleged mortgage debt which has been disallowed on the ground that it formed no portion of the consideration for the mortgage debt. In the special circumstances of this case I think for the purposes of taking the account the rate of interest to be allowed on this sum of Rs. 19,000 should be Rs. 12 per cent.

The plaintiff will receive his costs on the amount allowed and pay the defendant's costs on the amount disallowed throughout on the appeal and on the memorandum of objections. The time for payment will be extended to six months.

Oldfield, J.—I agree.

S.N./R.K.

Order accordingly.

(7) [1892] 16 Bom. 141.

A. I. R. 1914 Madras 149 (1)

AYLING, J.

Thandayuthapani Sethuram and others—Petitioners—Plaintiffs.

v.

Chinnathal and others—Defendants—Respondents.

Civil Revn. Petn. No. 94 of 1912, Decided on 12th January 1914, from order of Dist. Judge, Tanjore, in I. A. No. 676 of 1911.

Limitation Act, S. 5—Delay in presentation of appeal—Order refusing to excuse delay is not revisable—Civil P. C., S. 115.

An order of a Subordinate Court refusing to excuse delay in presentation of an appeal is not open to revision under S. 115, Civil P. C., even for the purpose of showing that the appeal was presented in time: *Letters Patent Appeal No. 82 of 1911, Foll.* [P 149 C 2]

G. S. Ramachandra Aiyar—for Appellant.

C. V. Anantakrishna Aiyar—for Respondents.

Judgment.—This is a petition to revise under S. 115, Civil P. C., an order of the District Judge of Tanjore dismissing a petition purporting to be presented under O. 41, R. 1, Civil P. C., and S. 5, Lim. Act. In his order the Judge holds

that the petitioner's appeal to his Court was barred by limitation and that there was no excuse for the delay in its presentation. He accordingly dismissed the petition: and (in effect) rejected the appeal as time barred.

The question is whether a revision petition will lie under S. 115, Civil P. C. In so far as the petition was one to excuse delay in presentation I think it is quite clear that the order is not open to revision. Mr. Ramachandra Aiyar, however contends that the appeal was not really time-barred and that the District Judge's order in so far as it declares the appeal to be time-barred is open to revision. The latest ruling on the point is a very recent one of Sankaran Nair and Sadasiva Aiyar, JJ., in *Letters Patent Appeal No. 82 of 1911* and following this, I must hold that even in this respect the Judge's order is not open to revision under S. 115, Civil P. C.

The petition is dismissed with costs.
S.N./R.K. *Petition dismissed.*

A. I. R. 1914 Madras 149 (2)

MILLER, J.

In re Kora Sellandi—Accused.

Criminal Revn. Case No. 670 of 1913, Criminal Referred Case No. 94 of 1913, Decided on 20th November 1913, from order of Sess. Judge, Salem, D/- 13th October 1913.

Criminal P. C., (1898), S. 403—Magistrate acting under S. 348 ought not to find accused guilty before commitment but should frame charge and then commit—Criminal P. C., (1898), S. 348.

Where a Magistrate has to act under S. 348 he ought not to find the accused guilty before commitment but should merely frame a charge and then commit, as otherwise a conviction would bar a fresh trial before the Sessions Court under S. 403. [P 149 C 2; P 150 C 1]

Public Prosecutor—for Government.

Order.—In this case the Magistrate has found the accused guilty, and then committed him to the Court of Session, under S. 348, Criminal P. C. The effect of the conviction would seem to be that S. 403, Criminal P. C., would bar the trial by the Court of Session.

It is not entirely easy to deal satisfactorily with cases under S. 348. The Magistrate is bound to commit if there has been a previous conviction, of one of the offences described unless he can adequately punish the accused; consequently he must either as a preliminary matter or at any rate before framing a charge,

determine whether there has been a previous conviction; having decided that point, he will have to consider whether in the circumstances of the case his powers enable him to pass a sufficiently severe sentence. If he thinks they do not permit, he may either commit the accused for trial or try him himself, if they do not so permit, but the evidence does not warrant the discharge of the accused, he must frame a charge under S. 210 of the Code and commit him for trial under Chap. 18.

In the present case I set aside the conviction and direct the Magistrate to frame a charge under S. 210 and commit the accused for trial before the Court of Session.

S.N./R.K. *Conviction set aside.*

A. I. R. 1914 Madras 150 (1)

SADASIVA AIYAR AND SESHAGIRI AIYAR, JJ.

Koppara Kandiyil Changan Mancheri—Plaintiff—Appellant.

v.

Anthalathil Kalleri Katheesa and others—Defendants—Respondents.

Second Appeal No. 1049 of 1912. Decided on 13th March 1914 from decree of Dist. Judge North Malabar, in Appeal Suit No. 68 of 1911.

Hindu Law—Alienation—Guardian—De facto guardian cannot alienate except for minor's benefit or family necessity.

The de facto guardian of a minor cannot alienate the minor's property except for the benefit of the minor or for meeting some urgent family necessity; 15 I. C. 576, *Foll.*

[P 150 C 1]

J. L. Rozario—for Appellant.

Ryru Nambiar—for Respondents.

Judgment.—The plaintiff is the appellant in this case. He wants to enforce against defendants 2 to 5 (children of defendant 1) a mortgage-deed executed by defendant 1 as their guardian.

The plaint assumes that defendant 1 was the de jure guardian of defendants 2 to 5 when she executed the mortgage-deed, but it is now admitted that she was not the de jure guardian of the minors.

Then it is argued that she was the de facto guardian. Even if she was, her document could not bind the minors unless it was executed for meeting such urgent necessity or for securing such clear and undoubted benefit to the minors as are held to be necessary to be proved in

Hyderman Kutti v. Syed Ali (1). No foundation was laid on the plaint for any such case and having looked into the evidence of the only two witnesses examined on the plaintiff's side, we find no such necessity or undoubted benefit established by that evidence.

The second appeal fails and is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1912] 15 I. C. 576.

A. I. R. 1914 Madras 150 (2)

SADASIVA AIYAR, J.

Meeyaru Ammal and others—Counter-Petitioners—Petitioners.

Criminal Revn No. 588 of 1913 and Criminal Revn. Petn. No. 478 of 1913, Decided on 10th September 1913, from proceedings of 2nd Class Magistrate.

(a) Criminal P. C. (5 of 1898), S. 144—**Prohibiting melvaramdar from exercising certain acts is valid—Tenants are not bound unless order is against them.**

An order prohibiting a melvaramdar from exercising certain acts as melvaramdar is valid under S. 144. If such an order includes certain rights properly belonging to the tenants, it would not be operative to prevent the tenants, from exercising acts properly belonging to them, unless the order is specific and definite, and is addressed to them [P 151 C 1]

(b) Criminal P. C. (5 of 1898), S. 144—**Words "any person to abstain from certain acts" are liberally construed to enlarge Magistrate's jurisdiction in Madras.**

The words "any person to abstain from certain acts" in S. 144 (1) are construed liberally in Madras, so as to enlarge a Magistrate's jurisdiction: 24 Mad. 45 and 24 Mad. 262, *Foll.*

[P 150 C 2]

K. N. Aiyar—for Petitioners.

Order.—Though there may be certain Calcutta decisions confining rather strictly the powers of Magistrates in respect of orders directing under S. 144, Cl. (1), Criminal P. C., "any person to abstain from a certain act" the Madras cases, see *Ramanadhan Chetty v. Murugappa Chetty* (1) and *Queen-Empress v. Abdulla Shaib* (2), have not taken such a restricted view of the section.

In the present case, the Magistrate has merely restrained the 2nd party (petitioners before me) from trying to exercise any acts as melvaramdar or to assist petitioner 1 to exercise such right.

I do not think this order would exceed his powers under S. 144, Criminal P. C. In his attempt to define those melvaram rights the Magistrate may have included

(1) [1901] 24 Mad. 45.

(2) [1901] 24 Mad. 262.

rights which do not really pertain to the melvaram proprietor, and this may be prejudicial to tenants, but the order against the counter-petitioners has not been made against them as tenants. It could not affect the petitioners who are only prohibited from exercising the melvaramdar's right and not from exercising the rights which may belong to them or any of them as tenants.

Of course, if the magistracy tries to use S. 144 as a means of granting a perpetual injunction in favour of one of two opposing parties, instead of as an order to meet a temporary emergency, the High Court has the power to interfere to prevent such abuse of powers.

The order now in question will expire in two days.

I therefore reject this petition,
S.N./R.K. *Petition rejected.*

A. I. R. 1914 Madras 151(1)

BAKEWELL AND SPENCER, JJ.

Chempathoor Raman Nambudri—Appellant.

v.

Nagalaseri and another—Respondents.

Letters Patent Appeal No. 80 of 1911, Decided on 2nd December 1913, from judgment of Ayling, J., in Civil Revn. Petn. No. 110 of 1910.

Mortgage — Kanom document providing that kanomdar should pay jenmi fixed quantity after deducting interest and revenue — Government revenue subsequently increased — Kanomdar held liable for increase in revenue.

Where a kanom document provided that out of the estimated income of the properties fixed at a certain quantity, the kanom mortgagee should pay the jenmi every year a particular amount "after deducting Government revenue and interest on the kanom amount" and subsequently at the settlement, the Government revenue was increased.

Held: that the kanomdar himself must bear the increase in the revenue as the document gave him also a right to enjoy the increase in the income: 17 *M. L. J.* 517; *Second Appeal No. 430 of 1910. (unreported), Foll.* [P 151 C 2]

B. Govindan Nambiar—for Appellant.

C. V. Anantha Krishna Iyer—for Respondents.

Judgment.—By the contract in this case the income of the land is taken at a fixed amount, the interest on the kanom amount is calculated, and the kanomdar has agreed to pay a fixed amount of 54 paras 8 narayams arrived at by deducting the revenue charged upon the land and the agreed interest from the estimated income.

We think that the kanombar has agreed to pay a fixed rent, and that the references to the income and revenue and interest are only intended to show the manner in which this rent has been calculated.

It is admitted that, if the income should exceed the estimate, the kanomdar takes the excess, and it is reasonable to suppose that he should take the risk of increased burdens as well as increased gains.

In the case of *Panigatan Kanaran v. Raman Nair* (1) the kanomdar was entitled to a fixed sum by way of interest and it was accordingly held that the jenmi had to bear the enhanced assessment; it is therefore the converse of the present case.

The judgment in *Thirumathur v. Swaminatha Pattar* (2) also supports this view.

The Letters Patent appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1907] 17 *M. L. J.* 517.

(2) [1912] 16 *I. C.* 184.

A. I. R. 1914 Madras 151(2)

SADASIVA AIYAR AND TYABJI, JJ.

Kuttuva Narayanasami Iyer—Defendant—Appellant.

v.

Soranammal and others—Plaintiffs—Respondents.

Second Appeal No. 1821 of 1911 Decided on 9th December 1913, from decree of Dist. Judge, Madura, in Appeal Suit No. 1 of 1911.

Transfer of Property Act (1882), S. 76—Mortgagee claimed charges in settlement accounts for (1): increase in water-tax, (2) amount spent in building granary and (3) amount spent in laying waterpipes—Mortgagee was held not entitled to claim anything.

A usufructuary mortgagee claimed that the following charges should be allowed to him in the settlement of accounts between himself and the mortgagor:

- 1 Increase in the Municipal water-tax;
- 2 Amount spent in building a granary;
- 3 Amount spent to bring out waterpipes.

Held: (i) that as regards (1) the increase in the Municipal tax should be borne by the mortgagee himself as he enjoyed an increase in rent consequent on the introduction of pipe-water;

[P 152 C 1]

(ii) that as regards (3) this was not "substantial repairs" within the meaning of S. 76, Cl. (d), so as to make the mortgagor liable for the same: 19 *Mad* 327, *Foll.*; 26 *Cal.* 1, (P. C.) *Dist.*, 16 *I. C.* 635, *Diss. from.* [P 152 C 2]

(iii) that as to (2) the granary being a moveable wooden structure, the mortgagee himself

could remove the same, and he should not be allowed credit for it. [P 153 C 1, 2]

K. N. Aiyar—for Appellant.

T. V. Gopalasami Mudaliar—for Respondents.

Sadasiva Aiyar, J.—The only point in this case is whether defendant-appellant 1 (the prior usufructuary mortgagee) is entitled to claim :

(a) Rs. 19-3-6 which he has paid for Municipal water-tax.

(b) Rs. 30-8-0 spent in building a granary.

(c) Rs. 43-9-1 spent in laying water-pipes.

Total Rs. 93-4-7

First, as regards the Municipal water-tax, the mortgage document of 1894 allows defendant-appellant 1 to enjoy the profits of the mortgaged property in lieu of interest after deducting the house-tax from the profits. Supposing the Municipal house-tax is afterwards increased by the imposition of a water-tax, who is to bear it ?

As was said in Second Appeal No. 430 of 1910, every such document must be construed in the light of the surrounding circumstances to ascertain the intention of the parties. S. 76 (c), T. P. Act, shows that public charges ought to come out of the income of the mortgaged property. Where the income or profits (which in this case is the net rental income of the mortgaged house) is liable to fluctuation and the mortgagee enjoys such fluctuating income in lieu of interest, the reasonable view seems to be that fresh charges on the rent should be borne by the rental profits of the mortgagee, especially as the rental income was in all probability increased by the very same cause (namely) the introduction of pipe-water into the Municipality which gave rise to the obligation to pay the water-tax.

We therefore reject defendant's 1 claim for credit for the amount (a). As regards the claim (c), for laying water-pipes, I am prepared to follow *Arunachela Chetti v. Sithayi Ammal* (1), decided by two very learned Judges of this Court (Sir H. H. Sheppard and Sir S. Subramania Aiyar), though their view has been dissented from in *Rahamatulla Beg v. Yusuf Ali* (2), and though the English law might

be different. This Court is bound by the provisions of the Indian Statute Law as embodied in the Transfer of Property Act. I do not say (as my learned brother thinks, if I understood him rightly) that the learned Judges might not have laid down too broadly that for nothing which comes under the head of costs of improvements could the mortgagee claim credit unless he had the mortgagor's consent to the making of such improvements. But I am very diffident to pronounce any opinion doubting, even to that slight extent, the opinion of those very learned Judges without further more serious consideration of the question. In this case it is clear that the improvements for which defendant 1 claims credit cannot come under the class of these exceptional improvements which might also be called substantial repairs, and I therefore disallow claim (c) also. As regards claim (b), the granary built by defendant 1 seems to be a wooden structure, for I find from Ex. 2 (f) (the list of expenses claimed by defendant 1) that the cost consists of the value of wooden planks, sticks, etc. Under the common law of the country, a person can remove such improvements built by him, if he could do so without causing any injury worth the name to the house.

The lower appellate Court without assigning any reasons says vaguely : "It (the granary) apparently cannot be removed without detriment to the property" We are unable to accept this vague finding and we request the lower appellate Court to give a fresh finding referring to the evidence and probabilities. The finding should be submitted within four weeks from the date of receipt of this order and ten days will be allowed for filing objections.

Tyabji, J.—The appellant claims that the water-cess charged on the mortgaged property should be added to the mortgage debt and should therefore be borne by the mortgagor. S. 76, Cl. (c), T. P. Act, which is applicable, seems to me to require that the point should be decided against the appellant. That clause lays down that charges of a public nature must be paid out of the income of the property. Hence such charges must be borne by the mortgagor if the mortgage provides that the income belongs to the mortgagor ; but these charges will fall on the mortgagee in case the mortgage provides that the

(1) [1896] 19 Mad. 327.

(2) [1912] 16 I.C. 635.

mortgagee is entitled to the income; so that in the case of usufructuary mortgages such charges must fall upon the mortgagee. The appellant also claims from the mortgagor the sums expended on improvements consisting of the introduction of a water-pipe and the putting up of a granary.

The learned District Judge, following the decision of *Arunachella Chetti v. Sithayi Ammal* (1), has held that the expenses of the improvements in this case must be borne by the mortgagee. It is unnecessary for us in this case to consider whether the learned Judges who decided the case of *Arunachella Chetti v. Sithayi Ammal* (1) did not state the law with somewhat too great stringency as against the mortgagee, and there is a case decided by the Privy Council, *Kadir Moidin v. Nepean* (3), which has been cited to us as being in support of that view. The opinion has also been expressed that certain classes of improvements at any rate might be claimed by the mortgagee as against the mortgagor under S. 72 or 63, T. P. Act: see *Rahmatulla Beg v. Yusuf Ali* (2) and Ghose on Mortgages (Edn. 4, I, 549). The case of *Kadir Moidin v. Nepean* (3) was on appeal from the Courts of Burma, but their Lordships of the Privy Council say that they are not prepared to dissent from the argument of the counsel that the law governing the case should be the same as that laid down in the Transfer of Property Act and they fully approve of the decision of the Chief Court of Burma in allowing the expenses of the improvements to the mortgagee. It may therefore be that the line which in practice is rather difficult to draw between improvements which are not "unreasonable or unnecessary" [see *Kadir Moidin v. Nepean* (3)] and repairs which are necessary may not be as clearly drawn with reference to the legal incidents of improvements and repairs as the learned Judges, who decided the case of *Arunachella Chetti v. Sithayi Ammal* (1), have laid down; but in the present case it seems to me that even taking the broader view of the law, the appellant is not entitled to succeed. The appellant did not rely in the lower Courts on the improvements being reasonable, within the rules referred to in *Kadir Moidin v. Nepean* (3), but set up the express assent

(3) [1899] 26 Cal. 1=25 I.A. 241 (P.C.).

of the mortgagor which both Courts hold that he has not proved. For these reasons I agree in the order that has been proposed by my learned brother.

In compliance with the above judgment the District Judge of Madura submitted the following

Finding.—The question to be answered is the following:

"Whether the granary can be removed without detriment to the property?"

2. By consent of parties, I find on the issue in the affirmative.

This second appeal coming on this day for final hearing after the return of the above finding, the Court delivered the following

Judgment.—We accept the finding and modify the decree of the lower Court by inserting a provision that the appellant (defendant 1) be at liberty to remove the wooden granary within two months from this day. In other respects, the decree is confirmed. The parties will bear their respective costs in the appeal.

S.N./R.K.

Decree modified..

A. I. R. 1914 Madras 153

SADASIVA AIYAR AND SPENCER, JJ.

Mahomed Mera Rowther—Appellant.

v.

Kadir Mera Rowther and others—Respondents.

Appeal No. 38 of 1912 and Civil Revn. Petn. No. 142 of 1912, Decided on 17th October 1913, from order of Dist. Judge, Trichinopoly, in Civil Misc. Appeal No. 45 of 1911.

(a) Civil P. C. (5 of 1908), O. 21, R. 22—Omission to record service of notice is no ground to set aside auction-sale in pursuance of notice—Civil P.C. O. 21, R. 60.

Where a Court, on receipt of the return by the process server of a notice, orders attachment of property, it impliedly declares that the notice to the judgment-debtor was "duly served" and it is not necessary, in each case, to make an express declaration of service. An auction-sale held in pursuance thereof cannot be set aside on the mere ground that the Court did not write an express order that the service of the notice was effected: 10 Bom. 202, and 3 I. C. 474, *Foll.* [P 154 C 1]

(b) Civil P. C. (5 of 1908), O. 21, R. 22—Whether omission to serve notice amounts to material irregularity (*Quaere*)—Civil P. C. (5 of 1908), O. 21, R. 90.

Quaere—Whether omission to serve the notice required under O. 21, R. 22 of the new Code, is such an irregularity as to vitiate an auction sale held under that Code: 25 Bom. 337 (P.C.), *Ref.* [P 154 C 1]

L. A. Govinda Raghava Aiyar—for Appellant.

T. R. Ramachandra Aiyar and *T. R. Krishnaswamy Aiyar*—for Respondents.

Judgment.—The omission to have a notice served under O. 21, R. 22, (old Civil P. C. S. 248) is no doubt, a serious irregularity: *Malkarjun v. Narhari* (1). Whether it would be such a serious irregularity under the new Code as it would have been under the old Code is a matter for fair argument having regard to para. 2 attached newly to O. 21, R. 22.

There is also no question that service of a notice otherwise than personal delivery cannot be said to have been effected duly unless the Court declares under O. 5, R. 19, (old S. 82) that the notice has been duly served, though personal service has not been effected: see *Nusur Mahomed v. Kazbai* (2).

But, as pointed out in that case in *Nusur Mahomed v. Kazbai* (2) itself, "there is a presumption in favour of the proceedings of Courts of justice that everything has been duly performed" and hence even though there is no express note by the Court that it accepts the service by affixture as service duly made, a declaration to that effect by the Court could be implied if on and after the return of the process by the serving office, the Court passes orders on the basis that the service has been duly made: see *In re Sree Krishna Doss* (3).

In the present case, the District Munsif passed orders for attachment after the process of service of notice under S. 248 was returned by the person with the note that it was affixed to the outer door of the judgment-debtor owing to his evading service.

This act of the Court indicates, in our opinion, a sufficient declaration that the service has been duly effected.

The learned District Judge has evidently gone upon the view that unless there is an express written declaration of due service noted by the Court, there can be no legally valid service.

The circumstances of this case as set out by the District Munsif clearly show that, as a matter of fact, the judgment-debtor had full notice.

As the learned District Judge has set aside the Munsif's order refusing to set

aside the Court auction sale on the sole ground that notice had not been duly served under S. 248 on the judgment-debtor and as we find that notice was duly served, the District Judge's order on appeal is set aside and the District Munsif's order restored with costs in this and in the lower appellate Court. It follows that the respondents' memorandum of objections in the matter of the District Judge's disallowance of costs to this respondent must be and is dismissed with costs.

As no civil revision petition lies when an appeal is allowed, the Civil Revn. Petn. No. 142 of 1912 is dismissed.

S.N./R.K. *Petition dismissed.*

A. I. R. 1914 Madras 154

AYLING, J.

T. S. Ramasamy Iyengar—Petitioner.

v.

Ramalinga Mudaliar and others—Respondents.

Civil Revn. Petn. No. 84 of 1912, Decided on 5th January 1914, from order of Dist. Munsif, Tiruvalur, in Insolvency Appeal No. 1928 of 1911, D/- 15th September 1911.

Provincial Insolvency Act (1907), S. 16—Insolvent's property vests in receiver from adjudication after which suit cannot be maintained by insolvent.

The property of an insolvent vests in the receiver from the date of adjudication and after that date the insolvent cannot maintain any suit on a chose in action belonging to him: 15 I. C. 931, *Foll.* [P 154 C 2]

T. Narasimha Aiyangar—for Petitioner.

S. Muthiah Mudaliar—for Respondents.

Judgment.—Under S. 16, Prov. Ins. Act the actionable claim which was the basis of the suit, vested in the Official Receiver from the date of the adjudication order and the insolvent was not entitled to sue on it. The District Munsif therefore rightly followed the ruling of *Subbaraya Iyer v. Vaithinatha Aiyar* (1) and rejected the petition.

This petition is dismissed with costs.

S.N./R.K. *Petition dismissed.*

S. N. Das

Advocate General's Court

Jamshedpur & Co. Ltd.

(1) [1901] 25 Bom. 327 (P.C.).

(2) [1886] 10 Bom. 202.

(3) [1909] 3 I. C. 474.

A. I. R. 1914 Madras 155

AYLING AND TYABJI, JJ.

Kopalli Krishna Row Garu and others
—Plaintiffs—Appellants.

v.

Collector of Kistna—Defendant—Respondent.

Second Appeals Nos. 2073 to 2076 of 1912, Decided on 21st January 1914, from decree of Dist Judge, Kistna, in Appeal Suits Nos. 76, 58, 83 and 82 of 1911.

Madras Irrigation Cess Act (7 of 1865), S. 1—Persons irrigating though unintentionally their lands from channel through unauthorized pipe are not exempt from liability to penal water-rate.

The words "is taken" in R. 5 of the rules framed under S. 1, Madras Irrigation Cess Act 7 of 1865, are not intended to exempt from liability to penal water-rate persons whose lands are irrigated from the channel through an unauthorized pipe even though they may not have inserted or abetted the insertion of the unauthorized pipe. No distinction is drawn in the rules between a person who receives an augmentation of water supply effected without his knowledge or even against his wish and one who has taken active steps to obtain the water. 6 I. C. 199, *Foll.* [P 155 C 2]

C. V. Anantha Krishna Aiyar—for Appellants.

Goyt. Pleader—for Respondent.

Ayling, J.—The suits out of which these second appeals arise were brought to recover penal water-rate alleged to have been illegally collected from the plaintiffs for Fasli 1317 in respect of certain zamindari wet lands belonging to them. The District Munsif gave the plaintiffs a decree in three of the suits and dismissed the fourth. The District Judge, on appeal, dismissed all the suits holding that the plaintiffs were liable to pay the penal water-rate collected from them.

The lands admittedly were irrigated by means of Government water, and their liability to pay water-rate under S. 1 of Act 7 of 1865 is not disputed. The levy of penal water-rate is regulated by rules framed under the said section, and published at p. 2 of the Appendices to the Standing Orders of the Board of Revenue. R. 5 runs:

"Double water-rate will also be charged if water is taken from a sluice or channel or other source of supply other than that which is provided or approved by the res-

ponsible officers of the Public Works Department."

In the present case it is found that the authorized source of irrigation is a single pipe (or a row of pipes) leading from the "Manager Kodu" channel and that the irrigation of the suit lands was actually effected by means of the water of the said channel passing through two pipes (or rows of pipes), the second having been inserted without the authority or approval of the Public Works Department. The effect of the insertion of the second pipe would be to double the supply of water available.

It may be noted here that according to the complaints, the suit lands were irrigated, and apparently entitled to be irrigated, not from the "Manager Kodu" channel, but from another source altogether—the Nibhanapudi Channel. These allegations have been found to be false. It has, however, to be determined whether on the facts found, the levy of the penal rate was legal.

The arguments of the learned Vakil for the appellants have been practically devoted to showing that R. 5 quoted above will not apply to these cases because it is not shown that the water used was "taken" by the appellants from an unauthorized source. It is not denied that the second pipe was unauthorized or that water passing through it irrigated the suit lands. But it is urged that the pipe is situated a mile distant from the suit lands that there is nothing to show that the plaintiffs inserted it or abetted its insertion and that the mere fact that the water passing through it flowed on to the plaintiffs' lands will not bring the case within the meaning of the rule.

After careful consideration I do not think this contention can be accepted. The Act itself admittedly draws no distinction between the use of Government water with or without the active co-operation of the owner of the land irrigated: vide *Secy. of State for India v. Swami Nautheswarar* (1). But it is suggested that the rules do, and that the adoption in the rules of the word "taken" in preference to "used" indicates that the penal rate is only to be charged when the person using the water had taken some active step to obtain the water. I can find no basis for such a distinction and in

the connexion in which it is used, I do not think any such special meaning as is suggested should be attached to the word "taken." Where as in the present case the water proceeds through an open pipe, no active "taking" is necessary or indeed practicable after the pipe has been put in position for the water flows of itself. If the rule had been intended to bear the interpretation placed on it by the appellants' vakil, care would have been taken to make it clear, that the penal rate was only leviable from a person who took the water instead of using the phrase "is taken" in the passive voice and impersonally.

It is argued that any wider interpretation of the rule would expose an innocent cultivator to an enhanced charge in consequence of an unauthorized augmentation of his water supply, which may have been effected without his knowledge or even against his wish; and that it is unlikely that such could have been the intention of the framers of the rules. The answer to this is twofold. In the first place it does not follow that because penal rate is legally leviable, Government will demand it from persons who have quite innocently become leviable to it. In the second place, if the probable intentions of the framers of the rules are to be looked to all the considerations presented to them must be borne in mind. As a matter of fact, it is very seldom possible to prove who effects an unauthorized diversion of water for irrigation purposes. Such diversions are usually effected secretly and involve little time or labour, and as in most cases they benefit not only the culprit himself but all those who hold land in the immediate vicinity including in many cases the local village officials themselves the chances of detection are small indeed. The main safeguards against such acts is the liability of everyone profiting thereby to be charged penal water-rate. If this liability is to be limited to persons who can be shown to have actively co-operated in diverting the water, the rule will be simply nullified. Now the prevention of unauthorized interference with Government irrigation sources is a matter of vital importance not only to the public revenue but (what is even more serious) to the public peace.

Throughout this Presidency irrigation disputes are even now frequently the

cause of riots and bloody affrays. As already stated where one or more ryots secretly divert water for the benefit, of their own lands their immediate neighbours usually share in the benefit but in almost every case other ryots holding lands lower down will be prejudiced or will deem themselves prejudiced and the temptation to take the law into their own hands will frequently prove irresistible and will produce lamentable consequences.

The desirability of preventing so far as possible unauthorized interference with Government irrigation sources is therefore a matter of vital importance and can hardly have been overlooked by the framers of the rules.

I do not suggest that these considerations of public policy are any reason for putting a strained interpretation on the rule; but where the wording is consistent with what such considerations would dictate and where it is argued that a word in the rule was deliberately selected as bearing a narrow meaning inconsistent therewith, I think they are not without weight.

In my opinion the penal water-rate was legally leviable and I would dismiss the appeals with costs.

Tyabji, J.—Second appeal No. 2073 of 1912. The question involved in this appeal is whether the plaintiff was liable to be charged a double water-rate for Fasli 1317 under the following rule:

"Double water rate will be charged if water be taken from a sluice or channel or other source of supply other than that which is provided or approved by the responsible officers of the Public Works Department": Vol. 2, Standing Orders of the Board of Revenue, p. 4. The plaintiff alleged that his lands were entitled to take water from the Nibhanapudi Channel and that as a matter of fact the lands were irrigated by water from that channel in Fasli 1317. On both these points the findings are against the plaintiff. It is found that the plaintiff's land is entitled to receive water from another channel, the Manager Kodu, and that the water did come from that source, but through two sluices instead of one sluice, only one sluice being authorized. The plaintiff on these findings was held liable to the double water-rate. The plaintiff's case in the Court of first instance was not that he had taken water from the

Manager Kodu from which he is really entitled to take it and which is the source "provided or approved by the responsible officer of the Public Works Department." If this had been the plaintiff's case and if he had further pleaded that no act had been done by him or to his knowledge or for which he was responsible by reason of which the source ceased to be so provided or approved and that he was not in fact aware of the source having ceased to be so provided or approved, in that case some questions might have arisen on which I do not at present feel called upon to express any opinion. But, on the allegations of the plaintiff and on the findings to which I have alluded it seems to me to be clear that after two sluices had been made instead of one the Manager Kodu as a matter of fact ceased to be a source approved by the Public Works Department. It is also clear that the plaintiff's land was irrigated by water coming through this unauthorized channel; it seems to me that where it is proved that a certain piece of land is irrigated by water coming from a certain source, in the absence of some explanation being offered it may well be considered that the water has been taken (within the terms of the rule) by the person whose land is so irrigated. The rules ought it is true not to be strained in a penal sense but neither ought they to be construed as though their object were to provide a variety of methods by which the sources of irrigation might be tampered with without any one being responsible for such tampering by becoming liable for enhanced water-rate. The object of the rules is just the reverse; and within reasonable limits, it seems to me, that object ought to be given effect to. I quite agree however with my learned brother that it is assuming too much to proceed on the basis that the double water-rate would necessarily be levied by the Government in every case where the legal liability to pay it, arises though the person becoming liable may have acted in good faith throughout and may not have unduly benefited by water coming from an unapproved source.

For these reasons, I agree that the appeal should be dismissed with costs.

The judgments in Second Appeals Nos. 2074 to 2076 will follow.

S.N./R.K.

Appeals dismissed.

A. I. R. 1914 Madras 157

TYABJI, J.

Subramania Aiyar and another — Defendants—Petitioners.

v.

T. R. M. T. Subramania Chetty—Plaintiff—Respondent.

Civil Revn. Petn. No. 791 of 1911, Decided on 12th December 1913, from decree of Sub-Judge, Trichinopoly, in Small Cause Suit No. 557 of 1911.

Contract Act (9 of 1872), S. 74—Stipulation to pay interest at 36 per cent per annum is not penal—Stipulation exempting interest till default of payment but charging it after default at 36 per cent on instalments paid and on those due as well is penal.

A stipulation in bond to pay interest at 36 per cent per annum from the date of the bond is not by itself penal though it may be unreasonable.

But where such bond stipulates that no interest shall be payable until default of payment of any instalments, and on default interest at the rate of 36 per cent should be paid not only on the sums remaining due, but also on the instalments previously paid up, the stipulation is in effect penal as the rate of interest becomes higher and higher, and the sums to be paid in discharge of the bond becomes larger and larger: 12 *L. C. 78, Dist.* [P 158 C 2]

N. Rajagopalachariar — for Petitioners.

G. S. Ramachandra Aiyar—for Counter-Petitioner.

Judgment.—It is argued in the first instance before me that the learned Subordinate Judge should have held that Rs. 80 had also been paid by the petitioner. I was at one time inclined to accede to this argument, because it seemed as if the finding that Rs. 36-7-0 has been paid was based on Ex. 1 and therefore that the Subordinate Judge must have come to the conclusion that Ex. 1 had been satisfactorily proved. Ex. 1 is however signed not by the plaintiff but by his alleged agent Manikkam Pillai and there is no satisfactory evidence to show that he had authority to make the statement contained in Ex. 1 or that the statement is, as a matter of fact, true. That must have been the view taken by the Subordinate Judge because he finds expressly that Rs. 80 alleged by the defendant to have been paid was as a matter of fact not paid. I do not think I can disturb the finding as regards the payment of Rs. 80.

With reference to the rest of the claim however, it seems to me that under the circumstances of this case, the agreement for interest was certainly penal un-

der S. 74, Contract Act. The case cited to me, *Annamalai Chettiar v. S. Sellappa Gounden* (1) is, no doubt, authority for the proposition (for which it seems to me that no authority is needed) that the stipulation of interest at the rate of 36 per cent will not of itself make the stipulation penal. On referring to the judgment, which was before the learned Chief Justice in that case, I find that the only circumstance alluded to by the Munsif in holding the stipulation penal was the fact that the interest stipulated for was at the rate of 36 per cent. The learned Chief Justice and Abdur Rahim, J., have both held that 36 per cent is not such a high rate of interest as in itself to make the bargain unconscionable. But assuming that the interest is extortionate, that might furnish evidence of the stipulation being hard and unconscionable: it cannot make by itself the stipulation penal. In the circumstances of the case which I have to decide however the question is not whether 36 per cent is a fair and conscionable rate of interest. Here no interest is stipulated for until there is default in paying the instalments as they fall due, and in case of default, interest is to be calculated not on the amount actually due but on the whole of the sum originally advanced, notwithstanding that a part of the original debt may have been paid off. I accept the argument that the fact that nominally no interest is payable if there is no default in paying the instalments indicates that the total of the instalments must have included something by way of interest, that as a matter of fact, something less was advanced than Rs. 200 which is stated to have been advanced. But my decision is not affected by this consideration. For assuming that the whole of the Rs. 200 had been advanced, the agreement cannot be said to have been merely to pay interest at the rate of 36 per cent but it was an agreement that in case a particular stipulation was not carried out then one of the contracting parties was to incur additional liability. As regards that additional liability, it was not merely that interest at 36 per cent should be paid on what was then actually due, but on the whole sum originally due, and in the events, that have happened after 1st August 1909, when Rs. 100 had been paid the rate of interest stipulated for in the

bond being Rs. 36 per cent on the whole of the sum of Rs. 200, it really became Rs. 72 per cent on the Rs. 100 actually due and the rate would have become still higher had a larger sum been paid off by the defendant. It was rightly conceded by the learned pleader for the plaintiff that in these circumstances the stipulation for interest at the rate of Rs. 36 per cent to be calculated on the whole of the original debt should be considered penal.

I think the proper order will be to give the plaintiff a decree for the amount due on the bond with interest at 12 per cent making allowance for the payments of Rs. 100 on 1st August 1909 and Rupees 36-7-0 on 25th April 1910 and interest will be on the amount of the principal sum due on the bond deducting the sums of Rs. 100 and Rs. 36-7-0 as from 1st August 1909 and 25th April 1910, respectively. It is argued that no allowance should be made on Rs. 36-7-0 with reference to interest. But if that amount becomes due by the plaintiff to the defendants, the defendants are entitled to have it credited to themselves on account of any sums that may be payable by them to the plaintiff.

I will not disturb the order of the lower Court as to costs in that Court and costs in this Court will be borne by each party.

S.N./R.K.

Petition allowed.

* A. I. R. 1914 Madras 158

SADASIVA AIYAR AND SPENCER, JJ.

Subbaiyar—Defendant—Appellant.

v.

S. P. Kallapvian Pillai — Plaintiff—Respondent.

Appeal No. 74 of 1913, Decided on 17th November 1913, against order of Sub-Judge, Tuticorin, in Appeal Suit No. 9 of 1912.

* Civil P. C., O. 9, R. 13—*Ex parte decree obtained suppressing compromise — Proper remedy is suit to set aside decree on ground of fraud—Decree—Setting aside.*

Where a plaintiff suppresses a compromise from the knowledge of the Court and obtains against the defendant an *ex parte* decree, the proper remedy for the defendant, though there may be other remedies open to him, is to bring a suit to set aside the decree as one obtained by fraud: *S M. I. A. 91, Rel. on.* [P 159 C 1]

T. R. Ramchandra Aiyar and *T. R. Krishnaswami Aiyar*—for Appellant.

V. Viswanadha Aiyar — for Respondent.

(1) [1911] 12 I. C. 78.

Judgment. — The case of *Rajmohan Gossain v. Gourmohan Gossain* (1) (which was very frankly brought to our notice by the appellant's learned vakil, Mr. T. R. Ramachandra Aiyar) shows that, if an appellant, suppressing a compromise from the knowledge of the Court, obtains a decree against the respondent, such a decree is one obtained by fraud and might be treated as a nullity by the judgment-debtor. The judgment-debtor in that case brought a suit for relief on the compromise agreement against the terms of which the fraudulent decree was obtained, and their Lordships of the Privy Council held that the question of the fraudulent nature of the decree might be gone into and decided in the second suit. The person against whom such a fraudulent decree was passed might have several reliefs open to him, but the most appropriate relief is to have it set aside in a regular suit and any other relief he might have cannot prevent his recourse to the above natural and appropriate relief.

The order of remand made by the lower appellate Court was therefore right and we dismiss the appeal with costs.

S.N./R.K. Appeal dismissed.

(1) [1865] 8 M.I.A. 91.

A. I. R. 1914 Madras 159 (1)

SADASIVA AIYAR AND TYABJI, JJ.
Vellayappa Chetty—Appellant.

v.

Veerappa Chetty and another — Respondents.

Appeal No. 152 of 1912, Decided on 9th December 1913, from order of Sub-Judge, Ramnad, in I. A. No. 349 of 1912, D/- 22nd April 1912.

Civil P. C. (5 of 1908), O. 5, R. 17—Summons affixed to door of defendant's house because he was not in village is not duly served.

Where the return of a serving officer shows that the summons was affixed to the door of the defendant's house because he was not in the village, the summons cannot be said to have been duly served: 21 Mad. 419 and 29 Mad. 824, *Foll.* [P 159 C 2]

S. Srinivasa Aiyangar and R. Narayanaswami Aiyar—for Appellant.

K. Srinivasa Aiyangar and S. Krishnamachariar—for Respondents.

Judgment.—Under O. 9, R. 13, Civil P. C., defendant 1 is entitled to have the decree passed ex parte against him set aside if he proves that "the summons

was not duly served," that is, the summons in the suit.

The Sub-Judge on 29th January 1912 noted on the record "defendants 1, 2, 5 and 6 absent, ex parte." We take it, that this means that the Sub-Judge passed proceedings, declaring under O. 5, R. 19 (on the two summonses returned by the serving officer, under O. 5, R. 17) that the two summonses on defendant (who is the appellant before us) were duly served and that defendant 1 did not appear notwithstanding such due service. The question is whether the Sub-Judge was legally justified in making that declaration. Following *Subramania Pillai v. Subramania Ayyar* (1) and *Abraham Pillai v. Donald Smith* (2), we hold that the summons was not duly served even accepting the return of the process server on the second summons as correct and that defendant 1 is therefore entitled to have the decree passed ex parte against him set aside.

We therefore reverse the Sub-Judge's order and set aside the ex parte decree passed against defendant 1.

As regards costs, though defendant 1 has succeeded on the legal right given to him by O. 9, R. 13, Civil P. C., we are not satisfied that he could not have appeared and defended the suit on 21st March 1912, though he had not been duly served with summons. We therefore make no order as to costs of the appellant. The costs of the respondent in this Court shall be costs in the cause.

S.N./R.K. Appeal allowed.

(1) [1898] 21 Mad. 419.

(2) [1906] 29 Mad. 324.

A. I. R. 1914 Madras 159 (2)

MILLER, J.

Marudappa Gounden—Petitioner.

v.

Bommanna Gounden—Respondent.

Civil Revn. Petn. No. 629 of 1912, Decided on 21st November 1913, from order of Dist. Munsif, Coimbatore, in I. A. No. 57 of 1912.

(a) Criminal P. C., (5 of 1898), S. 195—Court cannot dismiss application under Criminal P. C., S. 195, for default and non-payment of process fees.

A Court has no power to dismiss for default and non-payment of process fees, an application made under S. 195: 32 Bom. 203, *Foll.* [P 160 C 1]

(b) Civil P. C., (5 of 1908), S. 115—Application under Criminal P. C., S. 195, dismissed for default and restored—High Court

will not interfere—Criminal P. C. (5 of 1898), S. 195.

Where a Court restores to its file an application under S. 195, Criminal P. C., the High Court will not interfere, for the order of restoration is required to set right what was done without jurisdiction. [P 160 C 1]

J. Krishna Rao—for Petitioner.

V. Narasimha Aiyangar—for Counter-Petitioner.

Judgment.—I think there was no jurisdiction in the District Munsif to dismiss the petition for default: vide, *In re, Gopal Siddeshwar Deshpandhe* (1), and therefore, his order restoring it to file may be considered merely as a recognition that the former order was a mere nullity, and may be supported on that ground.

But, whether that is so or not, there is no ground for interference under S. 115, Civil P. C., for the order of restoration is the order required to set right what had been done without jurisdiction and I ought not to interfere with it in such a way as to perpetuate a wrong order. The question is merely technical, for, if instead of a petition to restore the dismissed petition to file, the petitioner had presented a new petition for sanction to prosecute, there is nothing so far as I can see in the Code of Criminal Procedure which would have prevented the District Munsif in his discretion from admitting it.

I dismiss the petition with costs.

S.N./R.K. *Petition dismissed.*

(1) [1908] 32 Bom. 203.

A. I. R. 1914 Madras 160

SANKARAN NAIR AND OLDFIELD, JJ.

Secretary of State—Defendant — Appellant.

v.

P. M. Krishnamachariar—Plaintiff—Respondent.

Second Appeal No. 1085 of 1912, Decided on 27th November 1913, from decree of Dist. Judge, Coimbatore, in Appeal Suit No. 285 of 1910.

Assignment — Assignment of unassessed waste—Order of Collector sanctioning assignment of such lands operates to transfer the same to the heading "assessed land"—Revenue collected from grantee after grant of patta—Collector cannot cancel assignment order.

Where under the darkhast rules framed by the Government, Deputy Tahsildar could assign "unassessed waste" only after the Collector had transferred to the head of "assessed land," an order of the Collector sanctioning the assignment of the lands made with the

knowledge that the lands are assessed waste operates to transfer the same to the heading "assessed land." [P161 C1, 2]

When a patta is once granted, and the revenue due thereon collected from the grantee, it is not open to the Collector to cancel the order of assignment on a knowledge of facts gained by him subsequent to the assignment. G. O. No. 687 does not affect an assignment made before the date of the order. [P 161 C 1, 2]

J. L. Rozario—for Appellant.

T. Rangachariar and *G. Narasimha Chariar*—for Respondent.

Facts.—In Dalavoypoliam, a village in Coimbatore District, there was a large block of land disafforested by the Forest Department. There were good many applicants for the assignment of these lands under darkhast rules. The Deputy Collector directed the Deputy Tahsildar to inspect the lands in person, and report whether they can be assigned or not. On the receipt of that report from the Deputy Tahsildar, the Deputy Collector submitted the same to the Collector for sanction. The Collector ordered the assignment of the lands under the darkhast rules and had knowledge that the lands were unassessed waste. The Deputy Collector then ordered the Deputy Tahsildar to make the necessary order of assignment. There were a large number of applicants including the plaintiff. The Deputy Tahsildar assigned the lands in plaintiff's favour, and directed him to pay the value of the trees on the land, patta was issued to him, and revenue was collected from him for one fasli. The plaintiff then hypothecated the land to another person, raised money, and paid the Government the value of the trees on the land. There were afterwards good many objection petitions to the assignment, on the ground that the land should not have been assigned at all as they were required for commercial purposes. The Collector cancelled the order of assignment made by the Deputy Tahsildar and made an order of refund to the plaintiff of the tree value deposited by him. The plaintiff then instituted the present suit to declare the order of the Collector, cancelling the assignment, illegal; the hypothecatee also brought a suit to recover from Government the amount ordered to be refunded to the plaintiff, in case the order cancelling the assignment was upheld. The District Munsif dismissed the plaintiff's suit on the ground that the Deputy Tahsildar had no jurisdiction to order the assign-

ment of the land, without transferring it to the head of "assessed" by the Collector and the order of assignment is, therefore, ultra vires. On appeal the District Judge held that the fact that the Collector sanctioned the assignment, with the knowledge that it was "unassessed," impliedly transferred the land to the head of "assessed," and the Deputy Tahsildar had, on the date on which he passed the order, jurisdiction to assign it. Accordingly he decreed the plaintiff's suit. The present appeal was by the Government against that decree.

Judgment.—Two questions are raised in this second appeal. It is first contended that the lower appellate Court has found that the land is unassessed waste. Therefore it was not open to the Tahsildar to grant the same under the darkhast rules to plaintiff, as under S. 1 of the Standing Order 15 of the Board of Revenue, it could be so granted only if the Collector transfers the unassessed land to the heading "ayan or assessed land;" and the Collector has not directed such transfer in this case.

The facts are these: The land was unassessed waste, and the Collector directed the Deputy Collector to dispose of the land under the darkhast rules (Ex. 3), also telling him that in his opinion it would be better to grant all this land to the villagers whether pattadars or not. The Deputy Collector referred the matter for disposal to the Deputy Tahsildar, who is empowered by the darkhast rules to grant assessed waste on patta. In pursuance of that order the Deputy Tahsildar granted the land to the plaintiff. The Deputy Collector confirmed the Tahsildar's grant and granted a patta to the plaintiff. Some months after the confirmation by the Deputy Collector, when these facts were brought to the Collector's notice, he passed an order in which no objection was taken to the grant on the ground that the Deputy Tahsildar had no authority. The Judge was of opinion in these circumstances that, as the Collector was in possession of all the facts necessary for him to come to a decision whether the lands should be disposed of under the darkhast rules, whether the lands were assessed or not, and he intended them to be disposed of as assessed lands, although he passed no formal order for their transfer from the heading of unassessed to ayan,

his order to the Deputy Collector to assign the lands as assessed gave his subordinate power to grant them to the plaintiff. We are of opinion that though there is no formal order to that effect, the Collector has really directed the lands to be treated as ayan lands. In the Form (No. 6) which was submitted to him under the revenue rules, the land is shown to have been divided into Sub-divisions, the extent of each Sub-division, the assessment thereon given, and it is stated therein by the Subordinate Revenue Officials, who submitted that report, that these lands surveyed as cultivable waste have been assessed according to the rates of the adjoining patta lands. The endorsement on the report by the Collector is in the following words:

"The survey extent and assessment are approved and sanctioned." If the Collector had not previously sanctioned the transfer, this certainly is a sanction to treat the land from that date as bearing that assessment. From the date of that order the Subordinate Revenue Officials were entitled, if not bound, to treat the land not as unassessed waste, but as ayan lands liable to be disposed of under the darkhast rules. We are, therefore, of opinion that this contention fails.

The next ground is that the Collector has set aside the grant under the power conferred on him by G. O. No. 687 Revenue. This order cannot enable the Collector to interfere with vested rights; and the grant to the plaintiff was made before the date of the order. Moreover, the Collector sets aside the patta on the ground that the procedure laid down for unassessed land should have been followed and the Collector's sanction should have been obtained for the proposal to transfer the land to "ayan" or assessed heading. We have pointed out that the Collector had given such sanction and the title conferred on the plaintiff is not liable to be defeated on this ground.

For these reasons we confirm the decree and dismiss the second appeal with costs. Time allowed for payment of costs is three months.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 162

AYLING AND SADASIVA AIYAR, JJ.

Subbiah Naicker — Counter-Petitioner — Appellant.

v.

Ramanathan Chettiar — Petitioner — Respondent.

Appeal No. 61 of 1913, Decided on 22nd January 1914, against order of Dist. Court, Tinnevely, D/- 28th August 1912, in Appeal Suit No. 399 of 1911.

(a) Civil P. C. (5 of 1908), S. 150—Meaning of "transferred" explained—To transfer business from one Court to another, no order of superior Court under S. 24 regarding case or cases pending is necessary — Civil P. C., S. 24.

The word "transferred" in S. 150, is not limited to such transfers only as are made under special provisions of the Code. The section clearly implies that the whole business of a Court might be transferred to another Court without any order of transfer being passed by a superior Court under S. 24, or any other section of the Code either as regards a particular case or as regards all the cases pending in a particular Court. [P 167 C 2]

(b) Civil P. C. (5 of 1908), S. 150—Pending proceedings are ipso facto transferred by change of venue to new Court unless right to continue pending proceedings is reserved to Court losing jurisdiction.

On principle unless the authority which changes the venue reserves the right to the Court which has lost jurisdiction to continue pending proceedings (affecting the property so transferred to another Court) such proceedings are also ipso facto transferred by the change of venue to the new Court the records relating to that action becoming parts of the records of the new Court. 13 A. D. 1943; *Remington v. Smith*, 1 Ohio, 53. [P 167 C 1, 2]

(c) Civil P. C., S. 150—By change of venue by Local Government, business of Court losing jurisdiction will be ipso facto transferred to new Court.

By the change of venue made by a Local Government the business of a Court which loses jurisdiction over a certain area, so far as it relates to cases affecting the lands in the transferred area will be ipso facto transferred to the new Court. [P 167 C 2]

(d) Civil P. C., Ss. 150, 37 and 38—When portion of territorial jurisdiction is transferred by Local Government to another Court, execution relating to transferred area and pending at date of transfer is to be continued by latter Court.

Where a portion of the territorial jurisdiction of a civil Court is transferred by the Local Government to the territorial jurisdiction of another civil Court execution proceedings relating to lands situated in the transferred area and pending in the former Court at the date of the transfer are to be continued by the latter Court. 6 Cal. 513 and 15 Cal. 667, *Ref* [P 168 C 1]

(e) Civil P. C., O. 9, R. 13—Orders in execution under S. 47 are decrees—R. 13 applies to such order—Civil P. C., S. 47.

Orders in execution which come under S. 47, are "decrees" as defined in S. 2 of the Code and

hence ex parte orders passed in execution are ex parte decrees and O. 9, R. 13 applies: 3 C. L. J. 276 and 8 I. C. 22, *Dist.* [P 169 C 1]

(f) Civil P. C., S. 11—Ex parte order passed after holding that notice was duly served binds defendant on principle of res judicata.

An ex parte order passed after the issue of notice and after the Court had held that the service of the notice was duly effected is on general principles binding as res judicata on the defendant just as much as a contested order or decree. [P 163 C 2]

(g) Limitation Act, Art. 164 — Art. 164 applies not only to decrees but to execution orders.

Article 164 is not intended to apply only to decrees strictly so called. It also applies to orders in execution which come under the definition of decree in the Civil Procedure Code. [P 169 C 1]

(h) Civil P. C., O. 9, R. 13 — Unstamped objection against ex-parte decree without prayer to set aside order or mention of date of notice of order is not application to set aside ex parte order.

An unstamped objection statement against an ex parte order neither containing any prayer for setting aside the order nor giving the date on which the objector had notice of the order cannot be treated as an application for setting aside the ex parte order: 9 I. C. 213, *Dist.* [P 169 C 2]

L. A. Govindaraghava Aiyar—for Appellant.

B. Sitarama Rao—for Respondent.

Judgment.—Defendant 2, one of the three judgment-debtors, is the appellant before this Court. This appeal has arisen out of an execution petition put in by the decree-holder. The facts are a little complicated and though it is not necessary to detail all the facts it is necessary to set out the following for understanding the contention on both sides.

The decree in this case was passed so long ago as March 1898, in favour of one Arunachalam Chettiar. There were several execution petitions by the said decree-holder himself. The decree is then alleged to have fallen in a partition between two members of the decree-holder's family and a partner of the family firm to the share of the said partner who also held a power-of-attorney from the decree-holder. This partner filed execution petitions in 1905 and 1907. Finally on 21st April 1909 Execution Petition 389 of 1909 was filed by a next friend on behalf of the minor son of the said partner after the death of the latter.

We must here state that the decree was passed by the District Munsif's Court of Srivilliputtur and all these applications including the Execution Petition 389 of 1909 of 21st April 1909 were instituted in

that Court. On this application No. 389 of 1909 notice was ordered to be issued to defendants to show cause why the decree should not be executed by sale of properties which had been attached long ago and which attachment was still subsisting. For the purpose of this appeal it is necessary only to consider the notice issued to defendant 2, that notice having been issued in July 1909 by the Srivilliputtur Munsif's Court for defendant 2's appearance on 10th August 1909 to show cause against execution. The process-server took the notice to defendant 2's village on 31st July 1909 for service on defendant 2. What took place there appears from the endorsement of the Village Munsif on the process-server's return and that endorsement is as follows:—"On inquiry made on 31st July 1909, at 9 a. m., regarding defendant 2 the females in defendant 2's house and the inmates of the adjoining house state that it is two days since he went to Sankaranainarkoil, that the date of his return is not known and that no proper male heir is present on the spot; the duplicate of the notice to the said defendant 2 is affixed to the front door of his house." With a return to this effect the process-server returned the notice to the Court on 6th August 1909. On 10th August 1909 (which was the date fixed in the notice for defendant 2 to appear to show cause) the District Munsif made a record to this effect: "Notice affixed, defendant absent, adjourned to 14th instant for batta, for proclamation." The learned District Judge seems to have thought that 10th August 1909 was a mistake for 10th December 1909, but it seems that there is no such mistake and the order was really passed on 10th August 1909 by the Munsif. On 18th October 1909 the proclamation was settled and the sale date was fixed for 10th December 1909. The sale fixed for 10th December 1909 seems to have been again adjourned to some other date in 1910, on account of certain other proceeding, which it is unnecessary to detail.

In May 1910 the Ramnad District was newly constituted by the Local Government and the Srivilliputtur District Munsif's Court was placed under the Ramnad District Judge. The properties which had been attached by the Srivilliputtur District Munsif in execution of the decree of 1897 came under the jurisdiction of the Additional District Munsif of Tin-

nevelly having been taken away from the Srivilliputtur District Munsif's jurisdiction. On these facts the next friend of the minor who claims to be the decree-holder (we shall call him "respondent") and who had put in the Execution Petition No. 389 of 1909 in April 1909 in the Srivilliputtur District Munsif's Court put in Miscellaneous Petition No. 338 of 1911 in the Additional Munsif's Court of Tinnevelly praying among other things that the execution proceedings instituted in the Srivilliputtur Munsif's Court in April 1909 might be continued in the Additional District Munsif's Court of Tinnevelly after obtaining all the records from the Srivilliputtur Court. Paras. 7 and 8 of the affidavit accompanying this petition of February 1911 are as follows:—"7. As the properties which are mentioned in the said sale proclamation and which are applied for, for being sold in this suit are situate in Kurivikulamkattu Kuthagai, Kurinjikulam village in Sankarnainarkoil Taluq within the jurisdiction of this Court as the Srivilliputtur Munsif's Court in which steps had been taken before this, has been abolished in so far as this District is concerned as the said Court has lost its jurisdiction in matters of execution in respect of the decrees of this district and as this Court itself has now jurisdiction to execute the decrees connected with this District it is necessary and reasonable to continue and execute through this Court itself the petition pending in the said Srivilliputtur Munsif's Court."

"8. Moreover this plaintiff made an application to the said Srivilliputtur Munsif's Court but the said application has been returned with an endorsement stating that the entire records aforesaid have been sent to this Court, with reference to matters stated in para. 6 above. The application so returned is herewith filed."

The Additional District Munsif dismissed this application. The conclusions he came to are (as we understand them:)

(a) The decree of the Srivilliputtur District Munsif's Court was not transferred to the Additional District Munsif's Court for execution though a portion of the records were sent to the Tinnevelly Additional District Munsif's Court on the transfer of the territorial jurisdiction by the District Munsif of Srivilliputtur himself.

(b) The District Munsif's Court of Srivilliputtur has not ceased to exist nor has it ceased to have jurisdiction to execute its own decree on the transfer of territory from its jurisdiction as such transfer did not take away the jurisdiction (to entertain application for execution and to pass orders thereon) which it had under S. 223, Civil P. C.

(c) The Additional District Munsif's Court of Tinnevely did not acquire the jurisdiction to execute the decree under S. 649, Civil P. C., or S. 150, Act 5 of 1908 because the Additional District Munsif's Court of Tinnevely could acquire the jurisdiction only if the Court of the District Munsif of Srivilliputtur ceased to exist or to have jurisdiction to execute the decree.

(d) The ex parte order passed by the Srivilliputtur District Munsif's Court on 10th August 1909, allowing execution to proceed against defendant 2 because he did not appear, (though held to have been duly served) could not be treated as estopping defendant 2 so as to preclude him from objecting to the minor respondent executing the decree, (the objection being based) on the ground that execution is barred by limitation and that his right to execute had not been satisfactorily proved. The reason for defendant 2's not being so estopped is that the notice issued under S. 248, Civil P. C., in July 1909, was not personally served upon him and he was not otherwise aware of such notice: see *Mochai Mandal v. Meseruddin Mollah* (1).

(e) The said applications of 1905 and 1907 are however in accordance with law and hence the execution petition of April 1909 was not barred by limitation.

These were the conclusions of the Additional District Munsif of Tinnevely and he rejected the decree-holder's petition to continue the proceedings in his Court on the ground that his Court had no jurisdiction to so continue the proceedings. The minor respondent then appealed to the District Judge against this order of the Additional District Munsif of Tinnevely refusing to continue the execution proceedings inaugurated in April 1909. The learned District Judge's conclusions may be stated thus:

(a) Section 150, Civil P. C., provides that when the business of any Court is transferred to any other Court, the latter

shall have the same powers and duties as the former had in respect of it. But (according to the learned District Judge) the execution petition of 1909 was a pending business in the Srivilliputtur Munsif's Court when it lost its jurisdiction over the territory (in which the attached properties were situated) on 1st June 1910 and such pending business was not legally transferred to the Additional District Munsif of Tinnevely. So the minor petitioner could not take advantage of S. 150, Civil P. C., and contend that the Additional District Munsif of Tinnevely was a Court to which the business of the Srivilliputtur Munsif's Court was transferred.

(b) But the Srivilliputtur Munsif's Court though it continued to exist and to be held in the same station and continued to have the jurisdiction over a portion of its former territorial jurisdiction must be deemed to have "ceased to exist" within the meaning of S. 37, Cl. (b), Civil P. C., because the territories within its jurisdiction had been transferred to the newly created Ramnad District by the Local Government and appeals from its decrees and orders lay thereafter to the Ramnad District Court and not to the District Court of Tinnevely. Hence the Court which passed the decree had now become the Additional District Munsif's Court of Tinnevely. In other words the learned District Judge's view was that as the Srivilliputtur Munsif's Court ceased to exist the Court which originally passed the decree ceased to exist and the Additional District Munsif's Court of Tinnevely became "the Court which passed the decree" within the meaning of S. 37, Cl. (b), and hence it ought to continue the execution proceedings.

(c) Defendant 2 could not raise the question of limitation by reason of the alleged legal invalidity of the execution petitions of 1905 and 1907 as the order of the Srivilliputtur Munsif's Court of the 10th August 1909, allowing execution after declaring the service on defendant 2 to have been duly effected cannot be questioned by defendant 2 now, as he has not had that ex parte order (allowing execution) set aside by proceedings in appeal or by any other legal means open to him.

On the basis of the conclusions (b) and (c) above, the learned District Judge set aside the Additional District Munsif's

(1) [1911] 9 I.C. 213=13 C.L.J. 26.

order and remanded the petition for disposal of Execution Petition No. 389 of 1909 by that Court from the point it had reached on 23rd February 1910. It is against this appellate (District Judge's) order of remand that the present Civil Miscellaneous Appeal No. 61 of 1913 has been filed before us. The arguments of the learned vakil for the appellants before us might be shortly stated thus:

(a) The learned District Judge was right in saying that S. 150, Civil P. C., refers to the transfer of business owing to an order of transfer by a superior Court as under S. 24 or any such similar order and that mere alteration of jurisdiction through the Local Government's notifications does not transfer any business within the meaning of S. 150; but the learned District Judge was in error in holding that the Srivilliputtur District Munsif's Court ceased to exist within the meaning of S. 37, Cl. (b), merely by reason of the fact that the territory over which the said Court had to exercise jurisdiction was included in a new district, the portion in dispute in these execution proceedings and which also formed the basis of the venue of the suit having been transferred to the Tinnevely Additional Munsif's Court's jurisdiction.

(b) The Srivilliputtur District Munsif's Court not having ceased to exist, it also did not cease to have power to exercise jurisdiction within the meaning of S. 37, Cl. (b) because as the Court which passed the decree, it continued to have jurisdiction under S. 38, Civil P. C., (old S. 223) even though the property attached in execution of the decree had been transferred to the jurisdiction of the Additional District Munsif of Tinnevely.

(c) As the Srivilliputtur District Munsif's Court continued to have jurisdiction to execute the decree, the Additional District Munsif's Court did not obtain jurisdiction either to execute the decree or to continue the execution begun in the Srivilliputtur Munsif's Court, only one of the two Courts being capable of executing the decree.

We shall consider briefly each of these three contentions. Before the new Code was passed, there was a conflict between the decisions of the Calcutta High Court and the decisions of the Madras High Court in respect of the question whether a Court which passed the decree which directed the sale of immovable property

had jurisdiction to order the sale of that property if after the decree and before the application for sale, the said property had been transferred by the Local Government's notification from its jurisdiction to the jurisdiction of another Court. The principal decisions of the Calcutta High Court on this question are *Latchman Pundeh v. Maddan Mohun Shye* (2); *Kartick Nath Pandey v. Tilukdhari Lall* (3); *Prem Chand Dey v. Mokhoda Debi* (4); *Kali Pado Mukerjee v. Dino Nath Mukerjee* (5); *Jahar v. Kamini Debi* (6) and *Udit Narain Chaudhury v. Mathura Prasad* (7). We do not think it necessary to deal in detail with every one of these cases. *Kartick Nath Pandey v. Tilukdhari Lall* (3) was virtually overruled by the Full Bench decision of *Prem Chand v. Mokhoda Debi* (4). The result of all these cases is that though under O. 21, R. 10, (old S. 230), the application for execution by sale of properties which had passed out of the territorial jurisdiction of the Court which passed the decree might be made to the Court which passed the decree, it may also be made to the Court which had acquired jurisdiction over the said properties as it is also included in the definition of the Court which passed the decree by the strength of S. 37, Cl. (b), as the Court which passed the decree has ceased to have jurisdiction to sell the properties decreed to be sold. Hence, according to the result of these decisions of the Calcutta High Court, both the Courts which passed the decree and the Court which had since obtained jurisdiction over the property could entertain an application for execution of the decree.

(b) Though both Courts could entertain the application, the Court which passed the decree had ceased to have jurisdiction to order the sale of properties and hence could not itself order a sale and if the execution application is made to it, it must transfer it to the Court which had now obtained jurisdiction over the properties for passing and executing the order for sale.

Thus the Calcutta High Court decisions make a distinction between the jurisdiction to entertain the execution

(2) [1881] 6 Cal. 513.

(3) [1888] 15 Cal. 667.

(4) [1890] 17 Cal. 699.

(5) [1898] 25 Cal. 315.

(6) [1901] 28 Cal. 238.

(7) [1908] 35 Cal. 974.

application and the jurisdiction to order sale of properties in execution, and while it gives jurisdiction to both the Court which originally passed the decree and the Court which has since obtained jurisdiction over the territory to entertain applications, the said decisions give jurisdiction only to the latter Court to order the sale of the properties.

As regards the Madras High Court, the principal cases are *Gomatham Alamelu v. Komandur Krishnamacharlu* (8) *Panduranga Mudaliyar v. Vythilinga Reddi* (9), *Subbaraya Mudaliyar v. Rakki* (10) and *Alagappa Mudaliyar v. Thiagaraja Mudaliyar* (11). In *Gomatham Alamelu v. Komandur Krishnamacharlu* (8) it was merely held that if a Court which had not got jurisdiction had passed a decree for sale of the properties outside its jurisdiction without objection by the defendant, such a decree is not a nullity and the judgment-debtor could not object to the validity of such a decree in execution proceeding. In *Panduranga Mudaliyar v. Vythilinga Reddi* (9) it was held that the Court which passed the decree for sale had jurisdiction to entertain an execution application for sale of that property even though the property had been transferred to the jurisdiction of some other Courts. Apart from the question of its jurisdiction to entertain the application, whether it would itself order the sale of that property, was not and need not have been considered in that case, because the decree-holder in his application for execution, also prayed for the transfer of the decree to the Court which had since obtained jurisdiction over the properties directed to be sold. The decision of *Panduranga Mudaliyar v. Vythilinga Reddi* (9) seems, therefore, to be not in conflict with the Calcutta decisions which only negative the right of the Court which passed the decree to order the sale of the properties which had passed out of its jurisdiction, but do not negative the right of that Court to entertain the application for execution. *Subbaraya Mudaliyar v. Rakki* (10) depended upon the meaning of S. 189, Madras Estates Land Act, though there is a general observation that even when a statute takes

away the jurisdiction of a class of Courts to hear suits of a certain nature and transfers the jurisdiction to hear such suits to another class of Courts, the first class of Courts does not lose the jurisdiction over the suits pending at the time of the passing of the Act which so transfers the jurisdiction.

In *Alagappa Mudaliyar v. Thiagaraja Mudaliyar* (11) doubt was thrown upon the decision of *Panduranga Mudaliyar v. Vythilinga Reddi* (9), and the learned Judges* (Wallis and Krishnaswamy Aiyer, JJ.) say that the question whether, the transfer of local area from the jurisdiction of one Court to another Court would not divest the original Court of jurisdiction over even pending suits was a question of "considerable difficulty." The learned Judges, therefore, without deciding that question disposed of the case on the assumption that the notification of the Local Government deprived the Subordinate Judge's Court of Tuticorin from trying the pending suit and they got over the difficulty by transferring the case to his file from that of the new Court (Ramnad Court) to whose file it had been transferred (ex-hypothesi) by the notification. We are inclined to think that the Calcutta decisions in making a distinction between the jurisdiction to entertain applications and the jurisdiction to pass orders on such applications are not strictly logical, as the Court which passed the decree of sale of a property cannot even entertain an application in execution for sale of such properties. However the really important question is now settled in Calcutta, namely, that the new Court which has since obtained territorial jurisdiction over the property ordered to be sold or sought to be attached and sold in execution has jurisdiction both to entertain an application in execution for such sale as also to pass orders on such applications.

In Vol. 2, Encyclopædia of Law and Procedure, pp. 713 and 714 the following passages occur: "A proper and lawful exercise of delegated legislative authority, or the direct exercise of constitutional power, will operate to abolish a Court or not, according to the intent expressed or lawfully to be implied within the principles heretofore stated. This intent governs in determining the effect of the adoption of a new constitution, of the creation, alteration, and re-organization of

(8) [1904] 27 Mad. 118.

(9) [1907] 30 Mad. 537.

(10) [1909] 1 I. C. 73=32 Mad. 140.

(11) [1910] 11 I. C. 864.

new districts, circuits or other judicial subdivisions, of the detaching, attaching, annexation, and consolidation of districts and the transfer of jurisdiction in general. And it has been held that in the absence of a constitutional or statutory provision to the contrary, causes pending in the abolished Courts (the same principle must apply by analogy where a portion of the jurisdiction is transferred) "are transferred by operation of law to the new Courts, no certificate or order transferring them being necessary. The new Court will obtain and proceed to exercise jurisdiction over causes lawfully transferred. This rule includes authority to hold the remainder of a term which was in session when the statute took effect, the right to amend records relating to the judicial action of the superseded Courts, etc." In Vol. 40, Encyclopædia, p.129, it is said: "Where, pending an action, a new county or district is created or existing lines are altered, so that the subject-matter of the action or the residence of defendant is thrown into a different county or district from what it was when the action was instituted, there is some conflict of authority as to whether the venue should be changed accordingly, or whether the action should proceed where it was instituted without a change of venue. The question depends largely upon the provisions of the statute." In American Digest, Vol. 13, at p. 1943, a decision is referred to in which it was held that a statute giving exclusive jurisdiction to justices, in certain cases and containing no clause saving pending suits, deprived the Circuit Courts (which till then had jurisdiction over such cases) to try even pending suit. Another case is quoted in which a decree rendered by a Probate Court in a suit after the Court was deprived of its jurisdiction by an Act (which came into force while the suit was pending) was reversed in appeal as passed without jurisdiction: *Remington v. Smith* (12). It seems to us on principle that unless the authority which changes the venue reserves the right to the Court which has lost the jurisdiction to continue pending proceedings (affecting the property so transferred to another jurisdiction), such proceedings are also ipso facto transferred by the change of venue to the new Court, the records relating to

(12) 1 Ohio. 53.

that action becoming part of the records of the new Court. In the present case, it appears that since the change of venue was made from the Srivilliputtur Munsif to the Additional District Munsif of Tinnevely, the Srivilliputtur District Munsif sent all the records remaining in his Court in Execution Petition 389 of 1909 to the Additional District Munsif's Court of Tinnevely, thus washing his hands completely of that affair. We think he was right in doing so. As stated in *Premchand Dey v. Mokhoda Devi* (4): "So far as the Procedure Code is concerned, execution of a decree is only a continuation of the suit, and there appears no legitimate reason why a Court in the later stage of a suit should have greater powers than it possessed at its institution. But, however that may be, a comparison of S. 223 with the last paragraph of S. 649 seems to us to indicate that territorial jurisdiction is a condition precedent to a Court executing a decree."

We might add that the new S. 150 introduced by the new Code seems to clearly imply that the whole business of a Court might be transferred to another Court without any order of transfer being passed by a superior Court under S. 24 or any other section of the Code either as regards a particular case or as regards all the cases pending in a particular Court. The introduction of this new section indicates, in our opinion, that the Calcutta view which held that by the changes of venue made by a Local Government, the business of the Court which loses jurisdiction over a certain area so far as it relates to cases affecting the lands in the transferred area will be ipso facto transferred to the new Court, has been adopted by the legislature. We are unable to agree with the learned District Judge that the word "transfer" of business under S. 150 covers only transfers made under special provisions of the Civil Procedure Code and we have found it difficult to follow the reasoning of the learned District Judge who relies on Ss. 8 (1), 13 (2) (3) and 17 (1), Bengal Civil Courts Act. Those provisions appear to us to have little bearing on the decision of this question. In the result we hold that the learned District Judge was right in his conclusion that the Additional District Munsif's Court of Tinnevely has juris-

diction to continue the proceedings in execution initiated in the Srivilliputtur District Munsif's Court in 1909. Our reason for that conclusion is that the Srivilliputtur Munsif's Court ceased to have jurisdiction to continue the proceedings in execution, whereas the reason given by the learned District Judge is that the Srivilliputtur Munsif's Court ceased to exist. Even if we are wrong in the above view, we are prepared to get over the difficulty sought to be raised on the question of jurisdiction by transferring the Execution Petition No. 389 of 1909 from the Srivilliputtur Munsif's Court for disposal to the file of the Additional District Munsif of Tinnevely, a similar expedient having been resorted to by the learned Judges who decided the case in *Alagappa Mudaliyar v. Thiagaraja Mudaliyar* (11).

The next point sought to be argued by the appellant was whether the execution application of 1909 was barred by limitation. The question of limitation depends upon certain facts alleged by the judgment-debtor, the truth of which facts has not been gone into by the lower appellate Court as it was contended by the decree-holder that those facts cannot be gone into, defendant 2 being bound by the ex parte order of August 1909, allowing execution of the decree in the respondent's favour. On the other hand the appellant's contention is that the order of August 1909 being an ex parte order is not legally binding on him and has not the legal effect of estopping him from questioning its validity at later stages of the execution proceedings if he proves that he had no notice of the date fixed for the hearing of the execution petition of 1909. The respondent's rejoinder to this is that till the appellant has that order of August 1909 set aside by proceedings under S. 108, Civil P. C., (new O. 9, R. 13), or by proceedings in appeal, it is binding on the appellant and estops him from denying the respondent's right to execute the decree. Now the order of August 1909 was, no doubt, an ex parte order but it was passed after notice was issued to defendant 2 (appellant) to show cause why such an order should not be passed and after the Court had satisfied itself on the affidavit and the return of the process-server that the notice had been duly served, though by affixture to the outer door of defendant 2's house.

An ex parte order passed after issue of notice and after the Court had held that the service of the notice was duly effected is, it seems to us, on general principles binding as res judicata on the defendant just as much as a contested order or decree. It has now been settled : see *Hara Chandra Bairagi v. Bepin Behary Das* (13), that an ex parte decree does operate as res judicata. See also *Raja Kumara Venkata Perumal Raj Bahadur v. Thathu Ramaswamy Chetty* (14) where Benson and Sundara Aiyar, JJ., express the view that an ex parte decree does estop the parties to the suit from disputing its validity in law." This effect of an ex parte decree or order passed after notice (declared to be duly served on) the respondent does not rest merely upon the provisions of the Civil Procedure Code, S. 11, but upon general principles of jurisprudence. Though as pointed out by the Privy Council in *Thakur Prasad v. Fakirulla* (15) the special provisions of the Civil Procedure Code like the old Ss. 43 or 373, or 108 which preclude a litigant from bringing a fresh suit in respect of certain claims though they had not been actually heard and decided in the first suit, could not apply to execution proceedings, the general principles of jurisprudence which govern the Courts as regards res judicata or estoppel by record do apply to execution proceedings and have been so applied, following the well-known case of *Mungul Pershad Dichit v. Girija Kant Lahiri* (16) by all the Indian Courts.

There is, again, no hardship in treating an order passed ex parte in execution proceedings as binding on the judgment-debtor provided that notice had been issued to him and had been declared duly effected by the Court. For, if he was really ignorant of the notice, he is entitled under S. 108, Civil P. C., (O. 9, R. 13 of the new Code) to have the ex parte order set aside by putting in his application within one month of his knowledge of the order under Art. 164, Lim. Act. It is contended by the appellant's learned vakil, Mr. L. A. Govindaraghava Aiyar, that O. 9, R. 13, Civil P. C., does not apply to ex parte orders in execution passed but only to ex parte

(13) [1910] 6 I. C. 860.

(14) [1911] 9 I. C. 875=35 Mad. 75.

(15) [1895] 17 All. 106=22 I. A. 44 (P.C.).

(16) [1882] 8 Cal. 51=8 I. A. 123 (P.C.).

decrees in suits. We think that that argument can not be accepted. Orders in execution which come under S. 47, Civil P. C., are decrees as defined in S. 2 of the Code and hence ex parte orders passed in execution are ex parte decrees and O. 9, R. 13, provides generally for the setting aside of ex parte decrees and not only for the setting aside of those classes of ex parte decrees which are not also orders passed under S. 47 in execution proceedings. We are fortified in this view by the decision of *Krishna Chandra Pal v. Protap Chandra Pal* (17).

As regards the obiter dictum of Mookerjee, J., in *Sripati Charan Chowdhury v. Shamaldhone Dutt* (R. Belchambers) (18) that the whole of the rules in O. 9 do not apply to execution proceedings, we need only say that the learned Judge was not directing his attention to every one of the 14 rules in O. 9 when he pronounced that dictum, but was generally considering the question whether the bar of fresh proceedings in suits, enacted in Rr. 9, 12 and so on will apply to execution proceedings. There is no allusion in the learned Judge's decision to the case in *Krishna Chandra Pal v. Protap Chandra Pal* (17), which directly held that S. 108, (O. 9, R. 13), applied to execution proceedings. The argument of the appellant's learned vakil based on the fact that, in Art. 164, Lim. Act, the general expression "summons" is used instead of "summons or notice" does not convince us that Art. 164 was intended to apply only to decrees strictly so called and not to orders in execution which come under the definition of decree in the Civil Procedure Code. Besides the remedy under S. 108, the defendant could also have sought the remedy by way of appeal against the ex parte order. We are therefore reasonably clear that the ex parte order of August 1909, allowing execution in favour of the respondent cannot be questioned in the further stages of the execution proceedings by the appellant.

The learned District Judge was therefore right in refusing to go into the question whether the respondent was barred by limitation or any other cause from prosecuting Execution Petition No. 389 of 1909.

It is next contended that the unstamped objection statement, dated 27th July 1911, put in by defendant 2 might be treated as an application (under O. 9, R. 13) to set aside the ex parte order passed in August 1909 in the respondent's favour and that an opportunity should be given to the appellant to prove (as such applicant) that he was not duly served with notice of the execution petition before that order of August 1909 was passed and that he had no knowledge of the passing of that order till within one month of his filing this statement in July 1911. No doubt in the case of *Mochai Mandal v. Meseruddin Mollah* (1) an objection by the judgment-debtor that no notice had been really served upon him and that he had no knowledge of an order passed against him (allowing execution of the decree) was treated as of the same effect as an application to set aside ex parte order allowing execution and on its being not denied by the decree-holder that the judgment-debtor had not been duly served and did not have knowledge of the previous order allowing execution till eight days before the judgment-debtor preferred his objections, that order was treated as not binding upon him. But we think, in the present case, the objection statement of July 1911 cannot be treated as an objection to set aside the ex parte order of August 1909, (a) as it is not stamped as an application; (b) as there is no prayer in that statement to set aside the order of August 1909 and (c) as it does not appear from it when defendant 2 had notice of the order of 2nd December 1909, that is, whether he had notice only within one month of the filing of this memorandum of objections and whether, if the objection statement be treated as an application to set aside the order of August 1909, such an application is not barred by limitation. If defendant 2 had knowledge (as seems probable from the other proceedings in the case) of the order of August 1909, more than a month before the filing of the statement of objections in July 1911, he was barred from applying to set aside the ex parte order of 1909.

In the result we dismiss the appeal with costs.

S.N./R.K.

Appeal dismissed.

(17) [1906] 3 C. L. J. 276.

(18) [1910] 8 I. C. 22.

A. I. R. 1914 Madras 170 (1)

SADASIVA AIYAR AND SPENCER, JJ.

Muthukaruppan Chettiar—Plaintiff—Appellant.

v.

M. A. Chinnasawmy Pillai—Counter-Plaintiff—Respondent.

Appeal No. 1 of 1913, Decided on 18th December 1913, from appellate order of Dist. Judge, Coimbatore, in Appeal Suit No. 187 of 1912.

(a) Civil P. C., O. 34—"Do pay" used in decree entitles decree-holder to proceed against defendant's person even before sale of mortgaged property—Decree—Construction.

The words "do pay" used in a decree entitle the decree-holder to proceed against the person of the defendant even before bringing the mortgaged property to sale : 12 I. C. 689, *Foll.*

[P 170 C 1]

(b) Decree—Execution—Personal decree along with decree for sale—Executing Court bound to execute it according to its terms.

Where a Court has given personal decree at once against the defendant along with a decree for sale, an executing Court is bound to execute it according to its terms, though it is erroneous.

C. S. Venkatachariar—for Appellant.**Judgment.**—The learned District Judge has proceeded on the footing that the decree passed in the suit followed the provisions of the new Civil Procedure Code, which superseded the corresponding provisions in the Transfer of Property Act relating to mortgage decrees. The decree ought, no doubt, to have followed Form No. 4, Sch. D, of the new Civil P. C., but it did not do so and gave a personal decree at once against the defendant along with a decree for sale.

The executing Court has to execute the decree according to its terms and the decree-holder is entitled to the relief granted him by the subsisting decree even if it is erroneous.

In *Raja of Kalahasti v. Venkata Perumal* (1) this Court held that a decree containing a direction that a mortgagor-defendant "do pay" a certain sum of money (as the decree in the present case directs) entitled the decree-holder to proceed against the person of the defendant even before bringing the mortgaged property to sale.

We set aside the District Judge's decision and restore that of the Munsif with costs in this and the lower appellate Court on the respondent.

S.N./R.K.

*Appeal allowed.**** A. I. R. 1914 Madras 170 (2)**

SADASIVA AIYAR AND SPENCER, JJ.

Gade Seshamma—Defendant—Appellant.

v.

Bulusu Venkatasuryanarayana and others—Plaintiffs—Respondents.

Civil Misc. Appeal No. 280 of 1912, Decided on 23rd October 1913, from order of Dist. Judge, Vizagapatam, in Appeal Suit No. 884 of 1911.

*Civil P. C. (5 of 1908), O. 23, R. 1—Legal representative of deceased defendant not brought on record within time—Suit withdrawn with liberty to bring fresh suit—New suit is not maintainable against defendant's representatives not on record or against whom suit has abated—Civil P. C., O. 22, R. 4 (2).

Where a suit abates against a particular defendant by reason of the legal representatives not having been brought on the record within the time limited by law and the plaintiff thereupon withdraws his suit with permission to bring a fresh suit, such permission only empowers him to bring the fresh suit against those defendants who were on the record on the date of withdrawal and not against defendant who on that date had ceased to be on the record or against the legal representatives of a defendant who was dead and against whom the suit had abated : 8 I. C. 268, *Diss. from.* [P 170 C 2]*T. Rangachariar*—for Appellant.*S. Srinivasa Aiyangar*—for Respondents.**Judgment.**—We are of opinion that, when a suit has abated against a particular defendant by reason of his legal representatives not having been brought on the record within the time limited by law, and when the plaintiff thereupon withdraws his suit with permission to bring a fresh suit, such a permission can only empower him to bring the fresh suit against those defendants who were on the record on the date of the withdrawal and not against a defendant who had ceased to be on the record or against the legal representatives of a defendant who was dead at the time of the withdrawal and whose said representatives had either not been brought on the record or had been removed from the record by an appellate order which set aside the order of the first Court bringing them on record.As regards the case of *Peria Perumal v. Pichan alias Karuppan* (1), the learned Judges were, no doubt, (if we may say so with respect), right in saying that the cause of action in that case survived as against the defendants other than the deceased defendant and hence a new suit

(1) [1910] 8 I. C. 268.

(1) [1911] 12 I. C. 689=21 M. L. J. 1036.

would be under the permission granted under S. 373 as against the other defendants. But in so far as that decision holds that even against the legal representatives of a defendant who was dead at the time of the withdrawal with permission to bring a fresh suit, the new suit would be sustainable, we respectfully dissent therefrom, the learned Judges themselves having evidently arrived at their conclusion after much hesitation.

Further, the modifications made by the new Civil Procedure Code in the language of the old Ss. 373 and 368 (O. 23, R. 1 and Cl. (2), O. 22, R. 4) seem to make the matter quite clear and to prevent the bringing of the fresh suit as against a defendant who was not on the record at the time of the withdrawal.

We therefore reverse the learned District Judge's order and restore the Munsif's decision with costs in this and in the lower appellate Court in favour of the appellant.

S.N./R.K. *Order reversed.*

A. I. R. 1914 Madras 171

SADASIVA AIYAR AND SPENCER, JJ.

Rajammal—Plaintiff—Appellant.

v.

Lakshammal — Defendant — Respondent.

Second Appeal No. 659 of 1911, Decided on 28th January 1914, from decree of Dist. Judge, Chingleput, in Appeal Suit No. 243 of 1908.

Limitation Act (9 of 1908), S. 10—Deposit of moveables or money by A with B—Express trust is not created within S. 10 nor is banker or agent or debtor an express trustee—Relationship between son-in-law and father-in-law is not similar to relation between solicitor and client—Principal and Agent.

A mere deposit of moveable or money by A with B would not make B the trustee of A on an express trust, so as to attract the provisions of S. 10 nor is a depository or a banker or an agent for a debtor to whom a loan is made and who promises to return the loan, an express trustee within the meaning of the section.

A relation between a son-in-law and a father-in-law is not at all similar to the relation between a solicitor and his client, that is, a son-in-law by his new matrimonial relationship does not stand in a fiduciary relation to the father-in-law as a solicitor does to his client : 5 I. C. 381 and 6 I. C. 427, *Ref.*

[P 173 C 2 ; P 174 C 1]

G. S. Ramachandra Aiyar — for Appellant.

C. V. Seshachariar, V. S. Govindachariar and C. S. Kallabhiran Aiyangar — for Respondent.

Judgment.—The District Judge disbelieved the evidence of the trust alleged in the plaint on the ground that the accounts put in do not contain the plaintiff's name. The allegation in the plaint regarding the trust is that it was for K. Srinivasa Aiyangar, i. e., the plaintiff's father, and for the plaintiff. If in fact there was a trust for Srinivasa Aiyangar, the plaintiff as his heir would be entitled to the benefit of it, and as the plaintiff alleged in the plaint that there was a trust for both Srinivasa Aiyangar and herself she would be entitled to succeed if a trust for Srinivasa Aiyangar is found. The District Munsif observes in para. 13 of his judgment that Seshadri Aiyangar accounted for the money in his hands in December 1878. That was apparently during the lifetime of Srinivasa Aiyangar, for he says in the same paragraph that Srinivasa Aiyangar died in 1882. The absence of the plaintiff's own name would not, of course, show that there was no trust for Srinivasa Aiyangar. Besides if the accounts show that the money was treated by Seshadri Aiyangar as a fund held by him in trust even after Srinivasa Aiyangar's lifetime, the mere fact that the plaintiff's name does not appear would be immaterial. The Judge apparently did not come to a conclusion on the question of the genuineness of the accounts. We cannot treat the finding of the Judge as satisfactory. We shall therefore ask him to return a fresh finding on the question whether the money in question was held by Seshadri Aiyangar in trust either for Srinivasa Aiyangar, or for the plaintiff, or for both. We must express no opinion on the question whether the facts proved by the plaintiff at the trial would make out a trust. If the finding of the District Judge should be in the affirmative on the question of trust, he will record findings also on issues Nos. 2 to 4.

Findings should be submitted in one month from date of receipt of this order by the lower Court, and seven days will be allowed for filing objections :

(In compliance with the order contained in the above judgment, the District Judge of Chingleput submitted the following) :

Finding.—In Second Appeal No. 659 of 1911 on the file of the High Court against Appeal Suit No. 243 of 1908, on the file of this Court their Lordships

have directed me to submit a fresh finding upon the following

Issue:

Whether the money in question was held by Seshadri Aiyangar in trust either for Seshadri (sic) Aiyangar or for the plaintiff or for both (N.B. *The second "Seshadri" must be a clerical error for "Srinivasa" and I have proceeded upon this supposition.*)

If the finding should be in the affirmative, fresh findings are also required upon the following

Issues:

Issue 2. Whether the suit is barred by limitation?

Issue 3. Whether the plaintiff is entitled to any and what amount against the estate of the deceased husband of the defendant?

Issue 4. Whether the plaintiff is entitled to a charge over the plaintiff mentioned properties?

My predecessor allowed this appeal on the ground that the accounts, even if their genuineness be admitted, would not show that the late Seshadri Aiyangar held any money as trustee for the plaintiff to whom there is no reference in them at all. It is true there is no mention of the plaintiff in the accounts, but the plaintiff's case, as I understand it, is that the plaintiff's father K. Srinivasa Aiyangar in 1877 entrusted a sum of about Rs. 400 to Seshadri Aiyangar who was then about to marry the plaintiff. After K. Srinivasa Aiyangar's death the said Seshadri Aiyangar continued to hold the money, as then improved, in trust for his wife, the plaintiff; and after Seshadri Aiyangar's death the money came to his son Srinivasa Aiyangar. The last named died in 1906 and plaintiff now seeks to recover the money from the estate.

The principal account is Ex. A. The District Munsif has discussed it at length in paras. 7 to 17 of his judgment and has come to the conclusion that it is substantially genuine. At the top of p. 7 the name Kaveri Srinivasa Aiyangar was undoubtedly written at a later date than the rest of the page, as is especially apparent on looking at the other side of the paper. There is also an interpolation at line 1a. On p. 7 the word "Seshan" also is an interpolation. With the exception of these interpolations the account book bears every indication of being

genuine. There is also evidence that the book is in the handwriting of Seshadri, but P. W. 3 admits that the entry at the top of p. 7, and also the superscription on p. 1 of the book are not in Seshadri's hand. As regards the superscription (A-3) it runs "K. Srinivasa Aiyangar's account from Avani of Iswara year (August) 1877". It appears old, and contemporaneous with the first few pages of the book, and whether it is or is not in the hand of Seshadri, I do not think it can be a modern addition. The vakil for the defendant argues that as the account book has been tampered with, it cannot be accepted. I think that as the suspicious items can be clearly distinguished and are few in number, the rest of the book is acceptable. I therefore agree with District Munsif, and find that this Ex. A was an account kept by Seshadri in the name of his father-in-law K. Srinivasa in order to account for money which the latter had entrusted with him. As there is no mention of the plaintiff, and the oral evidence is not altogether satisfactory on the point, I cannot hold that she was originally a beneficiary, either alone or jointly with her father.

As regards the details of Ex. A, it practically opens on p. 5 with "particulars of the property brought when he came to our house" the property being mostly jewels. The "he" must be K. Srinivasa Aiyangar as this was the time when he came to Seshadri's house and the whole book purports to be in his name. P. 7 and the top of p. 8 (Ex. A-5) sets out the details of a total of Rupees 387-8-0 which should then be on hand. Then on p. 11 (Ex. A-4) the particulars for 3rd November 1880 amount to Rupees 404. In the year 1884 the trust fund was carried over to Seshadri's general family fund as is found in Ex. C-1, and Ex. E, when it amounted to Rs. 400. Ex. A then ceased and there is no means of ascertaining what became of the interest which this money earned.

The vakil for the defendant has argued at length that accounts alone are not sufficient to charge any person with liability, that the accounts have not been properly proved, that they were not kept in the regular course of business, that it was not proved that entries were made at the time, that Seshadri may have merely been Srinivasa's book-keeper

whilst Srinivasa himself held the money, and that the money may have been subsequently repaid, for the accounts produced only bring us down to 1904, shortly after Seshadri's death. I have considered all these points and I am still of opinion that the accounts are as good as can be reasonably expected, and that they show Seshadri held money on-trust for Srinivasa.

After Srinivasa's death, the plaintiff inherited his property and thus becomes the sole beneficiary of the trust. I find issue No. 1 in the affirmative that the money in question was held by Seshadri Aiyangar in trust for Srinivasa Aiyangar, and after the latter's death in trust for the plaintiff.

Issue 2 deals with limitation and the District Munsif has found it in the negative. S. 10, Lim. Act, will govern the case and therefore there is no time limit. The vakil for defendant argues that this section applies only to a specific trust, and not to an implied trust or one made by operation of law, and he has quoted as his authorities the rulings of *Arunachala Pillai v. Ramasamy Pillai* (1), *Kumarasami v. Subbaraya* (2) *Ashabai v. Tyeb-Haji Rahimtullah* (3) *Barkat v. Daulat* (4) and *Hirabai v. Jan Mahomed Khalakdina* (5). All these rulings are clearly distinguishable and of no use to the present case. In order to make a person an express trustee within the meaning of the Limitation Act it must, no doubt, appear either from express words or clearly from the facts, that the rightful owner has entrusted the property to the person for the discharge of a particular obligation. I think that such an intention does appear from Ex. A, namely that Seshadri accepted the fund to be held for Srinivasa's benefit. S. 10, Lim. Act, will apply, and the issue is answered in the negative.

Issue 3. The estate of Seshadri descended to the deceased husband of the defendant, and it is liable for the trust amount. There is nothing to show that after 1884 any interest was added to principal, and I must agree with the District Munsif in presuming that as the beneficiary was Seshadri's wife, the in-

come was used for their family expenses. Only the capital amount of Rs. 400 can be demanded by the plaintiff.

Issue 4. The trustee has mixed the trust funds with his own, and the burden is therefore upon him to point out what has become of them. The plaintiff is unable to say that any particular item of the plaint property was purchased with her money, and it is not reasonable that she should be required to do so. Seshadri acquired the plaint property by money with which he had mixed the trust funds and therefore the trust must have a charge upon the property. Issue 4 is answered in the affirmative.

(This second appeal coming on for final hearing on receipt of the finding of the lower appellate Court upon the issues referred by this Court for trial, the Court delivered the following):

Judgment.—The learned District Judge has held that Seshadri Aiyangar was express trustee for Srinivasa Aiyangar (Seshadri Aiyangar's father-in-law) because the account A shows that Srinivasa Aiyangar's moveables were deposited with Seshadri Aiyangar.

A mere deposit of moveables or money by A with B would not make B the trustee of A on an express trust, so as to attract the provisions of S. 10, Lim. Act.

A deposit with a solicitor or other person already standing in a fiduciary relation to another might make such a solicitor an express trustee according to some English decisions: see *Soar v. Ashwell* (6). Also *Narondas Ramji v. Narondas Ramji* (7). But the relation between a son-in-law and a father-in-law is not at all similar to the relation between a solicitor and his client, that is, a son-in-law by his new matrimonial relationship does not stand in a fiduciary relation to his father-in-law as a solicitor does to his client and hence the deposit in this case by a middle aged father-in-law with his youthful son-in-law will not make the latter an express trustee for his father-in-law. The terms of the trust and the duration of the trust have not at all been established and it is impossible in this case to ascertain with "reasonable certainty" the purpose of the trust, the trust property, or the terms of any transaction in the nature of the creation

(1) [1883] 6 Mad. 402.

(2) [1826] 9 Mad. 325.

(3) [1885] 9 Bom. 115.

(4) [1892] 4 All. 187=(1882) A.W.N. 3.

(5) [1888] 7 Bom. 229.

(6) [1893] 2 Q. B. 390=4 R. 602=69 L. T. 585=42 W. R. 165.

(7) [1907] 31 Bom. 418=9 Bom. L. R. 287.

of a trust by Srinivasa Aiyangar. That K. Srinivasa Aiyangar received back out of his deposit sums of moneys whenever required by him for his own purposes from his son-in-law shows rather that there was no trust for any specific purpose of any specific sum, but it was only the ordinary case of a customer who deposited property with a sowcar or a banker and was drawing whatever he wanted for his use from time to time: see *Official Assignee of Madras v. Krishnaswami Naidu* (8), *The Official Assignee of Madras v. Mellapparan Kannor Sarvajana Sahaya Nidhi* (9); *Official Assignee of Madras v. Smith* (10) and *Ichha Dhanji v. Natha* (11). That after 1884, Seshadri Aiyangar merely treated himself as a banker in possession of his father-in-law's money is shown by his having mixed up (for investment purposes) the money he owed to Srinivasa Aiyangar with his (Seshadri Aiyangar's) own funds.

A depositary or a banker or an agent (or a debtor to whom a loan is made and who promises to return the loan) is not an express trustee within the meaning of S. 10, Lim. Act. As this suit was based on an alleged relationship between the plaintiff and the plaintiff's husband (or between the plaintiff's father and the plaintiff's husband) of cestue que trust and trustee and as that allegation has not been established by the oral evidence (disbelieved by the District Court) or of the account Ex. A (relied on by the District Court on remand) the suit fails and the second appeal must be dismissed. Whether if the plaintiff had sued as the heir of a mere depositor she could have succeeded is a question which would depend upon allegations and proofs as to dates of acknowledgments, dates of demands, etc., and it is impossible at this stage to convert the suit based on an express trust to a suit of a different character.

As the defendant denied the genuineness of Ex. A in its entirety, there will be no order as to costs of this second appeal.

S.N./R.K.

Appeal dismissed.

* A. I. R. 1914 Madras 174

AYLING AND SADASIVA AIYAR, JJ.

Kandalam Rajagopalacharyulu and others—Plaintiff—Appellants.

v.

Secretary of State and others—Defendants—Respondents

Second Appeals Nos. 1368, 1398 to 1401, 1468, 1563, 1770 and 1774 of 1911, Decided on 16th September 1913, from decrees of Dist. Judge, Kistna.

(a) **Madras Irrigation Cess Act (1865), S. 1—Meaning of "engagement" explained.**

In S. 1, Act 7 of 1865, the legislature has evidently used the comprehensive word "engagement" instead of the words "agreement or contract" in order that implied undertakings based on equitable considerations may be relied on by landlords in support of their claim for exemption of water cess. The section does not restrict itself to any engagement at the time of the permanent settlement and it is open to the parties to enter into any engagement at any time they like. [P 175 C 2, P 176 C 1]

*(b) **Interpretation of Statutes—In construing words of enactment debates in legislature or Government opinions during passing of Bill should not be referred to.**

In construing the plain words of an enactment the debates in the legislature or the expressions of antecedent views of Government which may have been modified during the passing of a bill through the legislature, should not be referred to, to interpret the Act.

[P 176 C 2]

(c) **Contract Act, S. 197—Express ratification unless communicated to other party is incomplete.**

An express ratification, within the meaning of S. 197, Contract Act, cannot become complete until it is communicated to the other party. Till then it is liable to revocation.

[P 180 C 1]

(d) **Madras Irrigation Cess Act (7 of 1865), S. 1—Declaratory suit claiming right to irrigate land free of water rate—Plaintiff relying on engagement of 1864—Engagement not proved—Suit as framed held to be incompetent.**

In a suit for declaration of right to irrigate land free of water rate, the plaintiff relied upon an engagement of 1864. This was not proved:

Held: that the suit as framed must fail, and that unless the plaint was amended the suit could not succeed on the basis of the usual engagement deducible from the terms of a permanent settlement.

[P 185 C 2]

(e) **Contract Act, S. 197—Acts by public servants may be ratified by subsequent approval—Ratification once made upon full knowledge of circumstances is irrevocable—Ratification by long course of conduct is equally effective.**

Acts done by public servants in the name of the Crown or of the Government of India may be ratified by subsequent approval in much the same way as private transactions. Ratification, once deliberately made upon full

(8) [1910] 5 I. C. 331=33 Mad. 154.

(9) [1910] 6 I. C. 427=34 Mad. 125.

(10) [1909] 1 I. C. 712=32 Mad. 68.

(11) [1889] 13 Bom. 338.

knowledge of all the material circumstances, becomes at once obligatory and cannot afterwards be revoked or recalled. Ratification by a long course of conduct is not less effective than a ratification by a formal declaration.

[P 189 C 2; P 190 C 1]

(f) **Civil P. C., S. 100—Question of fact—Conversion rate of patti is question of fact.**

The area of a patti is not uniform but varies between 8 and 11½ acres in different villages.

The question of the conversion rate of a patti is a question of fact.

[P 182 C 2]

T. V. Seshagiri Iyer—for Appellants.

C. V. Napier—for Respondents.

Ayling, J.—The suits out of which these second appeals arise are all of a similar character. They are brought by various proprietors of land under the Godavari anicut system for a declaration of their right to irrigate their lands with anicut water free of water rate, for an injunction restraining Government from levying water rate under Act 7 of 1865, and except in the case of Second Appeal No 1774 of 1911, for a refund of the amounts collected.

The substantial question involved in each is the extent to which Government is bound to allow the irrigation free of water rate. It is not denied that the water used is Government water; the only question is whether Government is bound by an "engagement" within the meaning of S. 1, Act 7 of 1865 to allow the irrigation free of charge.

Some of the suits deal with mokhasa villages, others with minor inams, and such may conveniently be treated separately.

Second Appeals Nos. 1398 to 1401 and 1770 and 1774 of 1911 all arise out of suits relating to mokhasa villages, all in the Ellamanchili Zamindari with the exception of one (that resulting in Second Appeal No. 1398 of 1911) which relates to a village in the Nidadavole Zamindari. These suits will be considered first.

All these suits are laid on the basis of an alleged engagement with Government embodied in an order of Government (G. O.) No. 101 Rev., dated 16th January 1864, to the effect that Government water would be supplied free of charge to all those lands, whose pre-existing sources of irrigation were cut off by the anicut works. This general engagement, or undertaking, on the part of Government is said to have been subsequently given practical effect by the proceedings of a Deputy Collector,

named Subba Rao, who in 1876 determined the actual extents to be allowed rate free in each case; and the proceedings of Mr. Subba Rao are said to have been ratified by Government in its Order No. 661 Rev., dated 13th September 1894.

Government denies both the alleged engagement and the ratification.

The first point for determination is as to the meaning of the word "engagement" in S. 1, Act 7 of 1865. It has been repeatedly held, and is not now disputed, that in all cases of permanently settled estates where the income derivable from wet lands had been taken into consideration in settling the peishkush payable to Government, there is an implied undertaking of the nature of an enforceable contract on the part of Government to allow the use of Government water to such wet lands without charge; and that this implied undertaking amounts to an engagement within the meaning of the Act. There is a similar implied engagement as regards enfranchised inams. If I understand the learned Government Pleader aright, he contends that these undertakings deducible from the circumstances under which the peishkush (or quit-rent in the case of an inam) was determined are the only engagements contemplated by, or within the meaning of, the Act. I can find nothing in the Act tending, however, remotely to justify such a narrow construction. The word "engagements" is not qualified in any way, as it would have been, had it been intended to limit it to the cases just referred to. An imaginary case may be taken: suppose that Government had, prior to the Act, constructed a channel through a Zamindar's land for the benefit of Government lands on the understanding that in consideration of the Zamindar allowing the use of the ground through which the channel was dug, he should be allowed to irrigate his own land from it, free of charge; can it be contended that such an agreement could not be pleaded under the Act as a bar to the subsequent imposition of water rate? or would it not rightly be held to be an "engagement" within the meaning of S. 1?

I am content to rest my decision on the plain wording of the Act; and do not propose to follow in detail the arguments

of the learned Government Pleader and vakils for the appellants based on previous rulings of this Court or on various Government Orders and other official documents written shortly before the passing of the Act, and referred to as showing the probable intention of Government. As regards the former it is true that the earlier cases *Chidambara Row v. Secretary of State for India in Council* (1), *Lutchmee Doss v. Secretary of State for India* (2) and *Secretary of State for India v. Ambalavana Pandarasannidhi* (3) only, deal with what I may call Permanent Settlement engagements; but they contain nothing, suggesting the exclusion of other engagements. In *Kandukuri Mahalakshamma Garu v. Secretary of State for India* (4), (Ullam case), the learned Judges discuss the evidence of another engagement, though they find it not proved; and in two other cases, Appeal Suits Nos. 182 to 184 of 1904, and *Sri Raja Venkata Rangayya Appa Rao Bahadur v. Secretary of State for India* (5), they find a similar engagement to that now set up as coming within the scope of the section. The most recent case, *Kesari Venkatasubbiah v. Secretary of State for India* (6) is also a distinct authority in support of my view.

In the last named case, one of the learned Judges has to some extent based his conclusions on a consideration of antecedent official correspondence. Before us much argument has been devoted to this line of reasoning, and the Government Pleader was permitted to file some fresh exhibits in the shape of Government orders and Board's Proceedings connected with the documents considered in that case, but not referred to in the judgment. The admission of these documents was allowed on the understanding that they were to be referred to only as bearing on the interpretation of the term "engagement." I do not purpose to discuss any of these documents or their effect, inasmuch as, with all deference, I doubt whether it is either necessary or advisable to interpret the plain words of the Act in the light of expressions of the views of Government before its enactment: vide *Administrator-General of Bengal v.*

Prem Lall Mullick (7), *Kadir Bakhsh v. Bawhani Prasad* (8) (judgment of Edge, C. J.), *Queen-Empress v. Bal Gangadhar Tilak* (9). I may remark that, if debates in the legislature should not be referred to, it seems still less legitimate to refer to expressions of the antecedent views of Government, which may have been modified during the passage of a Bill through the legislature. I may also refer to the remarks of Lord Halsbury in *Hilder v. Dexter* (10).

Assuming then that an engagement of the kind alleged by the appellants would be an engagement within the meaning of the Act, has such an engagement been proved? It is, of course, entirely distinct from, and independent of, the engagement deducible from the conditions of Permanent Settlement and inam grants, to which reference has been made and which is admitted by Government. The District Judge has held that it has not been proved; and, although his finding, based chiefly on the interpretation of documents, is open to question in this Court, I am of opinion that he is right. The plaint in the suit ending in Second Appeal No. 1398 of 1911, (with which the other plaints are identical or practically so), sets out engagement as follows:

"That prior to the introduction of the anicut system or irrigation into the Godavari delta, the mokhasa village of China Nindrakolanu had a wet ayakut of katties 24 watered under old and independent sources of irrigation. The introduction of the anicut system interfered with those sources of irrigation and rendered them useless for irrigation purposes. Government were therefore bound to compensate the mokhasadars (plaintiff's predecessors-in-title) for the loss either in money or otherwise and to cover up all such cases Government, in its Order No. 101, Revn., dated 16th January 1864, declared that Government water would be supplied free of charge to all those lands whose pre-existing sources of irrigation were cut off by the anicut works. Agreeably with the said declaration of Government and under the orders of his departmental superiors, M. R. Ry. Subba Rao Pantulu Garu, then

(1) [1903] 26 Mad. 66.

(2) [1909] 3 I.C. 456=32 Mad. 456.

(3) [1910] 8 I.C. 357=34 Mad. 366.

(4) [1910] 8 I.C. 67=34 Mad. 295.

(5) [1913] 19 I.C. 227.

(6) [1913] 20 I.C. 804.

(7) [1895] 22 Cal. 788 (P.C.).

(8) [1892] 14 All. 145.

(9) [1898] 22 Bom. 112.

(10) [1902] 4 A.C. 474.

in charge of the division, recognized, on 17th July 1876, acres 546—86 as mamool wet, i. e., as land entitled to Government water free of charge, fixing the old wet ayacut at katties 22—6 and converting it into acres at the average conversion rate of acres 24—53 per katti. Though full justice was not done to the mokhasadars (plaintiffs and their ancestors), they submitted to the above settlement and it has now been in force for nearly 30 years having been ratified by the Board and Government. There is thus an engagement between the plaintiffs and the defendant in regard to the extent of mamool wet in China Nindrakolanu and it is not now open to the defendant to go behind it and reopen the question."

A copy of G. O. No. 101 Rev., dated 16th January 1864, is filed as Ex. 24 in Original Suit No. 24 of 1905 (Second Appeal No. 1400 of 1911); and as this is alleged to contain the "engagement," it obviously calls for very careful consideration. The Government order was passed on a letter from the Board of Revenue which was not filed in the lower Courts. A copy was filed and exhibited before us, but subject to the conditions that it was only to be used, as already stated, in connexion with the interpretation of the word "engagement" in the Act. Fortunately, however, the purport of the Board's letter is set forth very fully in the Government order itself. It apparently dealt with two subjects.

(1) the submission of a draft Act for levy of water-cess;

(2) a proposal to modify the rules previously in force in Godavari and Kistna for the levy of water-cess.

We are only concerned with the second of these, which is dealt with in paras 7 to 12 of the Government order as follows:

"7. The last 24 paras of the Board's Proceedings relate to the subject of inam and zamindari "mamool nunja."

"8. The rules hitherto in force have been held, the Board state, to require the levy of the half water rate on "mamool nunja," on the ground that it was formerly imperfectly irrigated; but the rule has not been uniformly observed in the Godavari and Kistna deltas, the practice in the former bearing harder upon the inamdars than that observed in the latter."

"9. The Board have, after mature consideration, come to the conclusion that

the impost is in every respect an objectionable one. There cannot be a doubt, of course, about the benefit which all wet lands under the influence of the anicut channels have derived from these works: the difficulty is to determine the exact amount of that benefit. Besides this, it is to be remembered that, when these irrigation works were commenced, the old tanks and channels had been for years neglected, hence the apparent present improvement is much greater than would have been the case if the existing tanks, etc., had been duly maintained. The Board notice in regard to zamindaris, that the assets on which their peshkush was based included the nunjah assessment receivable from "mamool wet lands," and that the sanads granted to the proprietors declared that the assessment of the public revenue on their lands should never be liable to change under any circumstances. In the case of nunjah inams too, the grant was intended to secure to the grantee the revenue derivable from lands under wet cultivation. A charge for improved irrigation interferes with these rights. The Board further argue that such a demand is in opposition to the expressed intentions of the Home Government, and they quote several despatches from the Secretary of State on this point, specific instances of the hardship entailed by the present practice have been brought to their notice and they finally recommend that the demand of half water rate on mamool nanjah should be relinquished, leaving it to the local authorities to deal with exceptional cases in which the equity of the demand may be unquestionable."

"10. The principle on which exemption might be allowed they consider should be the following:

"In the zamindaris and inams, the nanjah ayacut proved to the satisfaction of the local authorities to have been customarily cultivated as such in times past under old channels and tanks without the aid of the anicut works, shall in future be exempt from all water rate for a single crop."

"11. The Board add that the adoption of this rule will ensure to Government a revenue but little if at all less than would be obtained under the present orders.

"12. On further consideration of the subject and the weighty arguments ad-

duced by the Board, the Government are of opinion that the minor charge for improved irrigation should be abandoned, wherever it can be shown that land whether inams or zamindari is entitled to irrigation, at the cost of Government. But the mere designation of "mamool nunjah" is not sufficient proof of this right; the real criterion is the rate of assessment which the accounts show the land to be liable to. If this indicates the title of the land to water, or if other reasonable proof can be adduced, then no charge should be made for irrigation, as the engagement to supply water manifestly implied a full and not an imperfect supply.

Now, it will be seen at once that there is not a word here of any compensation to the mokhasadars for interference or damage to "old and independent sources of irrigation." The Godavari anicut was completed in 1852: and irrigation by means of channels connected with it commenced in 1855: vide Ex 9 in Second Appeal No. 1468 of 1911. Lands newly brought under wet cultivation by means of this irrigation were charged at fixed rates for the use of the water; and apparently half the ordinary rate had been levied on "mamool nanja" (i. e., lands which had previously been customarily irrigated from other sources) on the ground of the benefit they received in the shape of an improved and more regular supply. This charge the Board proposed to discontinue on three main grounds: (1) the difficulty of calculating the benefit derived from the improvement, (2) the facts that the charge is an infringement of the rights of zamindars as conferred at the Permanent Settlement and similarly of inamdars under their grants, (3) that it was in opposition to the expressed intentions of the Home Government (what this refers to, there is nothing to show). Whatever the extent of the proposed concession was, it is pretty clear that except in so far as it was a gratuitous concession based on grounds of policy it was dictated by the fact that this charge conflicted with the rights acquired by zamindars at the time of Permanent Settlement and by inamdars under their grants. What was the extent of it? Here there is certain amount of ambiguity. The Board proposed to exempt nanja ayakut proved to have been customarily cultivated as such in

times past under old channels and tanks without the aid of anicut water.

It is suggested for the appellants that this means something different and larger than the wet ayakut at the time of Permanent Settlement. The idea is (1) that between the time of Permanent Settlement (1802 for Nidadavole and 1837 for Ellamanchili) the wet ayakut had increased: and (2) that the Board meant to extend the concession not only to the Permanent Settlement wet ayakut, but to all lands which had been brought under wet cultivation up to the time of introduction of anicut irrigation. Both these points seem extremely doubtful. We are not referred to any evidence tending to show that there had been any increase in wet ayakut: and the reference to the neglect of old tanks and channels suggests a very different state of affairs. Secondly, if there had been an increase, and the Board desired to extend the concessions in the manner indicated, why did they not explain their reasons for so doing? Government, in setting forth the purport of the Board's proposals, are not likely to have omitted such an explanation if given. It seems more probable that the Board's proposal was formulated with the knowledge that there had been no increase but rather a decrease of the wet ayakut.

The decision of Government is set forth in para. 12 to confine the concession to "land, whether inam or zamindari shown to be entitled to irrigation at the cost of Government." It is not a very happy phrase, but I can only understand it as meaning "land entitled to be irrigated with Government water without charge." It cannot be contended that a right to the use of Government water without charge was enjoyed by lands which were brought under wet cultivation between the time of Permanent Settlement and the introduction of the anicut system: and the reference to an "engagement to supply water" in the last sentence of the paragraph cannot have referred to such lands.

It is, of course in the order of Government and not in the proposals of the Board that the alleged "engagement" must be sought, and it is to be noted that Government do not accept the Board's proposal as quoted *verbatim* in para. 10: but formulate the terms of the concession themselves.

I can find nothing in the Government order relied on by the appellants more than a resolution to abandon the charge of half water rate on wet lands so cultivated at the time of Permanent Settlement or inam grant on the ground that the charge was arbitrary, impolitic and an infringement of rights acquired at the Permanent Settlement, or under the terms of the inam grant. This is a totally different thing from the engagement pleaded in the plaint.

It is true that, as appears from various exhibits, in later years some misapprehension prevailed as to the reasons which influenced Government in passing its order of 16th January 1864 as well as the exact definition of the concession. The Board in drafting rules (which were duly approved by Government) followed the wording of their original proposal, as set forth in para. 10 of the Government order and this naturally led to some confusion. But I may refer to Ex. 29, in Original Suit No. 24 of 1905 (Second Appeal No. 1400 of 1911), from which it will be quite clear that in 1888 both the Board and Government entertained no doubt that the concession allowed by Government in 1864, was limited to the "gudikat wet area", that is, the area entered as wet in the Permanent Settlement accounts. It is unnecessary to discuss these later documents in detail, inasmuch as it is not suggested that any of them constitute an addition to the "engagement" which has to be found within the four corners of G. O. No. 101, Rev., dated 15th January 1864. As a matter of fact, the question of whether the wet area at the time of Permanent Settlement or at any later time before the introduction of the anicut system should be adopted as the test was never viewed as a matter of any practical importance, probably for the simple reason that no general increase or material variation of wet ayakut took place in the interval.

It is necessary however to consider another argument put forward on behalf of the appellants. It is said that, whatever may have been the intention of Government in passing G. O. No. 101 Rev., dated 16th January 1864, the concession was interpreted by their officers and given practical effect in a particular way, and this procedure was approved and ratified by Government in 1894 so

that as thus given effect to it must now be treated as a binding engagement.

The officers in question are Mr. Hope, Collector of Godavari in 1875-1876, and Mr. K. Subba Rao, Deputy Collector on general duty. Mr. Subba Rao, under instructions from Mr. Hope's predecessor, made an investigation in 16 villages, including those now in question, and submitted proposals to Mr. Hope of the determination of the "usual wet area" on which exemption was to be allowed. Copy of Mr. Subba Rao's report is filed as Ex. 9, in Original Suit No. 46 of 1906 (Second Appeal No. 1468 of 1911). He took the "highest" area of wet cultivation in any one year, before the villages were brought under the anicut as the basis of his recommendation, and converted this area (recorded in the Bhuband accounts only in terms of seed grain) into acres on a system of calculation of his own. The appellants contend that his procedure in both particulars has been ratified by Government and cannot now be called in question. It embodies the exemptions they now claim. It was not argued before us that Subba Rao was acting under the authority of Government, or that, in the absence of ratification by Government, Government would be bound by his action. A clear authority against such a view, if it were needed is to be found in *Secretary of State for India in Council v. Krishna Reddi* (11). The only question is whether his settlement was ratified by Government. There was certainly no ratification by Government at the time. Ex. 10 (in the same suit) shows that the Collector, Mr. Hope, (influenced apparently by the sole idea of saving himself trouble, told Mr. Subba Rao, to dispose of the matter himself, and let parties aggrieved appeal to him. No appeals seem to have been filed, and no further question was raised till 1892, when Mr. Higgins, then Collector of Godavari, raised the question of whether the unauthorized settlement of Mr. Subba Rao should be repudiated. The Board in a resolution dated 31st March 1894 recommended that it should, on the ground that Subba Rao's conversion rate was excessively high : but Government, in its order No. 661, Rev., dated 13th September 1894, directed that "having regard to the official position held by that officer when he made the settlement and to the cir-

cumstances that in fixing the rates, he proceeded under the orders of the then Collector of the District and followed the sanctioned rules on the subject, the settlement made by him should not now be repudiated."

This is the order, which is now put forward as a ratification which is irrevocably binding on Government.

The District Judge states that the order "was never communicated to the parties concerned and was not in fact acted upon." This statement appears to be correct; and it has not been traversed before us. The whole question was reconsidered shortly afterwards on receipt of a further report, and on 17th June 1895 Government passed a fresh order (copy filed as Ex. 12 in Second Appeal No. 1468 of 1911), directing that in all cases in which the rates of conversion had not been accepted for at least twenty years, they might be revised. This, in effect, repudiated Subba Rao's settlement, which was only submitted for the Collector's orders on 31st December 1875, and this was Government's final decision in the matter.

In these circumstances I do not consider that the order, dated 13th September 1894 can be treated as a ratification which would bind the hands of Government. There can be no estoppel, for it was never communicated to the landholders much less acted upon by them. Mr. Seshagiri Aiyar for the appellants contends that no communication of the ratification is necessary, and that any expression (written or oral) of a resolve to ratify a contract is absolutely irrevocable even though uncommunicated and though the ratifier may change his mind a moment later. This is a startling proposition and one in support of which no authority has been cited.

The sections of the Contract Act which deal with ratification (Ss. 196 and 200) are silent on this point, and no rulings which have any bearing upon it have been quoted before us. But, on a consideration of the principles which seem to underlie the Act, it seems to me that an express ratification within the meaning of S. 197 cannot become complete until it is communicated to the other party. Till then, it is liable to revocation. This is in accordance with the principles embodied in the provisions of Ss. 3 and 6 of the Act, which deal with proposals,

acceptances and revocations: vide, in particular S. 5.

The Government order, dated 13th September 1894, in so far as it purports to ratify Subba Rao's settlement, must, therefore, be treated as an incomplete ratification, having been revoked before communication, and is, therefore, not binding upon Government.

I, therefore, agree with the District Judge in holding that the plaintiffs have failed to prove the engagement set up by them, and that the suits as framed must fail. In one case only (Second Appeal No. 1774 of 1911), the appellant's vakil has in this Court applied for, and been granted permission to amend his plaint by basing his claim not on the engagement first pleaded, but on the usual engagement to allow free irrigation to all the wet ayacut at permanent settlement. In the other appeals, the appellant's vakil on mature consideration elected not to apply for a similar amendment. This case (Second Appeal No. 1774 of 1911) will have to be considered separately. The other appeals (Second Appeals Nos. 1398, 1401 and 1770 of 1911) must be dismissed with costs.

In Second Appeal No. 1774 of 1911, however, the engagement pleaded in the plaint as amended is admitted by Government. The only question is whether the rate of conversion adopted by Government based on the investigation of another Deputy Collector Mr. Nageswara Rao, in 1904 is correct: or if incorrect, what should be substituted for it. As already explained, Government cannot be held to be bound by Mr. Subba Rao's method of calculation, unless it is found to be correct. There is no dispute here as to the figures of mamool wet cultivation estimated in putties adopted by Mr. Nageswara Rao. The question of the conversion rate to be adopted is discussed by the District Judge in paras. 31 and 34 of his judgment. It is one of extreme difficulty. The wet ayacut in the old Bhuband accounts is simply estimated in terms of the quantity of seed required for sowing. The question is what area in acres should be taken as equivalent to that for which a given quantity of seed is required. It might be possible to ascertain this by actual experiment; but no suggestion has been made by either side throughout the litigation that such a course should be

adopted, and it would be attended with obvious difficulties. No other method has however been suggested which can be regarded as really satisfactory. The Inam Commissioner's uniform rate of 8 acres as equivalent to 1 putti of seed grain for all lands, dry and wet alike, stands condemned in that everybody admits that much more seed to the acre is customarily used for wet land than for dry. The other methods (based in principle on the proportion between the total area of the village according to the Bhuband accounts and according to survey) produce results of such wide variations for different villages that it is impossible to have faith in their correctness. In these circumstances, I see no better course than to adopt the calculation of the District Judge: the result of which in the present case will be to give the appellant the declaration and injunction sued for to the extent of 550 acres. The Judge has rightly disallowed an addition of 10 per cent. to cover inaccuracies of measurement. In view however of the wrong frame originally adopted for the suit, I would direct each party to bear its own costs throughout.

There remain Second Appeals, 1398, 1468 and 1563 of 1911. The suits out of which these arise all relate to inam lands. In each, however, the suit is based on the alleged engagement in 1864. As this engagement has not been proved, and as no application was made to amend the plaint as in Second Appeal 1774 of 1911 by the substitution of an engagement implied in the terms of the grant, the suits must fail.

The appeals must be dismissed with costs. The memorandum of objections in Second Appeal 1563 presented by respondent 2 is pressed and is dismissed but without costs.

Sadasiva Aiyar, J.—Of the nine suits out of which these nine second appeals have arisen, six fall under one class and three under another class. The latter three are the suits out of which Second Appeals 1368, 1468 and 1563 have arisen. The other six suits form a distinct though connected class, the allegations in the plaints in those six suits being very similar. But during the arguments before us, the plaint in Suit No. 1774 was allowed to be amended and hence the suit of which the Second Appeal No. 1774 arose has to be separately dealt with

from the other five suits. I shall first, therefore, shortly deal with the Second Appeal No. 1774.

As amended, the material allegations in the plaint in that suit are as follows:

(a) The plaintiff is the proprietor of the village of Navarasapuram, Narasapur Taluk, Kistna District.

(b) Prior to the introduction of the anicut system of irrigation into the Godavary delta, the plaintiff's proprietary village of Navarasapuram had a wet ayacut of P. 48-19T.-11M. irrigated under independent sources of irrigation. The construction of the river embankment by the Government intercepted those sources and rendered them useless for irrigation purposes.

(c) Under such circumstances, the Government were bound to compensate the proprietor, and they declared by a general order (G. O. No. 101. dated 1864) that in all cases where the pre-existing sources of irrigation were cut off by the anicut works, Government water would be supplied free of charge.

(d) Under the orders of his departmental superiors, M. R. Ry. K. Subba Rao Pantulu Garu, the officer in charge of the division, in 1875, settled the extent entitled to free irrigation in the plaintiff's village to be 603 acres 48 cents by converting the old wet ayacut (P 48-19-11) into acres at the average conversion rate of the village, viz., acres 12.32 per putti, and it is not open to the Government to go behind this settlement of Kanchi Subba Rao and reopen the question. At the time of the permanent settlement between Government and the plaintiff's ancestor the wet ayacut was also of the extent of 48 putties 19 T. and 11 manikkas. There was, therefore, an engagement at the time of the said permanent settlement (1837) between Government and the plaintiff's ancestor that the plaintiff's estate was not to be charged water rate for water used in irrigating the said area, which was being cultivated as wet at the time of the permanent settlement.

(e) From 1875 to 1905, the plaintiff enjoyed free irrigation for the 603 acres 48 cents settled by Kanchi Subba Rao; but meanwhile another Deputy Collector appointed by Government, M. R. Ry. P. Nageswara Rao Pantulu Garu, reduced

the mamool wet extent of the suit villages from 603 acres 48 cents to 430 acres 76 cents, i. e., by 172 acres 72 cents; and Government has been illegally levying water rate on this difference of 172 acres 72 cents from 1905.

On the above material allegations, the plaintiff brought the suit against the Secretary of State for a declaration of the plaintiff's right to enjoy these 172 acres 72 cents also free from water-tax and for an injunction. The defendant, the Secretary of State, raised several defences to the plaint as originally framed; but after the plaint was amended by inserting the allegation that the plaintiff was entitled to free irrigation as regards the area which was classed as wet at the time of the permanent settlement of 1837, the only defence pressed is found in para. 6 of the written statement. The said para. 6 is as follows:

"The conversion rate of 8 acres to the putti adopted by M. R. Ry. P. Nageswara Rao Pantulu Garu is correct, and the plaintiff is not entitled to any greater extent of irrigation free of water-cess than has been allowed by M. R. Ry. P. Nageswara Rao Pantulu Garu, viz. 430—76 acres." The only questions therefore for decision in this case are:

1. What was the extent in putties of wet lands at the time of the permanent settlement, it being admitted that there was an implied engagement by Government that that area should be free of water-rate?

2. What is the correct rate of conversion for such area? Is it 12—32 acres per putti as was decided by Kanchi Subba Rao Pantulu Garu in 1875-76, or is it 8 acres per putti as decided by Nageswara Rao Pantulu Garu in 1904?

As regards the first question, three officers of the Government, viz. K. Subba Rao Pantulu in 1875, C. K. Venkatachalam Pantulu Garu in 1895 and P. Nageswara Rao Pantulu Garu in 1904, all proceeded on the footing that the plaintiff was entitled to free irrigation as regards 48 puttis 19 T. and 11 manik-
kas. They differed only as regards the conversion rate. The document produced for the defendant, the secretary of State viz. Bhuband accounts, Ex. 1 series, show that, at the time of the settlement, the wet area was 48 odd putties. The next question is as to the conversion rate.

The learned District Judge in his judgment in the connected Suit No. 1398 of 1911 dealt with this question at length. In paras. 31 and 32 of that judgment, the learned District Judge holds that the rate of conversion for putties at 8 acres per putti, which was adopted by the Inam Commissioner (who was allowed by P. Nageswara Rao Pantulu), was an arbitrary rate and was not at all accurate. As the District Judge remarks in that judgment, the area given in the Inam Commissioner's title-deed at 8 acres per putti and the area in acres as found by actual measurements at the survey of these inam villages do not tally at all, and "we have no evidence that any inamdar has encroached on any area outside what was granted him, under his title-deed." As the learned District Judge says in another place, the area entered in the title-deed of the inamdar in acres "was not measured before that area was entered in the title-deed" and "the old area shown in the Bhuband accounts was merely converted into acres by whatever commutation rate the Inam Commissioner had fixed for that taluk" and was so entered in that title-deed. Hence the true area for the Inam lands mentioned in putties in the Bhuband accounts should be arrived at in the mode in which similar areas were arrived at by the High Court in Appeal Suit No. 182 of 1904 and in the case of *Kandukuri Mahalakshamma v. Secy. of State* (4). The learned District Judge practically adopted that same plan in the present case and arrived at the area of mamool wet as 49—101 by 1131—93 acres, i. e., about 550 acres.

I might add that in Maclean's Manual of Administration (Vol. 2, Glossary, p. 711), the area of putti is admitted to be not a uniform area but to vary between 8 and 11½ acres in different villages. In the case decided by Benson and Miller, JJ., a putti was found to be 11 to 16 acres. In the case in *Mahalakshamma v. Secy. of State* (4) a putti was found equal to 20 acres. We think that on the question of the conversion rate of a putti, we are bound by the finding of the District Judge as it is a question of fact, and the learned District Judge has given good reasons for his finding based on the evidence and probabilities. The District Judge however has dismissed the plaintiff's suit on the ground that the plaint

was based upon an implied engagement at the time of the construction of the Godavari anicut (about 1855) instead of on an engagement at the time of the permanent settlement of 1837, and that as the implied engagement of 1855, has not been proved, the suit failed though the plaintiff was really entitled to free irrigation for 550 acres by reason of the engagement at the time of the permanent settlement. As we have allowed the plaint to be amended so as to enable the plaintiff to rely upon the engagement at the time of the permanent settlement we must set aside the decree of the District Judge dismissing the suit wholly, and a decree will issue in plaintiff's favour declaring his right to irrigate his lands by the Godavari anicut works to the extent of 550 acres and granting the injunction prayed for against Government. As the plaintiff has substantially succeeded in this case, I was rather inclined at first to allow some costs to the plaintiff against the Government, but I do not think it necessary to differ from the opinion on this point of my learned brother that each side should bear its own costs throughout.

Second Appeals No. 1398 to 1401 and 1770 of 1911.

In the suits out of which these five appeals arose, the plaintiffs are mokhasadars and proprietors of villages containing wet lands irrigated by the Godavari anicut system. In the plaints, the plaintiffs set up implied engagements with the Government as regards their right to free irrigation. To avoid confusion, we have to distinguish between two implied engagements made at two separate times. This distinction has been uniformly recognized in the numerous proceedings of the Board of Revenue and the G. Os. which have been adduced in evidence in these cases, and hence much confusion has arisen. The first engagement was admittedly at the time of the permanent settlement. The permanent settlement as regards the village in dispute in Second Appeal No. 1398 was made in 1802, that village being in the Nidadavole estate. In the four other second appeals, the villages in dispute are in the Elamanchili Zamindari, which was granted by a sannad of 1837. Both sides agree that at the time of the permanent settlement (1802) in one case and 1837 in the other four cases), Govern-

ment did impliedly engage not to charge water-tax upon the wet area cultivated as mamool wet at the time of the said Settlement (1802 or 1887 as the case may be). The learned Government Pleader further conceded (he could not but make this concession in view of the proceedings of the Board of Revenue and the Government orders filed as evidence on the side of the defence itself) that, even if the areas cultivated as wet at the time of the permanent settlement in 1837 or 1802 have become diminished by neglect of tanks and channels by the proprietor when the Godavari anicut system was established in 1855, the proprietors were entitled to free irrigation from the new works for the whole wet area mentioned in the Gudikat accounts prepared at the time of the permanent settlement. So much as to the first or primary engagements which took place at the time of the permanent settlement. The next implied engagement had (according to the plaintiffs) its birth about the time of the construction of the Godavari anicut works, that is, about 1855. As I understood the Government Pleader, he admitted that the introduction of the anicut system interfered with the older sources of irrigation and rendered those older sources of irrigation useless for the purposes of irrigation of all the wet lands which were under cultivation as wet in 1855. He further admitted that the Government were bound to compensate the proprietors to a certain extent on account of such obstruction to the old sources of irrigation, but he contended that they were bound to compensate only to the extent of the area which was mamool wet at the time of the permanent settlement (in 1802 or 1837), but not to the extent of the further area which might have been brought under cultivation as wet land by the proprietors between the date of the permanent settlement (1802 or 1837 as the case may be) and the construction of the anicut works in the fifties. He further contended that, as these suits were based on the allegation that there was an implied engagement by the Government to allow free irrigation for the area under wet cultivation in 1855 and not merely for the area under wet cultivation in 1802 or 1837, the suits were rightly dismissed by the learned District Judge. We have seen that the first engagement at the time of the permanent

settlement is admitted by both sides. The second engagement of the fifties, according to the Government Pleader, merely altered the first engagement by adding a clause that the mamool wet area at the time of the permanent settlement, which was being irrigated by the old works free of payment of water tax to Government, might continue free from water tax when irrigated by the new anicut works channels instead of by the older irrigation works destroyed by the new anicut works. The plaintiff's contention, on the other hand, is that the second engagement did not relate to the permanent settlement mamool wet area of 1802 or 1837, but to the mamool wet area as it existed at the time of their interference by the anicut works in 1855. The important question in these five appeals, therefore is whether the implied engagement of 1855 (which modified or superseded the engagement of 1802 or 1837) related to the mamool wet area as it stood at the time of the permanent settlement or to the mamool wet area as it stood at the time of the construction of the anicut works.

It will be convenient in this place to make a short reference to the Madras Act 7 of 1865. S. 1 of that Act, so far as is necessary for the present case, is as follows :

"Whenever water is supplied or used for purposes of irrigation from any work belonging to Government, it shall be lawful for the Government to levy at pleasure on the land so irrigated a separate cess for such water provided that where the zamindar or inamdar is, by virtue of engagements with the Government, entitled to irrigation free of separate charge, no cess under this Act shall be imposed for water supplied to the extent of this right and no more." The contention in these cases turns upon the effect of this proviso and the meaning of this proviso. The contention of the Government is that the combined effect of the engagement at the time of the permanent settlement and at the time of the construction of the anicuts which destroyed the older sources of irrigation was an undertaking by the Government to supply water free from the new works to the extent of the area which was mamool wet at the time of the permanent settlement and as the plaintiff does not rely upon an engagement on these terms

but on a different engagement, viz., an engagement by Government to supply free of water tax the area which was mamool wet in 1855 several years after the permanent settlement, the plaintiffs' suits must fail. As I said before, the question is whether the engagement was of the nature set up in the plaint, i.e., having reference to the mamool wet area in 1855, or was it of the nature contended for by the Government Pleader, having reference to the mamool wet area at the time of the permanent settlement.

The difficulty in arriving at a conclusion on this question is due to the circumstance that the nature of the agreement of 1855 has to be gathered, not from any written offers or acceptances or correspondence passing between the Government on one side and each of the numerous zemindars, proprietors, mokhasadars and inamdars, who were affected by the Godavari and Kistna anicut works on the other side, but from the declarations of Government and by the conduct of Government and of the proprietors, etc., and from the acts of Government officers acting within the scope of their authority, or if not acting within the scope of their authority, from such acts ratified afterwards by the Government. Speaking for myself, I further hold that the decisions of this Court in similar cases on the meaning of the expression "engagements" in S. 1 of Act 7 of 1865 are authorities binding on me.

Though I have formulated the question as if the two kinds of engagements, the one set up by the plaintiffs and the other set up by the Government, are different engagements, it is clear that under certain circumstances the two engagements might be practically identical and even that the engagement set up by the plaintiffs might be less burdensome on Government than the engagement contended for by Government. If the mamool wet area at the time of the permanent settlement is identical with the mamool wet area at the time of the anicut works, the engagement as contended for by the Government and the engagement as contended for by the plaintiffs would be identical. If the mamool wet area at the time of the anicut works was less than the mamool wet area at the time of the permanent settlement the engagement contended for

by the plaintiffs will be less burdensome on Government than the engagement as contended for by Government. (I may add that on the strength of some observations in one of the proceedings of the Board of Revenue filed as evidence in these cases the learned Government Pleader admitted that the mamool wet area at the time of the construction of the anicut works was probably less than the area at the time of the permanent settlement in most cases as many zamindars had allowed a portion of the mamool wet area at the time of the permanent settlement to lapse into dry or waste land through the neglect of their ancient irrigation works). If however the mamool wet area in 1855 had become larger than the mamool wet area at the time of the permanent settlement owing to the proprietor or the tenants under the proprietor having brought fresh dry or waste land into wet cultivation then the engagement as set up by the plaintiffs would be more burdensome on Government than the engagement as contended for by the plaintiffs.

The learned Government Pleader relied upon the well-known *Urlam* case reported as *Kandukuri Mahalakshamma Garu v. The Secretary of State for India* (4), in support of his contention that the only engagement which could be relied on by a proprietor was the engagement at the time of the permanent settlement enabling the proprietor to irrigate free of separate charge the extent of land which was classed as wet at the time of such settlement. If I understood him rightly his contention was that though Government had admitted that there was an implied modification of that engagement at the time of the construction of the anicut works in consequence of such construction having interfered with the anicut irrigation works and even though the written statement (para. 6) in one of the suits admitted an obligation on Government which arose in 1855 he was technically entitled to plead that there was no engagement of any kind even an implied engagement in 1855. The judgment in the *Urlam* case (4), in my opinion, does not state that the only engagement which can be relied on by a proprietor is the engagement impliedly given by the Government at the time of the permanent settlement. S. 1, Act 7 of

1865 speaks of engagements (in the plural); the plaintiffs agree that there was an engagement at the time of the permanent settlement also; the Government itself in my opinion has practically admitted that there was an engagement at the time of the anicut works which supplemented the engagement at the time of the permanent settlement supplementing the first engagement in the sense that the proprietor was entitled to substitute irrigation by the new works as regards the permanent settlement wet area for the irrigation under the old irrigation sources. The case of *Kandukuri Mahalakshamma Garu v. The Secretary of State for India in Council* (4) is therefore no authority for the proposition contended for by the learned Government Pleader there having been no question raised in that case connected with the obligation of the Government to compensate the proprietor for the destruction of the older irrigation works serving the wet area at the time of the construction of the new anicut works by Government. The case of *Secretary of State for India v. Ambalavana Pandara Sannadhi* (3) quoted by the learned Government Pleader is also not of much use as that case merely laid down the proposition that it is not the area at the time of the grant or the permanent settlement (grant in the case of inams and permanent settlement in the case of zamindaris and proprietary estates) that governs the engagement but the quantity of water which was being supplied at the time of the grant or settlement. That case lays down that where a larger area is irrigated by the inamdar subsequent to the grant it will be open to him to show that the increase in wet area is not due to any increase in the quantity of water used by him but to a more economical use of the same quantity of water in which case no water rate can be levied for the increased extent of area.

I do not think it necessary to dwell at length on the cases which establish that the engagement mentioned in the permanent settlement is not confined to an express agreement between the Government and the landlord or inamdar. In *Secretary of State v. Ambalavana Pandara Sannadhi* (3), the learned Chief Justice and my learned brother Aiyar, J., inferred implied engagements by the Govern-

ment : see pages 370 and 371.) In one place (see page 371), the engagement is called an "implied undertaking." The learned Judges refer in that case with approval to the principles established in *Maria Susai Mudaliar v. Secretary of State for India in Council* (12). The legislature has evidently used the comprehensive word "engagement" instead of the word "agreement" or "contract" in order that implied undertakings (based on equitable considerations) made by Government and not merely the ordinary contracts based on regular deeds signed by parties or arising out of formal proposals and acceptances made orally or to be gathered from correspondence might be relied on by landlords proprietors and inamdars in support of their claims for exemption from water-cess.

In *Maria Susai Mudaliar v. The Secretary of State for India in Council* (12), it was held, following *Secretary of State for India in Council v. Perumal Pillai* (13) that where a proprietor had been customarily obtaining supply to his tanks from Government sources, he was entitled to use that customary supply for extension of cultivation by virtue of his "engagements with the Government" without being liable to pay water tax for any portion of that supply, when he had made extensions of wet cultivation with that supply. The meaning of the term "engagement" has been considered by my brother Sankaran Nair, J. and myself in the separate but substantially concurring judgments which we pronounced in the case in *Sri Raja Venkata Rangayya Appa Rao v. Secretary of State for India* (5). Referring to the argument of the learned Government Pleader in that case that the only engagement intended by the Act of 1865 is the one to be implied from the grant of the permanent sannad. Sankaran Nair, J., says: "The section itself is not restricted to any engagement at the time of the permanent settlement. And I have no doubt it was open to the parties to enter into any engagement at any time they liked. * * *

He (the proprietor) is entitled to exemption if his pre-existing source of supply is interfered with or if the accounts show a nanja assessment or if the title-

deed supports the claim. The one is not exclusive of the others. The Act, as rightly pointed by the Judge" (District Judge), "being only an embodiment, so far as this matter is concerned of the pre-existing rules, an engagement is implied if any of these grounds exist." Both of us refer in that case to the judgment of Benson and Miller, JJ., in *Appeal No. 182 of 1904*, in which notwithstanding that the Government contended that the District Judge erred in law in finding that there was an implied contract between the plaintiffs and the Government to allow free irrigation for the extent of land the irrigation sources of which had been cut off by the anicut works, those learned Judges brushed aside that contention and took it as indisputable that the Government was bound by an implied engagement to allow free irrigation to the extent of land which was irrigable from the irrigation sources existing before the construction of the Godavari anicut system. I further refer in my judgment in that case to the proceedings of the Board of Revenue dated 11th September 1898 in which it is admitted that the Government allowed free irrigation from the anicuts to all lands which owing to the construction of the several anicut channels and other works connected therewith were found to have lost wholly or partially their pre-existing sources of supply, those proceedings of the Board of Revenue being based on G. O. No. 101, Rev., dated 16th January 1864.

We have heard the several General Orders of 1854, 1859, 1864, 1865, 1860, 1871, 1894, the rules of 31st October 1865 passed in pursuance of the Act (especially R. 10) and in continuation of old draft rules and the several proceedings of the Board of Revenue connected with these Government orders (all these have been exhibited as evidence in this case) fully discussed on both sides and I need only say that I have seen no ground for altering the opinion which I have arrived at in the case of *Venkata Rangayya Appa Rao v. Secretary of State for India* (5). I took that view mainly on the strength of the decision in *Appeal Suit No. 182 of 1904*. Benson and Miller, JJ., took, if I may say so respectfully, a very equitable view in this latter case when they decided, confirming the view of Mr. Hamnett

(12) [1904] 14 M. L. J. 350.

(13) [1901] 24 Mad. 279.

(who decided that case as District Judge), that the Government are bound by implied engagements to allow from the new anicut works that supply of water which was necessary for the irrigation of all lands which had been customarily cultivated as wet just before the construction of the anicut works and not merely that area which might have been irrigated as wet at the time of the grant by the permanent settlement to the proprietor (or the grant by inam title-deed to the inamdar). The few new Government Orders and Board's Proceedings, which have not been referred to by Sankaran Nair, J., in his judgment in *Venkata Rangayya Appa v. Rao Secretary of State for India* (5) and which have been strenuously relied upon by the learned Government Pleader in this case, are not inconsistent, in my opinion, with the conclusion of Sankaran Nair, J. The judgment of Sankaran Nair, J., was, very freely, though, of course, with due and proper respect, criticized by the learned Government Pleader in his arguments before us in this case, but in my opinion, while Sankaran Nair, J., might have placed the riparian or easement rights of proprietors in waters belonging to Government on a higher footing than I might be inclined to do it and while his inference from R. 7, para. 6 (19 *Ind. Cas.* 280=24 *M.L.J.* 686) may not follow from that rule, the general conclusion which he arrived at, so far as the particular matter now in dispute is concerned, seems to me to follow irresistibly from, and to be fully supported by, the general tenor of the Government Orders and Board's Proceedings discussed before us. I do not say these orders and proceedings are quite clear and logical throughout. Even judicial pronouncements fail to be completely logical or consistent in not a few cases. The Government Orders are many of them rather too brief and too tersely worded, and generally appear at the end of a long recital of the papers read by the Government before those brief orders are passed, and as might be expected, the brevity sometimes, nay, very often, leads to obscurity.

The distinctions between the implied engagement at the time of the permanent settlement, the right of the zamindar to get supply for the wet area as it stood at the time of permanent settlement, though such area might have

diminished at the time of the anicut works by reason of his own neglect of the irrigation tanks, etc., his right to get the same supply of water without liability for water rate, where he and his ryots by prudence have used the same supply of water for bringing a larger area under cultivation, his right to get water from the new works for all lands which he had made customary wet between the dates of the permanent settlement and the date of the new works without liability to pay further water tax, the distinctions between all these several rights have not been clearly kept in view in the several G. O.'s. and even in some of the Board's Proceedings, but the general impression left on my mind is the same as was left upon the two very learned Judges, Benson and Miller, JJ., (who had varied revenue experience in the beginnings of their long official careers) and upon Sankaran Nair, J., (who, as Government Pleader, had very close acquaintance with these matters). I need not say that I am differing from my experienced and learned brother, Ayling, J., in this case with very great reluctance, but I feel constrained to do so as, in the view I take of the decision of Benson and Miller, JJ., in *Appeal Suit No. 182 of 1904*, it is a precedent binding on me till it is overruled by a Full Bench. The Revenue Board took the same view when Sir Murray Hammick was the Secretary of that Board. The G. O. No. 623, dated 4th September 1888, printed at the end of Ex.29, adopted even a more liberal view, namely that "the highest Gudicat wet area entered in any reliable account as entitled to free irrigation whether previously cultivated or not", should get free irrigation from the new works and not merely the area "usually irrigated at the time of the introduction of anicut irrigation." Thus, so far as the latter area is concerned, Government had evidently no doubt whatever as to the right of the proprietor to irrigate the same free.

I shall now refer to certain facts which seem to me to be almost conclusive in the plaintiffs' favour as establishing the rights claimed by them in these suits. Kanchi Subba Rao, General Duty Deputy Collector, Godavari, with the special approval of his Collector, decided as regards these five proprietors (and several others) the extents of the

areas to the free irrigation on which they were entitled from the new works by reason of these new works having cut off the old sources of irrigation. This was in 1875-76 : see Exs. 8 to 10. In accordance with the decision of Kanchi Subba Rao, these proprietors enjoyed irrigation for the said area free of water cess for about 30 years till 1905. I need not say that the views of one Collector frequently differ from those of another, of one Board of Revenue from those of another Board of Revenue formed of different individuals, and of one Government assisted by Revenue Secretary from those of a succeeding or even the same Government served by another Secretary. In 1893, Mr. Wynne, the then Collector of the Godavari District, seems to have thought it necessary in the interests of the Government revenue to repudiate Kanchi Subba Rao's actions in allowing certain areas as entitled to free irrigations such areas being based on the rate of conversion of a Gudicat patti which Kanchi Subba Rao considered as the true rates.

The letter of Mr. Collector Wynne was forwarded to the then Government Pleader, Sir S. Subramania Aiyar, (afterwards a distinguished Judge of this Court), for his opinion by the Revenue Board. That distinguished lawyer formulated thus the question on which his views were called for : see para. 4 of his letter printed in Ex. 11 : "The question, therefore, is whether this action of the Deputy Collector" (Kanchi Subba Rao) "in 1875-76 precludes the Government for re-opening the matter and claiming cess for water supplied to lands over and above the extents, really covered by its engagements with the proprietors." (That is, as shown on a perusal of the whole of Ex. 11, the true area in acres of the putti extents cultivated at the time of the construction of the anicuts, if such area is found to have been mistakenly exaggerated by the alleged wrong conversion rates adopted by Mr. Kanchi Subba Rao). This letter of Sir Subramania Aiyar clearly shows that that eminent lawyer was, undoubtedly, of the opinion that there were engagements with the proprietors for free irrigation for the areas cultivated as wet at the time of the anicut works. Sir S. Subramania Aiyar's opinion was that Kanchi

Subba Rao's calculation of area based on what he (K. Subba Rao) considered to be the proper conversion rates was not binding on the Government for ever, if the true conversion rates were different. The Government was entitled to ascertain the true area and if that true area was less than Kanchi Subba Rao's area, they could in future charge assessment on the difference. The Board of Revenue advised the Government to repudiate Kanchi Subba Rao's calculation of the area to be recognized as free from wet assessment, and it is again to be noted that they did not question the right of the proprietors to irrigate the true area from the new works free of assessment. On 13th September 1894, the Government over the signature of Mr. Mr. E. Gibson, Acting Secretary to Government, passed the following order : "The Board's proposals are approved except as regards the 16 villages dealt with by the Deputy Collector Kanchi Subba Rao for which the Government considers that, having regard to the official position held by that officer when he made the settlement and to the circumstances that in fixing the rates he proceeded under the order of the then Collector of the district and followed the sanctioned rules on the subject, the settlement made by him should not now be repudiated."

It seems to me that this G. O. No. 661 Rev., dated 13th September 1894 precludes the Government thereafter from repudiating Kanchi Subba Rao's figures. It is true that in June 1895 the Government passed fresh orders (see Ex. 12) over the signature of Mr. Forbes, the then Acting Secretary to Government giving instructions to Mr. Venkatachalam Pantulu Garu, the Special Deputy Collector, to ascertain the mamool wet areas to be allowed according to the true rates of conversion of putties into acres in all cases where the rates of conversion have not been accepted for at least 20 years. This G. O. does not refer to the G. O. of September 1894 which directed that Kanchi Subba Rao's conversion rates for 16 villages should not be reopened. The Deputy Collector, Mr. Venkatachalam Pantulu, naturally felt doubts as to whether this G. O. of June 1895 was not inconsistent, so far as regards Kanchi Subba Rao's 16 villages, with the G. O. of September 1894. He

wanted instructions from the Collector who wrote to the Board of Revenue and the Board of Revenue wrote in their turn to the Government and the Government in a short sentence passed orders on 16th September 1895 as follows: "The instructions contained in G. O. dated 17th June 1895 No. 2416, supersede those in General Order dated 13th September 1894 No. 661." It seems to me (with great respect) that it was rather a strong course for the Government to take to repudiate the very deliberate and considered proceedings of September 1894 within nine months of the passing of that order.

Supposing that they were legally entitled to do so, the later proceedings merely expressed their intention to find out the actual area and to correct any of the mistakes which Kanchi Subba Rao fell into as regards the conversion rates of the patti area entitled to free irrigation at the time of the anicut works. The new Deputy Collector, Venkatachalam Pantulu Garu, adopted Kanchi Subba Rao's area, but the Government was still not satisfied, and again another Deputy Collector was appointed, and he adopted the Inam Commissioner's rule of thumb formula of 8 acres per putti. Some officers of Government are, of course, influenced, in forming their opinions as to the rights of Government, by a very natural and proper zeal for the interests of the Government revenue; others are influenced by an equally proper zeal for the fair name of the Government, namely, that the Government should not lightly repudiate the undertakings and promises made by itself or by its responsible officers and accepted as an undertaking of the Government for a long time by the people to whom those promises were made directly or indirectly. The result of the latter kind of zeal is seen in the G. O. of 1894 while that of the other kind is found in the Collector's letter of 1895. Surely the proprietors of landed estates are not bound by the decision of the third Deputy Collector, Mr. Nageswara Rao, as to the true rates of conversion, and, as I have shown, in my judgment in Second Appeal No. 1770, the learned District Judge for very good reasons practically adopted Kanchi Subba Rao's figures and rates as correct in six of the nine cases in dispute. I therefore adopt the learned

District Judge's figures, rejecting Nageswara Rao's figures as incorrect.

On the question whether the Government having ratified after mature consideration and after having been fully informed that Kanchi Subba Rao might have made mistakes in the conversion rates, whether the Government, after all this knowledge, having ratified Kanchi Subba Rao's settlement of 1875 in 1894, could afterwards repudiate it, I shall only quote a few passages from two standard works. Pollock and Mulla in pp. 538 to 541, (548 to 551, Edn. 3) of their Contract Act say: "A ratification is in law equivalent to a previous authority." "That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever becomes the act of the principal, if subsequently ratified by him, is the known and well established rule of law. In that case, the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by and with all the consequences which follow from, the same act done by his previous authority." "An act done by an agent in excess of his authority may also be ratified." "Ratification, if effective at all, relates back to the date of the act ratified." "Acts done by public servants in the name of the Crown, or of the Government of India, may be ratified by subsequent approval in much the same way as private transaction."

Story on Agency says in paras. 242 to 250: "A ratification, also, when fairly made, will have the same effect as an original authority has to bind the principal, not only in regard to the agent himself, but in regard to third persons." "In short, the act is treated throughout as if it were originally authorized by the principal; for the ratification relates back to the time of the inception of the transaction, and has a complete retrospective efficacy; or as the maxim above cited expresses it, *Omnis ratihabitio retrotrahitur*." "And a ratification once deliberately made with a full knowledge of all the material circumstances cannot be recalled." "Ratification once deliberately made upon full knowledge of all the material circumstances, becomes, *eo instanti*, obligatory, and cannot

afterwards be revoked or recalled." I do not intend to lay down that a mere mental ratification of an agent's unauthorized acts by a principal or a ratification in soliloquy is enough to bind the principal. But it seems to me that a deliberate and considered ratification by Government reduced into a formal Government order surely stands on a quite different footing, just as a person's declaration in a registered document would stand even if not directly communicated to third persons. If such a ratification in 1894 is not conclusive against Government, why should its unobtrusive repudiation of the ratification in 1895 be held conclusive or final? As I said already, the engagement of Government has to be gathered, not from formal communications passing in large numbers between the Governor-General-in-Council and each of the landholders, inamdars and ryots, but from formal declarations of Government acted upon by Government officers, from the conduct of parties evidently based on such declarations and from the implied acceptances of such conduct on both sides. I find it difficult to believe that the landholders and inamdars would have kept silent for so long as they did, if Mr. Kanchi Subba Rao's settlement had not been acted upon for so many years. Ratification by a long course of conduct is not less effective than a ratification by a formal declaration. The orders of Government are public acts of the highest public functionaries, and those interested in such orders relating to revenue matters affecting large classes (as distinguished from particular individuals) obtain knowledge of such orders, not by direct written communication from the Government office itself to each of the individuals of the large affected class but from the acts and omissions of the revenue officers at the time of jamabandi (in the case of ryots) and from the information given and declaration made by revenue officers at such times or on occasions of visits to and interviews with the revenue officers in the case of proprietors and the larger inamdars and from entries in village and other revenue records giving effect to such Government orders. The result is that the District Judge's decree dismissing these five suits should be reversed and judgments given in favour of the plaintiffs, the plaintiff or plaintiffs in each

case being entitled to a declaration that the area as found by the District Judge as mamool wet at the time of the anicut works is entitled to free irrigation and not merely the area incorrectly mentioned as mamool wet by Mr. Nageswara Rao. The plaintiffs will get their costs in all Courts from the Secretary of State, three months being given to the latter to pay the said costs. In Second Appeals Nos. 1398 to 1401 and 1770 of 1911, the Government should also refund to the appellants the respective sums claimed to be refunded as wrongly collected.

Second Appeals Nos. 1368, 1468 and 1563 of 1911.

In these cases, the questions are substantially the same, but the plaintiffs are inamdars under title-deeds issued about the years 1860 and 1869, whereas in the other six cases the plaintiffs were proprietors or mokhasadars who got their lands under permanent settlement sanads of 1802 and 1837. The principles involved however are practically the same. The learned District Judge admits that, as regards the areas shown in the inam title-deeds, the Government is bound to supply them with water from the new anicut works free. Now the area in an inam title-deed is mentioned in acres and not in putties. But it is admitted that the Inam Commissioner instead of the putties entered in the old accounts converted the putties into acres at 8 acres per putti and entered the extent in acres so found in the respective title-deeds. The title-deeds do not definitely say that the extent in acres is accurate. The village is mentioned and the wet area is entered as "said" to be of so many acres. These three villages are three of the 16 villages settled by Kanchi Subba Rao. The learned District Judge, in his judgment in Second Appeal No. 1398 of 1911, which governed six of the nine suits, found that the Inam Commissioner's conversion rate at 8 acres per putti was arbitrary, and yet in these three suits the learned District Judge has come to a different finding on the ground that "the Inam Commissioner specially made experiments to fix the commutation rate for each taluk, and arrived at 8 acres for this taluk; further there is evidence adduced that 8 acres was the rate prevailing in the taluk." I can find no such evidence, and I think the learned District Judge erred in disturbing the

finding of the learned Subordinate Judge as regards the true area granted as inam to the plaintiffs in these cases and in accepting the area in acres put down in a very rough manner in the title-deed as unimpeachable by the plaintiff. I might further state that the G. O. of September 1894 (Ex. 11), in which the Government accepted and ratified Kanchi Subba Rao's engagement with the proprietors and inamdars of the 16 villages as regards the respective areas to which they were entitled to free irrigation, is conclusive in plaintiff's favour. Reversing therefore the District Judge's judgments, I would allow the Appeals Nos. 1368 and 1468 of 1911 with costs and grant to the plaintiffs decrees declaring their right to enjoy as mamool wet the areas mentioned in their plaints free of water cess and ordering refunds. In Second Appeal No. 1563 of 1911 it is found that the plaintiff was wrong in having claimed 16 tooms 1 manikat and 8 giddas as wet extent and that his family was entitled to only 2 tooms, i. e., $\frac{1}{2}$ putti. For reasons already stated, I hold that this $\frac{1}{2}$ putti is not 2 acres as taken by the Inam Commissioner and by Mr. Nageswara Rao but is of the extent of 3 acres 40 cents according to the true mode of conversion of putties adopted by Mr. Kanchi Subba Rao (this rate of conversion is found by me on the basis that one putti 16 tooms 1 manikat 8 giddas has been found at the survey to measure 24 acres 51 cents). It is further found that the plaintiff is entitled only to 147/220 of the area belonging to his family. I would declare in this case that the plaintiff is entitled to free irrigation for 147/220 of 3 acres 40 cents. As the plaintiff has grossly exaggerated in his plaint the area he was entitled to irrigate free of water cess, I would direct him to pay the Secretary of State's costs throughout in this case.

By the Court.—As a result the appeals except Second Appeal No. 1774 of 1911 are dismissed with costs; and the memorandum of objections in Second Appeal No. 1563 of 1911 is dismissed with costs.

S.N./R.K.

Order accordingly.

A. I. R. 1914 Madras 191

SADASIVA AIYAR, J.

Mohanambal—Plaintiff—Petitioner.

v.

Davoodsa Rowther — Defendant—Respondent.

Civil Revn. Petn. No. 636 of 1912, Decided on 18th February 1914, from decree of Sub-Judge, Mayavaram, in Small Cause Suit No. 2012 of 1911.

(a) **Madras Estates Land Act (1908), S. 3, Cl. 2 (d)**—"Estate" defined.

All inamdars are not land holders under the Estates Land Act and the mere fact that the landlord is an inamdar and the tenant has got the permanent occupancy right, will not bring the inam lands within the definition of an "estate." 14 I. C. 215; 20 I. C. 769, *Ref.*

[P 192 C 1]

(b) **Madras Estates Land Act (1908), S. 3, Cl. 2 (d)**—Few acres of inam land in village granted by inam do not form part of estate within S. 3, Cl. 2 (d).

A few acres of inam land forming part of a village, the whole of which village had not been granted in inam, do not form part of an estate within the meaning of S. 3 Cl. 2 (d).

[P 192 C 1]

(c) **Jurisdiction**—Rent suit by inamdar—Civil Courts have jurisdiction unless inam lands come within definition of estate of its part.

The civil Courts do not lose jurisdiction over a suit for rent brought by an inamdar unless it is also shown that the inam lands come within the definition of estate or part thereof.

[P 192 C 1]

K. Jagannatha Aiyar—for Appellant.

S. Gopalasami Aiyangar—for Respondent.

Judgment.—The Subordinate Judge has considered principally the question whether the defendant was the owner of the kudivaram or permanent occupancy right in the lands and his conclusion in the defendant's favour seems correct. But the Judge at once proceeds to the conclusion that the inam lands form an estate within the definition contained in S. 3, Cl. 2, Estates Land Act, and that the inamdar is land holder within S. 3, Cl. (5). It seems to me that this is a case of non sequitur. S. 3, Cl. (2), is itself sub-divided into five sub-Cls. (a) to (e). The Subordinate Judge's judgment does not indicate under which of these sub-Cls. (a) to (e) the disputed inam lands fall. It was argued by the respondent's learned vakil that the lands come under sub-Cl. (d). That sub-clause relates to "any village of which the land revenue alone has been granted in inam, etc.," that is, any separated part of a whole village so granted in inam. In the pre-

sent case, the inam lands are a few acres in a whole village; these few acres were granted to a temple and there is nothing to show that the whole village had been granted in inam and that the disputed lands are a separated portion of such an inam village. All inamdars are not landholders under the Estates Land Act. Benson and Sundara Aiyar, J.J., held that the pre-settlement inamdar was not a landholder and even if the inam was a whole village, it was not an estate: see *Todikonda Buchi Virabhadarayya v. Sonti Venkanna* (1). Similarly Abdur Rahim, J., seems to have held in *Muthusawmi Pillay v. Jafar Husain Khan Sahib* (2) that those two facts alone, namely, that the landlord is an inamdar and that the tenant has got a permanent occupancy right, will not bring the inam land within the definition of an estate. In the result, I hold that civil Courts have not lost jurisdiction over suits for rent brought by an inamdar unless it is also shown that the inam lands come within the definition of estate or part thereof, and reversing the judgment of the learned Subordinate Judge, I direct the suit to be tried (on the question other than the question of jurisdiction and the question of the defendant's kudivaram right) and to be disposed of according to law.

Costs hitherto will abide the result.

S.N./R.K. *Order reversed.*

(1) [1913] 20 I. C. 769.

(2) [1912] 14 I. C. 215.

A. I. R. 1914 Madras 192

SADASIVA AIYAR AND SPENCER, JJ.

Budansa Rowther and another—Plaintiffs—Appellants.

v.

Fatima Bi and others—Defendants—Respondents.

Second Appeal No. 752 of 1912, Decided on 12th November 1914, from decree of Dist. Judge, South Arcot, in Appeal Suit No. 26 of 1911.

(a) **Hindu Law—Marriage—Hindu woman A married Hindu in French territory—A became converted to Mahomedanism and married Mahomedan in British territory—Daughter B born of marriage was held to be illegitimate and second marriage governed by British Indian law.**

A, a Hindu woman, married to a Hindu in French territory, became a convert to Mahomedanism and after conversion married a Mahomedan in British territory. A daughter B, born of that marriage, claimed a share in the estate of her paternal grand-father :

Held : (1) that B was illegitimate and could not claim a share in the properties ;

(2) that as the second marriage with the Mahomedan was in British territory, the law to be administered was that prevailing in British India. [P 193 C 2]

(b) **Custom—Woman marrying again in lifetime of her husband is contrary to public policy—Offspring of second marriage is illegitimate.**

A custom allowing a woman to marry again while her first husband is living is contrary to public policy and to morality and in such circumstances, even a recognition of paternity of children born out of the union is not equivalent to a recognition of legitimacy : 21 Cal. 666 and 4 I. C. 254, *Foll.* [P 193 C 2]

(c) **Mahomedan Law — Conversion — In Mahomedan country when woman becomes convert to Islam, husband will be called upon to embrace Mahomedanism and on his refusal marriage will be dissolved—In foreign country separation takes place after three monthly courses.**

In a Mahomedan country, when a woman is converted to the faith of Islam, she must apply to the Kazi or Magistrate who will call upon the husband to embrace the faith also and if he refuses, the Kazi will dissolve the marriage. In a foreign country if the wife becomes a Moslem and her husband is an infidel, separation takes place after the lapse of three monthly courses : Hedaya, pp. 176 to 179 ; Ameer Ali's Mahomedan law, pp. 426 and 427. [P 194 C 1]

(d) **Hindu Law—Apostacy does not dissolve marriage.**

According to the Hindu law, marriage is not dissolved by apostacy. [P 194 C 2]

(e) **Mahomedan Law—Marriage of woman in lifetime of her first husband is void.**

According to Mahomedan law, the marriage of a woman when her first husband is alive is not merely invalid but altogether void (*batil*) : 8 Mad. 169, *Overruled.*; 9 Mad. 66 ; 18 Cal. 264 ; 30 Mad. 550 ; 32 Cal. 871 ; 4 Bom. 330 ; 49 P. R. 1907 ; 15 All. 396 ; and Ameer Ali's Mahomedan Law, Vol. 2, 322 Cl. (c), *Foll.* [P 194 C 2]

(f) **Practice—Applicability of Law—Conflict between persons of different religions—Courts apply rules of justice, equity and good conscience.**

Where a conflict occurs between persons belonging to different religions, the Courts must apply rules of justice, equity and good conscience : 23 Mad. 171, *Ref.* [P 194 C 2]

(g) **Factum Valet—Meaning and scope of doctrine of factum valet.**

Per Sadasiva Aiyar, J.—As regards the doctrine of factum valet, neither the Hindu nor the Mahomedan law, does ever excuse the violation of a legal rule so as to make acts performed in such violation legally valid. That doctrine only means that a precept which merely belongs to the domain of ecclesiastical admonitory precepts has not “in the domain of Vyavahara” or secular law, the same force as a positive and clear rule of the Vyavahara. [P 195 C 1]

(h) **Hindu Law — Conversion—Status of Hindu becoming Mahomedan is subject to**

law and custom to which he originally belonged.

When a Hindu becomes a Mahomedan, his status is not allowed to be governed by the laws of the new faith, but continues to be subject to the law and custom to which he was originally subject. [P 195 C 2]

T. V. Seshagiri Aiyar for *L. A. Gorinda Raghava Aiyar* and *M. Narayanasaami Aiyar*—for Appellants.

T. Rangachariar, G. S. Ramachandra Aiyar, A. Ramachandra Aiyar and *A. Srirangachariar*—for Respondents.

Spencer, J.—The plaintiff, who died during the pendency of the suit, was one of the daughters of Jaila Rowther by his first wife, Fatma Bi, and defendant 7 who was the principal of those who contested the claim is a daughter by a later marriage. The suit was brought for the recovery of the plaintiff's share of her father Jaila Rowther's share in the estate of the plaintiff's grandfather Ahamsa. It was resisted on the ground that the plaintiff's mother having been married to a Hindu husband named Maniya Gounden, her subsequent marriage to Jaila Rowther, while the first marriage was subsisting, was not legal, and therefore the plaintiff and defendants 2 to 5 were illegitimate and as such debarred by the form of Mahomedan law in force among Sunnis from inheriting as sharers. The suit failed in both the lower Courts and the plaintiff's legal representatives appeal by their next friend.

Five contentions based on questions of law have been put forward at the hearing of this second appeal, namely:

(1) By conversion to Islam defendant 1 became a good Mahomedan and the tie of her marriage with a Hindu became thereby dissolved and her subsequent marriage to a Mahomedan was valid.

(2) A marriage of this kind, though irregular, would be regarded by the Mahomedans as not invalid, and by the principle of *factum valet* the irregularity would be condoned by the couple living together as husband and wife.

(3) In considering whether the marriage is valid, it is necessary to apply the law prevailing in the French possessions in India. Hindus and Mahomedans living in French India are not necessarily governed by the law recognized in British India, and it is incumbent on the defendants to show that the French Courts have adopted the same principles as the Courts in British India.

(4) By the custom and usages of persons belonging to the Palli caste, marriage with a second husband during the lifetime of the first husband is permissible; and the onus lies on those who assert that such a custom is not applicable in a particular case to prove it.

(5) The finding of fact by the lower Courts amounts to the establishment of the fact that there was an acknowledgment on the part of Jaila Rowther of the legitimacy of his children by defendant 2. It is conceded that, if the marriage was invalid and the parties knew it, no acknowledgment could make legitimate the offspring of a union which had its inception in illegitimacy; but it is contended that it has not been proved that the parties to the marriage knew it to be an invalid one.

We may briefly dispose of the last three contentions by observing first, that the Mahomedan and Hindu laws being personal laws are attached to the followers of each religion wherever they may be living and that the facts found by the lower Courts are that the plaintiff's mother, Fatma alias Unnamalai, was married to Mania Gounden at Karimputtur in Pondicherry but her marriage to Jaila Rowther was performed at Sholavalli in the South Arcot District, which is British territory, and therefore, as the marriage to Jaila Rowther has come before the British Courts, the law we must administer is that prevailing in British India; secondly that, assuming that there is a custom among Pallis or Vanniyans of allowing a woman to marry again during the lifetime of her first husband such a custom is contrary to public policy and to morality and appears to be condemned by the community: (see p. 103, Gazetteer of the South Arcot District), and therefore the Courts will refuse to recognize it, and thirdly, that a mere recognition of paternity is not equivalent to a recognition of legitimacy: vide, *Abdul Razak v. Aga Mahomed Jaffer Bindanim* (1) and the acknowledgment cannot make legitimate the offspring of zina (fornication or adultery): vide *Mardan Sahib Gansusaheb v. Rajak Saheb Kashimsaheb* (2).

The questions of law arising out of the first two contentions, which may be taken together, are more difficult of solu-

(1) [1913] 21 Cal. 666=21 I. A. 56 (P.C.).

(2) [1909] 4 I. C. 254=34 Bom. 111.

tion, but we feel no doubt of the answer which must be given to them.

The District Munsif found that defendant 1's Hindu marriage with Maniya Gounden took place 40 years ago. In para. 38 of his judgment he stated that her marriage with Jaila Rowther might be presumed to have taken place more than 34 years ago, though in the last paragraph of his judgment he gave no definite finding as to the date of this marriage, and the District Judge has left it open. Assuming that defendant 1's conversion and marriage took place before the conception of the children who were born of this union, the point to be decided is whether they may be treated as legitimate offspring. In a Mahomedan country the law is that, when a woman is converted to the faith of Islam she must apply to the Kazi or Magistrate who will call upon the husband to embrace the faith also and if he refuses the Kazi will dissolve the marriage. In a foreign country if the wife becomes a Moslem and her husband is an infidel separation takes place after the lapse of three monthly courses: see pp. 176 to 179 of Hedaya, Vol. 1, and pp. 426 and 427 of Ameer Ali's Mahomedan law Vol. 2. Certain observations which occur at p. 12 of Norton's Leading Cases, Vol. 1, and the remarks of Kernan, J., in *Sinammal v. Administrator-General of Madras* (3) are quoted in support of the theory that when a Hindu married woman who deserts her husband becomes a convert to Mahomedanism and adopts the habits of and lives as the wife of a Mahomedan she is altogether out of the pale of the Hindu law and ceases to have any recognized legal status according to that she becomes civilly dead and that the marriage and the relation of husband and wife become thereby absolutely dissolved. The view taken by Kernan, J., was not completely followed by Parker, J., when the question of the same marriage between Sinammal and Kristna a native convert to Christianity, came up for his consideration. He pointed out that although Kristna's conversion to Christianity rendered him an outcaste according to the Hindu law he might have been re-admitted to the status as a Brahman and his degradation might have been atoned for by renouncing Christianity and performing the rights of ex-

(3) [1885] 8 Mad. 169.

piation enjoined by his caste. He therefore held that apostacy does not itself dissolve the marriage tie: *Administrator General of Madras v. Anadachari* (4).

This question has now been settled beyond all reasonable doubt by the decisions of *In the matter of Ram Kumari* (5) which was followed in *Emperor v. Lazar* (6), also by *Sundari Letani v. Pitambari Letani* (7), by *Government of Bombay v. Ganga* (8), and by *Jamna Devi v. Mal Raj* (9) where the questions arising for determination were similar to those in the present suit.

Where a conflict occurs between persons belonging to different religions the Courts must apply the rules of justice, equity and good conscience: vide *Subbaraya Pillai v. Ramasami Pillai* (10).

In considering whether defendant 1's first marriage was subsisting or not at the time of her second marriage with Jaila-Rowther the principles of Hindu law must be applied but in testing the validity of her second marriage with Jaila Rowther the principles of Mahomedan law must be applied. According to Hindu law her Hindu marriage was not dissolved by her apostacy. According to Mahomedan law the marriage of a man with the wife of another man is not permitted so long as the first marriage is subsisting. Such a union will not be merely invalid (*fasid*), but altogether void (*batil*) and illegal: vide *Liaqet Ali v. Karim-un-nissa* (11) and p. 332, Cl. (c) of Ameer Ali's Mahomedan law, Vol. 2. The dictum in Norton's Leading Cases, Vol. 1, p. 12, must be considered to have been overruled by subsequent decisions and to be no longer good law.

It is argued that because the conversion of a non-Moslem wife to Mahomedanism in a foreign country dissolves the wife's marriage with her non-Moslem husband after the completion of three of her periods, the marriage in the present case would be perfectly valid supposing that the Moslem husband waited for three months after the woman's conversion before he married her; and that even if

(4) [1886] 9 Mad. 466.

(5) [1891] 18 Cal. 264.

(6) [1907] 30 Mad. 550=17 M. L. J. 476=6 Cr. L. J. 338.

(7) [1905] 32 Cal. 871=9 C. W. N. 1003=2 C. L. J. 97.

(8) [1879-80] 4 Bom. 330.

(9) [1907] 49 P. R. 1907=23 P. L. R. 1908.

(10) [1900] 23 Mad. 171.

(11) [1893] 15 All. 396=(1893) A.W.N. 167.

the marriage had been performed during those three months the marriage would be merely irregular : see Tyabji's, J. *Principles of Mahomedan law* pp. 102 and 103, for the principle that a marriage during the iddat or three months period which must elapse between the termination of one marriage and that into which a woman may subsequently enter is only irregular. As it must be held on the authority of the decisions to which I have referred that defendant 1's marriage with her Hindu husband was still subsisting in spite of her conversion, her marriage to another man of a different religion was not merely irregular in the eye of Mahomedan Law, but absolutely illegal and prohibited. The plaintiff must thus be regarded as an illegitimate child of Jaila Rowther, even adopting the facts most favourable to her contention. The second appeal fails and is dismissed with costs of respondents 6, 7, 9, 11 and 12 (one set).

Sadasiva Aiyar, J.—I entirely agree with the judgment just now pronounced by my learned brother, and I do not think that I can usefully add anything in my own words. I might however emphatically endorse his view that, if there is a custom among any community of allowing a woman to marry again during the lifetime of her first husband without any defined rules by which the marriage with her first husband is dissolved before the second marriage is contracted, such a custom is contrary to public policy and morality, and cannot be recognized by the Courts. The sentence quoted however by the learned vakil for the appellants from the South Arcot District Gazetteer (p. 103) does not, in my opinion, speak to the existence of the large, ill-defined custom relied upon by the appellants. As regards the doctrine of *factum valet* neither in the Hindu nor the Mahomedan law, does it ever excuse the violation of a legal rule so as to make acts performed in such violation legally valid. That doctrine only means that a precept which merely belongs to the domain of ecclesiastical admonitory precepts has not "in the domain of Vyavahara" or secular law the same force as a positive and a clear rule of the Vyavahara law has. As Sirkar says, in his book on Hindu Law, 3rd Edn., pp. 16 and 17, the text of Vyasa which prohibit one to alienate one's own

share in a joint family property or one's own self-acquired property are moral precepts and cannot weigh against the man's legal rights to exercise the right of alienation which the positive civil law gives, as "it is an axiomatic principle of the Vyavahara law that a co-sharer can dispose of his share and that one can dispose of his self-acquired property."

On the question of conversion to Islam of a Hindu wife and her marriage thereafter to a Mussalman husband during the lifetime of her first husband, I shall merely quote a few passages from Ameer Ali's *Mahomedan Law*, Vol. II : "The Native Converts' Marriage Dissolution Act (21 of 1866) was specially designed to meet the case of converts to Christianity from Hinduism and other cognate systems which do not recognize the dissolution of a marriage once contracted * * * Christianity and Islam are the only two proselytizing religions in India, and conversions to Islam are frequently as sincere as conversions to Christianity. But no "native husband" or "native wife" adopting Islam is entitled to come to the Court to obtain the relief provided in the Act. Their status is not allowed to be governed by the laws of the new faith, but continues to be subject to the law or custom to which they were subject before" : see p. 425. * * *

"If the conversion to Islam takes place in an Islamic country the Kazi must be moved to summon the other party to adopt the Moslem Faith. In case of compliance, the marriage remains intact and valid *ab initio* ; and there is no need for renewing the contract, though in practice it is sometimes done. Until the Judge has made his decree separating the parties, the connexion remains invalid and has all the consequences flowing from an invalid connexion : see pp. 426 and 427. * * *

"The Calcutta High Court has held that India is not a non-Islamic country, and that consequently when a married non-Moslem woman adopts the Mahomedan Faith, and thereafter, contracts a fresh marriage without applying to a Judge or a Magistrate to call upon the husband to adopt Islam, she is guilty of bigamy : see p. 427."

In the result, I agree with my learned brother that this second appeal should

be dismissed with costs of respondents 6, 7, 9, 11 and 12.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 196

AYLING AND OLDFIELD, JJ.

Murgam Aiyar—Complainant—Petitioner.

v.

S. J. Mercer—Accused—Respondent.

Criminal Revn. No. 542 of 1913 and Criminal Revn. Petn. No. 438 of 1913, Decided on 16th January 1914, from judgment of Dist. Magistrate, Cuddapah, in Criminal Case No. 3 of 1913.

(a) Railways Act (1890), S. 3 (4)—Railway employee cannot be ejected from quarters occupied while under railway employment under S. 122 (2)—Staff quarters cannot be deemed to be part of railway within S. 3 (4)—Railways Act (1890), S. 122 (2).

Section 122 (2) cannot be applied to eject a railway employee from the staff quarters occupied by him while under employment of the Railway Company. Staff quarters or any building of a residential character cannot be deemed to be part of a railway "within the meaning of S. 3 (4) of the Act." [P 197 C 1]

(b) Railways Act (1890), S. 138—Possession of staff quarters lawfully obtained by railway employee while under railway service can be lawfully determined only under S. 138—Dismissal by itself does not determine right of possession.

Possession of the staff quarters lawfully obtained by a railway employee, while under the service of the railway, can be lawfully determined only by steps taken under S. 138, and the fact of his dismissal does not, by itself, put an end to his right of possession.

In order to render such possession unlawful, there must be an interruption of possession, and a re-entry after such interruption.

[P 197 C 2]

(c) Trespass—True owner cannot use force and violence to eject trespasser from his own premises—Such act if attended with force and violence may be criminally liable.

It cannot be said that a true owner may, at all times enter his own premises and use force and violence to eject a trespasser; such an act, though not tortious and actionable, may still give rise to criminal liability if attended with force and violence: *Harvey v. Bridges*, 14 M. & W. 437 and *Lows v. Telford*, 1 A. C. 414, Dist. 6 Mad. 245, Ref. [P 198 C 1]

Barton—for Petitioner.

Public Prosecutor—for the Crown.

Judgment.—The accused in this case, Mr. Mercer, was convicted by the District Magistrate of Cuddapah of an offence punishable under S. 323, I. P. C., and sentenced to pay a fine of Rs. 300. He was acquitted of an offence punish-

able under S. 456. The case comes before us on a petition for the setting aside of the acquittal and a re-trial under the latter section and on an appeal against the sentence under the former. We deal first with the petition.

The findings of fact which we accept in doing so and which complainant has, moreover, not disputed are as follows: Last May the complainant, Assistant Station Master of Settigunta on the Madras Railway, struck and left his employment, moving from station to station in the interests of the strike. By Ex. 9, dated 3rd June 1913, he was informed that his services were dispensed with and directed to vacate his staff quarters. This communication, he admits, came to his notice at 6 p. m. on 9th June 1913. On the same date at 5 p. m. he had telegraphed from Settigunta to accused, his District Traffic Superintendent, to the effect that he had re-joined duty. Accused knowing that he had been specially dismissed regarding him as a dangerous character and having good reason for doing so, went at once to Settigunta with a small police force; arriving at about 1-30 a.m. at complainant's quarters, he kicked the door open, entered, and eventually incensed by his impertinent language, attacked him with his walking stick causing certain comparatively trifling injuries. He and the police then expelled complainant forcibly from the house and kept him on the station platform till he could leave for Madras by train. The general findings are that (1) "it was accused's intention in entering the house to restrain or prevent complainant from remaining in the railway premises at Settigunta," presumably by the use of any necessary force, (2) that it was not his intention to cause hurt to him independently of what his removal might involve.

Now for his actual use of force, which, (it is the finding) was induced by distinct subsequent occurrences, accused has been convicted and sentenced separately under S. 323. His original intention, as found above, is alone material at present; and the question is whether, other ingredients of an offence under S. 456, entry by night and house-breaking, being admitted, the entry made with that intention was a criminal trespass, and the offence should have been held established. The arguments for accused are that his con-

duct was (1) authorized by S. 122 (2), Act 9 of 1890, (2) merely the exercise of the right, which every owner possesses, to eject a trespasser and to enter the premises with the intent to use the force necessary in order to do so.

Section 122 (2), Act 9 of 1890, is in our opinion, inapplicable. It authorizes any railway servant to remove from the railway any person who has entered upon it unlawfully and has refused to leave it on being requested to do so. Firstly, we do not think that staff quarters are part of the railway. The material portion of the definition of a railway in S. 3 (4), is no doubt, expressed widely. But neither staff quarters nor any building of a residential character is among those specified in it, and it is with reference to the specific portion of the clause that the general later portion "other works constructed for the purposes of or in connexion with a railway" must be construed. Maxwell on Interpretation of Statutes, Edn. 3, p. 469. There is moreover positive reason against supposing that staff quarters are included in the definition, in the fact that they are covered by expressions, used and that a remedy for the mischief, against which S. 122 is invoked, is provided elsewhere in the Act. For in S. 7 (1) the distinction between a railway and its staff quarters is drawn twice, once when the administration is given powers to execute work for its railway and accommodation connected therewith, and again when in Cl. (1) (a), railways are referred to separately from the houses mentioned in Cl. 1 (d). And in S. 138 a procedure is provided for summary recovery by the railway of property, moveable and immovable, detained by its discharged or absent servants through the police; and this provision cannot be treated as merely concurrent with S. 122 or intended solely for the benefit of the administration and not of the person in possession, since it insists on a notice in writing which S. 122 does not require, and on an application to a Magistrate of the 1st Class.

Further, complainant was not a person, who had entered on the railway unlawfully. The nature of his possession is important with reference to the argument based on S. 122 as well as to that based on accused's general right to deal with a trespasser, though as regards the

former only complainant's entry is in question, whilst as regards the latter his remaining on the premises unlawfully is also material. On this part of the case, the lower Court's view is, as we understand it, that the entry and remaining were both unlawful. But we consider this finding defective, since the grounds for it, that complainant had been dismissed and impliedly admitted an interruption of duty in Ex. 6 take account only of his legal right to possession, not his actual continuance in it. That and the lawful nature of its origin, his entry on his appointment, are the important matters. On them we have his own evidence that though he himself had been absent on strike business, his wife and mother were in the home, when he returned on the afternoon before the occurrence, and that during his absence they had remained at Settigunta. The suggestion that they did not necessarily remain in staff quarters, but may have lived elsewhere in the village, was not supported by the cross-examination of second prosecution witness, the relieving Assistant Station Master, or any other witness and must be rejected. We are therefore, we consider, justified in holding that complainant's occupation of the premises was not interrupted and that his original lawful entry on appointment was not superseded by an unlawful re-entry after he left service. His entry having been lawful, S. 122 cannot be applied.

Then as to the wider ground, on which the case has also been argued, that accused acted in exercise of the right which every owner has, to use necessary force to eject a trespasser from his property. It was no doubt argued with reference to S. 27, I. P. C., that the possession was never that of accused, but was that of the railway throughout, through him as its servant, and that therefore no question of recovery of possession by the latter could arise but it is not possible to treat his use of the premises as his private residence as on account of his master or to apply the provision referred to. It was not disputed by complainant that the railway was the true owner or that it or accused on its behalf was entitled to possession or that the latter would have been entitled to enter the premises to obtain it peaceably. The question is whether he could have used

the force necessary in order to do so and whether his entry with the intention to use such force constituted a criminal trespass.

Mr. Osborne's principal argument for accused was that such an entry was not a civil and therefore could not be a criminal trespass. He based it mainly on the English cases of *Harvey v. Bridges* (1) and *Lows v. Telford* (2). They, no doubt, support him to the extent that the use of necessary force by the true owner to evict a trespasser is not ground for a civil action. But the consequence alleged, that it cannot be ground for a criminal charge, does not follow. In the first case there was no question of criminal liability and in the second, that question was raised with reference only to the conduct of the trespasser in evicting the true owner after his recovery of possession, or of the latter's recovery of it; and, when Lord Selborne said that it made no difference whether such recovery was forcible or not, he did so only with reference to the fact of his possession, its legal consequences and its right to protection, not as deciding that the means used to obtain it were lawful. In the later case of *Beddal v. Maitland* (3) these cases and also *Newton v. Harland* (4) were considered; and, the facts being very similar to those before us, the law, civil and criminal, was stated clearly to the effect that though conduct, such as that of accused would not be tortious or criminal under the common law, it might be the subject of indictment under statute. "The effect of the statutes is this: that when a man is in possession, he may use force to keep out a trespasser, but, if a trespasser has gained possession, the rightful owner cannot put him out, but must appeal to the law for assistance. . . . Defendant can recover no damages for the entry, because the possession was not legally his; and, he can recover no damages for the force used because, though the Statute of Richard II creates a crime, it gives no civil remedy." This Statute and others of similar effect, the

latest being one of Elizabeth, are referred to in Russel on Crimes, 7th Edn., 1, 442. The argument that there was no civil and therefore no criminal trespass in the circumstances in question is, so far as it is founded on English law, unsustainable unless the statutes are disregarded. We have then to consider with reference to the terms of the Code, whether it has, by expression or omission, made a sort of violence lawful in India, which is criminal in England.

With reference to omission Mr. Osborne referred to S. 141 as stating the measure of violence used in assertion of a real right, such as the true owners, against which the legislature has granted protection. That section, no doubt, penalizes the use of violence in such cases by not less than five persons. But it does not follow from the existence of this special provision that other cases, in which the number concerned is smaller, are withdrawn from the purview of other more general sections. For, apart from the terms of those sections, it is at least equally probable that S. 141 was intended, not to specify or restrict the cases in which the use of violence by the true owner is punishable, but to provide a special remedy in aggravated circumstances.

The law, as expressed in S. 441, postulates an intent to commit an offence or to intimidate, insult or annoy. The lower Court states in its para. 5 that the prosecution excluded all considerations save those of wrongful restraint and causing hurt and insisted on giving precedence to the question of the former; and no exception has been taken here to this statement. It is however impossible to base the charge of criminal trespass or any intent to restrain complainant wrongfully. For accused's intent was to make him leave the premises, not (as S. 339 requires) to prevent his proceeding in a direction, in which he had a right to proceed. Acts by which a person is made to proceed against his will are provided for by S. 352, relating to the use of criminal force; and it is possible that a reference to it was really intended. But if the definition of that offence in S. 350 be considered with reference to Ss. 43 and 44, it is clear that it again involves establishment of an intent to commit an offence, the only one suggested being that of causing hurt, or to cause fear or annoy-

(1) 14 M. & W. 437=3 D. & L. 35=9 Jur. 759=14 L. J. Ex. 272=69 R. R. 718.

(2) 1 A. C. 414=45 L. J. Ex. 613=35 L. T. 69=13 Cox. C. C. 226.

(3) [1881] 17 Ch. D. 174=50 L. J. Ch. 401=44 L. T. 248=29 W. R. 484.

(4) [1859] 1 M. & G. 644=1 Scott. (N. R.) 473=2 Jur. 350=10 L. J. C. P. 11=56 R. R. 488=133 E. R. 490.

ance or to cause harm, either by commission of an offence or by an act, which is prohibited by law or furnishes ground for a civil action. As regards the last alternative, no intention to cause harm by committing any offence, other than those referred to, or by any act, not an offence, which has been prohibited by law, has been alleged. And there is no reason for supposing that the Indian law as to civil liability differs from the English as stated in the cases already referred to. *Pratab Daji v. B. B. & C. I. Ry.* (5) is, in fact, authority to the contrary. There is therefore no ground for holding that accused intended any act, which would have furnished ground for a civil action.

The case founded on an intention to cause hurt, fear or annoyance remains; and the difficulty in dealing with it arises from the manner, already referred to, in which complainant's case was presented. It is, we think, possible that, if the lower Court's attention had been directed to the case founded on the causing of hurt or annoyance, it might and should have found on the facts that it was established. As regards the causing of hurt and Mr. Osborne's argument already referred to, no Indian authority justifying accused's plea that he acted in assertion of the true owner's rights has been adduced. For the only case, in which that argument appears to have been relied on, *Appavu Nayak v. Queen-Empress* (6), was decided with reference to S. 147; there can be no question of the right of private defence, since it could not be invoked against complainant, who has not been found and does not appear to have been guilty of civil trespass; and S. 99 (3) has not been shown to be inapplicable. The lower Court might therefore have found, if it had been asked to do so, that the causing of hurt, alleged to have been intended by accused, would have been covered by no exception and would have been an offence. It might also have found in favour of an intention to cause fear or annoyance if that had been relied on. Either of these findings would have entailed the framing of a charge of an offence punishable under S. 456. This conclusion is, of course, subject to the correctness of the statement of findings of fact already given and to the assumption,

tion, which according to the accused, is not justified by them, that he intended to cause hurt or fear or annoyance, not merely to obtain possession, the use of force being no part of his purpose but only a possibility, which he would have desired to avoid.

We need not however consider whether this assumption is legitimate, because, we are in any case not prepared to direct a rehearing. If, as we hold, the lower Court's decision is unsatisfactory, it is so because of the limitations imposed on himself by complainant's pleader at the trial; and the case is therefore not one for indulgence. This Court is not accustomed to interfere with an acquittal on revision except in the clear interests of justice and they would not be served by interference here. The occurrence took place over six months back in the course of a widespread and bitter dispute, which it is inadvisable to reopen and it is evident from the foregoing that accused's conviction on a charge under S. 456, I.P.C., would entail no material enhancement of his sentence.

He has, in fact, contended with some force in his appeal for a reduction in that sentence as excessive. His conduct was, undoubtedly, criminal. But the hurt he caused was not serious, and there is much to be urged in extenuation. He said in his statement before the lower Court: "I am sorry that I allowed myself to be provoked into striking Margam Iyer but I ask the Court to take into consideration the very severe strain of continuous work both by day and night in the very hottest season of the year which was upon me at the time, the very grave anxiety which was in my mind with regard to the public safety and the very great provocation which was offered to me by Margam Iyer in the presence of my subordinates." And these are matters, which might fairly have weighed with the Court in awarding punishment. We have however no reason for supposing that they were not given full consideration by the learned District Magistrate, and, though the sentence is, in our opinion, somewhat severe, we do not think that we should interfere with the exercise of his discretion.

The revision petition and appeal are dismissed.

S.N./R.K.

Appeal dismissed.

(5) [1875-77] 1 Bom. 53.

(6) [1898] 6 Mad. 245=1 Weir. 68.

A. I. R. 1914 Madras 200

WHITE, C. J., AND TYABJI, J.

Segu Rowthen and others—Defendants—Appellants.

v.

Muthu K. R. V. Alagappa Chetty and others—Plaintiffs—Respondents.

Second Appeals Nos. 505 and 511 to 522 of 1912, Decided on 16th January 1914, from decrees of Dist. Judge, Ramnad, in Appeal Suits Nos. 502, 536, 504, 506, 505, 524, 538, 546, 547, 528, 542, 548 and 526 of 1910.

(a) **Madras Estates Land Act (1 of 1908), S. 4—Stipulation to pay rent respecting lands actually under cultivation may displace general rule under S. 4.**

Section 4 merely lays down a general rule which can be displaced by the execution of a pattah stipulating payment of rent only in respect of lands actually under cultivation.

[P 201 C 1]

(b) **Madras Estates Land Act (1 of 1908), S. 4—Patta providing only for liability to pay rent for lands whether cultivated or not and rent was levied on basis of lands cultivated—Intention of parties was held to override general law.**

Where a pattah in one clause provided that a tenant shall be liable to pay rent for lands whether cultivated or not and in another, that it was open to the tenant to relinquish the lands, if found unproductive or impossible to cultivate, and where rent in previous years had been levied only on the basis of lands actually under cultivation:

Held: that the intention of the parties was to override the provisions of the Act and to stipulate rent only in respect of lands actually under cultivation: 4 *Mad.* 322, *Foll.* [P 201 C 1]

V. Viswanatha Sastri—for Appellants.

T. R. Ramachandra Aiyar—for Respondents.

White, C. J.—This is a suit for rent. The claim is in respect of two faslis before the Madras Estates Land Act, 1908, came into operation, and one after. The question is: Is the defendant liable to pay rent in respect of the entire area of his holding or is he only liable to pay rent in respect of so much of his holding as was in fact cultivated during the period, for which rent is claimed by the plaintiffs? The pattah which is in evidence bears date 30th June 1907, a date prior to the coming into operation of the Madras Estates Land Act. It is not clear whether there has been any formal acceptance of the pattah by the defendant—it is not suggested by him there has not been—and the plaintiffs' case is that the pattah has been accepted. The plaintiffs do not suggest that the pattah is not binding on them. In para. 2 of the pattah we

have a provision that for the lands whether cultivated, or left waste by the defendant's default, rent at a certain rate has to be paid. That, standing alone, clearly suggests that rent is only payable on lands in fact cultivated or on lands which might in fact have been cultivated but were left uncultivated by reason of the defendant's neglect. We have a later provision in the pattah, Cl. 6, that if the defendant finds it impossible to cultivate or does not want any portion of the lands comprised in his holding, he should apply for relinquishment. I shall have to refer to that in a moment; all that is necessary to say now is that so far as that particular provision in the pattah goes, it does help the plaintiff's contention. Now the issue, and the only issue, with regard to the question—and it is an issue of fact—is this:

"Is the whole land comprised in the account cultivable and is waste due to the neglect of the ryots?" The issue seems to have been framed on the assumption that the defendant was only liable to pay rent in respect of land which was cultivable, and which was not cultivated by reason of the neglect of the defendant. According to the form of the issue—and it has not been suggested the issue is wrong—the plaintiff had to prove two things, first, that the land in respect of which he claims rent was cultivable; secondly, that it was on account of the neglect of the defendant that cultivable land had not been cultivated. That this was the plaintiff's case, at any rate in the Court of first instance, is clear from the opening words of the judgment of the Deputy Collector: "The plaintiffs allege that the defendants have left the lands to lie waste and this was due to their neglect, and that rent is consequently payable for the same." There is no finding that the lands were allowed to remain uncultivated by reason of the neglect of the defendants. Inferentially the findings are all the other way. The findings of the District Judge are: "The lower Court found that the lands are peculiarly unproductive and that the same field cannot be cultivated every year and I see no reason to disagree." Again, "there is also no doubt that until fasli 1316 the custom was to charge only for the areas actually cultivated each year." Now, what have we to guide us as to what was really meant when this pattah

was accepted? First, we have the admitted fact that up to the granting of this patta the plaintiffs only charged for the areas actually cultivated. Unless there was indication to the contrary there is a presumption that the parties intended that their respective obligations should continue to be the same. That that was the intention, as it seems to me, is borne out by the provision in the patta itself contained in Cl. (2) to which I have already referred.

It seems clear, that in the Court of first instance no reliance was placed upon the provisions of the Estates Land Act. In the District Court an attempt was made to set up a case under the Act which had been passed subsequently to the granting of the patta which is in evidence. The plaintiffs relied upon S. 4 and the definition of "rent" contained in S. 3, sub-S. 11. S. 4 says that the landlord is entitled to collect rent in respect of all ryoti land in the occupation of a ryot. *Prima facie* it is so, but if the evidence shows that it was not the intention of the parties that he should collect rent in respect of all land in occupation of the ryot, but should collect rent only in respect of the land in fact cultivated by the ryot. of course, the intention of the parties overrides the provision of the Act. This section of the Act merely lays down the general rule, and, in my opinion, can be displaced by evidence as to what the parties meant and intended. As regards Cl. 6 of the patta, that no doubt supports the plaintiff's contention. We were referred to a case reported as *Vedanta Chariar v. Ayyaswami Mudali* (1), where a provision similar to this was objected to. The Court took the view that such a provision was unreasonable and they went on to observe: "The removal of this clause would not, of course, affect the landlord's right to collect the whole rent, notwithstanding that lands are left uncultivated."

In that case the report does not state all the terms of the patta. Here, reading the patta as a whole, the intention of the parties seems reasonably clear. I think the conclusion arrived at by the Deputy Collector is right, and that the decree of the lower Court should be set aside and that of the Deputy Collector restored with costs here and in the Court below.

This judgment will govern Second Appeals 511 to 522 of 1912.

(1) [1882] 4 Mad. 322.

Tyabji, J.—I agree in the order proposed by the learned Chief Justice.

This appeal arises out of a suit for the rent under S. 77, Estates Land Act. The question that is involved seems to me to be, on what basis the rent of the land in the occupation of the defendants is to be calculated. The Special Deputy Collector proceeded on the basis that the rent should be calculated in respect of the years in question, namely faslis 1316, 1317 and 1318, in the same manner in which the rent had been calculated for the previous faslis and he therefore came to the conclusion that the plaintiff was entitled to a decree for Rs. 42-6-3. The basis on which the rent was calculated in the previous faslis was that the plaintiff was paid by way of rent a sum of money determined with reference to the land actually cultivated by the tenant: it was not determined with reference to the extent of the land occupied by the tenant.

In appeal the District Judge gave to the plaintiff a decree for Rs. 111-5-7 in respect of arrears of rent and the basis on which he proceeded was that the rent should be calculated in other respects in the same way in which it was calculated in previous years but that though in the previous years it was calculated with respect only to the portion actually cultivated by the tenant, it should in respect of the arrears in dispute be calculated as though the whole land in the occupation of the tenants had been cultivated. The District Judge was of opinion that S. 4, Madras Estates Land Act, required him to do so. From the penultimate paragraph of his judgment it would appear that the learned District Judge was loth to come to the conclusion he did but that he thought the Act left him no option. With all respect to the learned District Judge it seems to me that he has misunderstood the provisions of the Madras Estates Land Act. S. 4 gives the right to the landholder to collect rent in respect of all ryoti land in the occupation of a ryot. That section by itself does not suffice for the determination of the total amount of rent that has to be collected. The amount of the rent to be collected can be determined only if both the extent of the land in respect of which rent is to be charged and the

rate at which the rent is to be calculated are known.

The way in which the rate of the rent is to be calculated is fixed by Chap. 3 of the Act. S. 1 of that Chapter is S. 24 which lays down that "the rent of the ryot shall not be enhanced except as provided by this Act." It is evident that if in respect of the same land the ryot is made to pay a higher rent then there is an enhancement of the rent. The learned Judge's error seems to me to have arisen from his considering that the rent paid in the previous years was not in respect of all the land in the occupation of the ryot. It was in fact in respect of all the land that the mode in which the amount payable was determined in the past was by reference not to the extent of all the land in the occupation of the tenant but to the extent of land cultivated. There is nothing in the Act which makes it necessary to alter this method of determining the amount of rent payable nor does the Act provide the landholder may exact a higher rent from the tenant for the same piece of land because he is entitled to obtain rent in respect of all the land in the occupation of the ryots. On the other hand the provisions of Ch. 3 of the Act lay down explicitly that the basis on which the rate of rent is to be determined is to be presumably the same as that on which it has been recovered by the landlord in the previous faslis. Now the basis on which the rent has been recovered in the past in respect of the lands in question seems to me to be perfectly clear and legal. On the facts found it is not questioned that the lands could not all be cultivated and it seems to have been clearly understood and agreed upon between the landlord and the tenant that the rent had to be paid by a calculation based on the land actually cultivated by the tenant. That is a basis of calculation which is capable of being made perfectly certain and capable of being adhered to. I see no reason why the same basis should not be continued to be utilized for the purpose of calculating the rent and it seems to me the Act expressly provides that the same basis shall be continued in the absence of another agreement being proved.

The plaintiff also relied on Ex. C which purports to be a patta tendered

to the defendants. The plaint refers to this patta as having been tendered. It is not alleged in the plaint that the patta was accepted. There is no reference in the judgment of either Court to the fact of the pattas having been accepted at least so far as our attention has been drawn to the judgments still less it is alleged that there is any finding to the effect that the patta has been accepted. It is true that the learned District Judge refers to the patta and apparently considers that the rights of the parties are to be determined with reference to the contents of the patta but that could only be so if the patta was in the nature of a contract entered into between the parties and valid under the Estates Land Act. The plaintiff has not proved those facts which are necessary in order that such a contract may result. It is not contended before us that the patta can affect the rights of the parties without being accepted and it is admitted that the rights of the parties must continue to be what they were before unless there is a patta tendered and accepted which alters the relation between the parties. We have clear findings as to what the rights of the parties were previous to the tender of the patta.

Both the Courts are agreed as to that and those findings are, as I have indicated above entirely, in favour of the decree passed by the Special Deputy Collector. It seems to me therefore to be unnecessary to deal with the construction of the patta. But I see no difficulty in reconciling Cls. 2 and 6 of the patta. Cl. 2 lays down that when the land is left waste by the neglect of the tenant rent shall be 'charged in respect of such land apparently not otherwise. Cl. 6 lays down that in case the tenant wishes to relinquish any land then he should apply to the landlord. These two clauses seem to me to be reconcilable on the basis that failure to cultivate under circumstances which would be the neglect on the part of the tenant under Cl. 2 can be prevented from being so considered by giving previous intimation to the landlord under Cl. 6 to the effect that the tenant does not intend cultivating the land. I consider however that the rights of the parties have to be determined irrespective of Ex. C. For these reasons I agree that the appeal should be allowed with costs.

This judgment will govern Second Appeals Nos. 511 to 522.

S.N./R.K. Appeals accepted.

A. I. R. 1914 Madras 203

SESHAGIRI AIYAR, J.

Chinnu—Plaintiff—Petitioner.

v.

Sambanda Moorthi and another—Defendants—Respondents.

Civil Revn. Petn. No. 16 of 1914, Decided on 4th March 1914, from order of Dist. Judge, Salem, in I. A. No. 148 of 1913.

(a) Civil P. C. (1908), S. 115—High Court should not interfere with every exercise of lower Court's discretion, though no right of appeal is open to party.

A High Court ought not to sit in appeal over every exercise of discretion by the Court below, even though under the law no appeal is given to the party against whom the discretion has been exercised. [P 203 C 1, 2]

(b) Civil P. C. (1908), S. 115—High Court will interfere only when there is wanton abuse of process of lower Court—Commission issued to examine witnesses by lower Court or refused—Refusal does not amount to abuse of process or action with material irregularity under S. 15, Charter Act, or S. 115, Civil P. C.—Charter Act (24 and 25 Vic. Cl. 104), Cl. 15—Civil P. C., O. 26, R. 4.

Nothing short of the conclusion that there has been a wanton abuse of the process of the Court below would induce a High Court to interfere in revision. Where a subordinate Court has either issued a commission to examine certain witnesses or has refused to issue one, it cannot be said under S. 15, Charter Act, or S. 115, Civil P. C., that his refusal amounts to an abuse of the process of the Court or that he has acted with material irregularity in the exercise of jurisdiction. [P 203 C 2]

T. M. Krishnasamy Aiyar — for Petitioner.

T. R. Venkatarama Sastri — for Respondents.

Judgment.—Mr. Krishnasamy Aiyar invites me to say that in all cases where a Judge has either issued a commission to examine certain witnesses or refused to issue a commission this Court under the Charter Act has power to satisfy itself upon the facts whether that exercise of discretion by the Court below was right or not and to remedy the injustice which has been done to the party, and he quotes *Lekhraj Ram v. Debi Pershad* (1) for the position that the arm of the High Court is long enough to reach all cases of injustice. I cannot accede to this contention. It would virtually mean that the High Court is to

sit in appeal over every exercise of discretion by the Court below, even though under the law no appeal is given to the party against whom the discretion has been exercised.

The case of *Vidya Purna v. Seethamma* (2) is a case where a party, in order to coerce another party to enter into a compromise, vexatiously summoned him as a witness where there was no necessity to summon him at all, and the learned Judges came to the conclusion that the order for the issue of a commission in that case must be regarded as an abuse of the process of the Court. In that case the largest extension of the power of the High Court to interfere in such matters has been reached; I feel that nothing short of the conclusion that there has been a wanton abuse of the process of the Court, to which the Court below, either wittingly or unwittingly lent itself, will induce this Court to interfere in revision. That is not the case before me. All that has been said in this case is that there has been an error of judgment on the part of the learned Judge which has seriously prejudiced the petitioner. It is, no doubt, true that it was held in *Vidya Purna Thirthaswami v. Seethamma* (3) that every party has a right under O. 26, R. 4, Civil P. C., to require that a commission should issue for the examination of witnesses, and I am inclined to think that in this case it would have been better if the learned Judge had granted the application, because there was a possibility of the commission being returned before the hearing itself took place. Probably, when an application is made afresh to the District Judge, if he is satisfied that before the case is finally heard the commission can be returned, this order will not stand in the way of his exercising his discretion in favour of the plaintiff. But I cannot say that under S. 15, Charter Act, or S. 115, Civil P. C., the refusal of the District Judge amounts to an abuse of the process of the Court or that he has acted with material irregularity in the exercise of his jurisdiction. The case *In re. Nizam of Hyderabad* (4) decided by Muthusami Aiyer, J., is a case in point. Following that decision I hold that this Court has no power to

(2) [1905] 28 Mad. 28=14 M. L. J. 329.

(3) [1911] 12 I. C. 74.

(4) [1886] 9 Mad. 256.

(1) [1908] 12 C. W. N. 678=7 Cr. L. J. 499.

interfere with the order passed by the District Judge under the circumstances of this case. I therefore dismiss the petition with costs.

S.N./R.K.

Petition dismissed.

A. I. R. 1914 Madras 204

SANKARAN NAIR AND OLDFIELD, JJ.

Krishnaswami Odayan and others—
Plaintiffs—Appellants.

v.

Kamalambal Ammal and others—
Defendants—Respondents.

Letters Patent Appeal No. 180 of 1912, Decided on 6th January 1914, from judgment of Ayling and Napier, JJ., in Appeal No. 103 of 1909, D/- 23rd September 1912.

Registration Act (3 of 1877), S. 17—Instrument taking effect from execution date is non-testamentary instrument.

Where an instrument is intended to take effect from the date of execution, it is a non-testamentary instrument requiring registration under S. 17, and not a "will" notwithstanding that that word is used in the instrument.

[P 206 C 2]

*K. Sreenivasa Ayyangar—*for Appellant.

*V. Seshagiri Aiyar and T. P. Muthukrishna Aiyar—*for Respondents.

Ayling, J.—Plaintiffs (appellants) sue on a document, Ex. A, which they put forward as the will of Chidambara Odayan, deceased. On the other side, it is contended that the document is a deed of gift inter vivos and this is the view taken by the learned District Judge.

The question of construction of the document is vital to the case, and is certainly not free from difficulty; but on full consideration I am inclined to agree with the District Judge that it must be taken to be a deed of gift. Both at the beginning and end of the document it is described as a "will inam deed." "Inam," undoubtedly, signifies "gift" so that in the matter of interpretation the two words may be taken to counter-balance each other. Apart from this ambiguous description, I can find nothing in the deed to even suggest the notion of its being a will. The essence of a will (vide definition in S. 3, Probate and Administration Act) is that the executant desires that his declared intentions regarding his property should not be carried into effect until after his death. In Ex. A, there is not a word to indicate such a desire, but, on the other hand, there is a distinct statement that the properties dealt with have been actually

handed over to the person, to whom they were conveyed, Narayanaswami Odayan. This is no mere empty recital for it is proved and, as I understand not contested, that from the date of Ex. A, the management of the properties was in the hands of Narayanaswami Odayan's father and brother, Narayanaswami himself being a minor.

Stress is laid on the fact that Chidambara Odayan lived for ten years after the execution of Ex. A, and on the improbability of his intending to immediately divest himself of all his property. How far such a consideration may legitimately be regarded in interpreting a document is a point on which I feel some doubt. But in any case I attach very little weight to it. Chidambara Odayan was admittedly an old man even in 1888, the date of Ex. A, and as far as my limited experience goes, the idea of an old man completely divesting himself of his property during his lifetime is neither strange nor unnatural to the Indian mind.

Our attention was drawn to a sentence in Ex. A in which it is provided that if any accident were to befall Narayanasami, his natural brother should hold enjoyment and it is suggested that this indicates a testamentary intention. I do not think it does. It is a very common thing for a man to make a gift of property, and at the same time desire to impose conditions and I am inclined to think that in a will, a clause of this kind would be very differently worded.

The learned vakil for the appellants has invited our attention to the Privy Council ruling *Udai Rai Singh v. Raja Bhagwan Bakhsh Singh* (1). I have carefully considered that decision, but in so far as it helps us at all it seems to me to be rather on the other side. The document in that case clearly purported to operate as a codicil to a will and, as their Lordships put, it was "in the main clearly testamentary in its character." It contained two paragraphs which, as the judgment says, gave some colour to the view that it was a gift. But their Lordships in deciding the question preferred to look at the matter broadly and declined to allow the presence of two paragraphs however strongly worded to outweigh the general tenor of the docu-

(1) [1910] 32 All. 227=6 I. C. 279=37 I. A. 46
=13 O. C. 172 (P. C.).

ment. In the present case, I do not think it can possibly be said that the document is clearly testamentary and, in my opinion, the effect of the above ruling is to somewhat strengthen the view that a document which on the face of it purports to take effect at once should not be viewed as a will merely on the strength of two words at the beginning and end thereof.

I therefore hold Ex. A to be a deed of gift.

On this view the District Judge's decree is undoubtedly correct and the appeal should be dismissed.

Napier, J.—This was a suit on a document alleged by the plaintiffs to be a will executed by one Chidambara Odayan on 29th November 1888. Issues 1 and 2 raise the question whether he executed it and whether it is a will. The District Judge being of opinion that it purported to be a deed of gift declined to admit it in evidence, first, because it was not registered and secondly, because execution was not proved by a witness who saw the executant sign. These are required by the T. P. Act, S. 123, and Evidence Act, S. 68, and if it is a deed of gift, the District Judge was right in excluding it. I am however of opinion, though not with confidence, that it is a will. The document is Ex. A. The alleged executant was an old man. He had first adopted one of the four or five sons of his daughter and the boy lived with him from that date. It is doubtful on the evidence who managed the lands after the execution of the document and from what date, but I do not consider that evidence admissible to explain the document not being a surrounding or attendant circumstance. The document begins with the words "will inam deed." I read these words to mean document of present by will. A will is always a present, there being no consideration, but a present obviously need not be by will. Reading it as a will, full meaning is given to the words. Reading it as a gift is to strike out the most important word in the document. On what basis can that be done? The word cannot be a slip of the pen because the same phrase is used at the end of the document. "To this effect is the will

inam deed executed by me with my consent." It is there intentionally used and I am unable to see how we can strike it out because the provisions in the document suggest a transfer inter vivos. It is true that the property is given with full rights for him to occupy and hold enjoyment with rights of gift, alienation and sale, but in the next sentence there is a remainder over to the other brothers, "if by act of the King, or God any accident were to befall you," and further there is the authority of the Privy Council in *Udai Rai Singh v. Raja Bhagavan Baksh Singh* (1), that clear words of gift in the preamble do not prevent a document being a will. Nothing could be stronger than the words in that document: "I made over the whole of the property to my adopted son," "delivered possession to him," "caused my name to be removed and his substituted," and "have absolutely and unconditionally relinquished all rights and proprietorship as well as ceased interference with the property." But he calls the document a deed by way of a deed of adoption and "codicil to a will" and the Board upheld it as such. In the present case, the executant knew the meaning of legal words, for he speaks of gift, alienation and sale and when he describes his document as a will inam, I cannot construct it as a gift. I am therefore unable to accept the findings of the District Judge on issues 1 and 3 and would remit the suit to him for re-trial on those issues as well as the other on the footing that the document purports to be a will, but as my learned brother would dismiss the appeal, the decree is confirmed. The appeal is dismissed with costs.

(From the above judgment, the plaintiff filed the Letters Patent Appeal.)

Judgment.—We are of opinion that, notwithstanding that the word "will" is used in the document in question, it was the intention of Chidambara that the instrument should take effect as from the date of its execution. In our opinion therefore the document in question is not, in law, a will.

The result is that the appeal is dismissed with costs,

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 206 (1)

SADASIVA AIYAR AND SPENCER, JJ.

Abdulla Sahib and another—Petitioners—Appellants.

v.

Ahmed Hussain Sahib—Respondent.

Appeal No. 130 of 1912, Decided on 26th November 1913, against appellate order of Dist. Judge, Chingleput, in Appeal Suit No. 612 of 1911.

Civil P. C. (5 of 1908), S. 39 (1)—Decree sent to another Court for execution on decree-holder's application — Question of competence by jurisdictional value of Court to which it is sent does not arise.

Where a decree is sent to another Court for execution on the application of the decree-holder himself, and not by the Court on its own motion, the question, of competence by jurisdictional value of the Court to which the decree is sent does not arise : 7 *Mad.* 397 and 17 *Mad.* 309, *Ref.* [P 206 C 1]

M. O. Parthasarathy Aiyangar and *N. Viswanadha Aiyar*—for Appellants.

Judgment. — The learned District Judge refers to S. 39, Cl. (2), Civil P. C., as supporting his view that the High Court could transfer its decree for execution only to a competent Court (that is, competent in respect of pecuniary jurisdiction). But the learned District Judge has omitted to notice that S. 39, Cl. (2), refers only to cases where a Court passing a decree sends it "of its own motion" to a Subordinate Court for execution. S. 39, Cl. (1), is the provision which is applicable to the present case, the decree having been sent for execution to another Court on the application of the decree-holder. In respect of a decree so sent on application, the question of competence by jurisdictional value of the Court to which the decree is sent does not arise : see *Narasayya v. Venkata Krishnayya* (1), *Shanmuga Pillai v. Ramanathan Chetti* (2) and *Syed Gulam Gause Shah Sahib v. Sunni Lal Agarwala* (3).

We set aside the District Judge's order in appeal quashing the proceedings of the District Munsif, the said order having been based on the untenable ground that

the District Munsif had no jurisdiction to execute the decree, and we direct the District Judge to re-hear the appeal before him having regard to the above observations. The respondent will pay the appellant's costs of this appeal. The other costs will be costs in the cause.

S.N./R.K.

*Order set aside.***A. I. R. 1914 Madras 206 (2)**

SADASIVA AIYAR AND SESHAGIRI AIYAR, JJ.

Vaddadi Jagannadha Bhupathi Deo Garu—Defendant—Appellant.

v.

Paddala Appalasawmy and others—Plaintiffs—Respondents.

Second Appeals Nos. 356 to 365 of 1913, Decided on 2nd March 1914, from decrees of Dist. Judge, Vizagapatam, in Appeal Suits Nos. 942 and 894, 943 and 872, 944 and 875, 945 and 873, 946 and 871 of 1911.

(a) Madras Estates Land Act (1908), S. 52 (3)—Patta tendered for particular fasli comes into force in fasli unless previous patta for more than one year is in force.

Under S. 52, Cl. (3), a patta tendered for particular fasli, comes into force in that fasli, unless a patta previously tendered for more than one revenue year is in force on that date.

[P 207 C 21]

(b) Madras Estates Land Act (1908), S. 52 (3)—Patta tendered under old Act not enuring beyond fasli—New patta becomes effective at once and S. 52 (3) is inapplicable.

Where, a previous patta tendered was under the old Act, and as such did not enure beyond the fasli for which it was tendered, the provision of S. 52, Cl. (3), would not apply and the new patta would become effective at once.

[P 207 C 2]

(c) Madras Local Boards Act (1884), S. 73 —Under S. 73 landlord can claim only half land cess from tenant.

Under S. 73 a landlord can claim only half of the land cess from the tenant and, therefore, a provision to pay the full land cess cannot be inserted in the patta. [P 207 C 2; P 208 C 1]

(d) Madras Estates Land Act (1908), S. 5 (1)—Rent is first charge upon holding and produce thereof—Charge does not extend when produce passes to purchaser.

Section 5, Cl. (1) provides that rent shall be the first charge upon the holding and the produce thereof ; therefore a provision in the patta to the effect is superfluous. The charge does not extend when the produce has passed into the hands of a purchaser. Sankarnami mamool is not a part of the rent and a provision in the patta to pay it cannot be allowed : 26 *Cal.* 611 and 2 *Mad.* 146, *Fon.* [P 208 C 1, 2]

(1) [1884] 7 *Mad.* 397.(2) [1894] 17 *Mad.* 309 = 4 *M. L. J.* 91.(3) [1910] 5 *I. C.* 155.

B. N. Sarma—for Appellant.

B. Narasimha Rao—for Respondents.

Sadasiva Aiyar, J.—The defendant is the appellant in these ten second appeals 356 to 365 of 1913. These second appeals have arisen out of five suits brought by five tenants against their common landlord, the defendants. As there were five appeals by the plaintiff and five appeals by the defendants in the lower appellate Court presented against the decisions of the Sub-Collector in the five suits, ten second appeals have been preferred to us against the ten decrees passed by the lower appellate Court.

The suits were brought by the tenants to have the terms of the patta for fasli 1319, ascertained and for directing the defendant to tender proper pattas for that fasli. The suits have been decreed in favour of the plaintiffs by the lower appellate Court after making certain modifications in the terms of the cadapas tendered to the plaintiffs by the defendants' officials in fasli 1319 and which terms the defendant insisted on plaintiff's accepting without any modification or omission. Coming to the grounds in the memorandum of appeal that is those grounds which were argued before us, I think that we cannot interfere with the findings of fact by the lower appellate Court on the question whether the plaintiffs accepted with full knowledge the pattas tendered to them by the defendants in 1319 and on the question whether the plaintiffs did execute muchalikas with full knowledge and consent in favour of the defendant for the same fasli. The next point argued was that though the plaintiffs brought their suits in order to obtain pattas for fasli 1319, the pattas, with the terms decreed by the lower appellate Court cannot legally come into force for fasli 1319 itself. In support of this argument, Cl. 3, S. 52, Madras Estates Land Act, is relied upon, or rather the proviso at the end of that clause. That proviso relates to a case where a patta or muchalika has continued to be in force for more revenue years than one, and the proviso enacts that in that case "no fresh patta or muchalika for the same holding shall take effect until the commencement of the revenue year next succeeding that in which such fresh patta is decreed." In order therefore to attract the terms of this proviso it is necessary of the defendant to show that

any patta has continued to be in force for more revenue years than one. It is argued that the patta tendered and accepted in fasli 1318, or it may be even fasli 1317, was such a patta. But so far as the patta for fasli 1317 is concerned, it must have been tendered under the old Act, and I am of opinion that that patta tendered for that particular fasli did not continue in force beyond that fasli, because under the old Act of 1865 a patta tendered for one fasli did not continue in force beyond that fasli. It is only under the first sentence of Cl. 3, S. 52, of the new Act that a patta accepted for a single revenue year continues to remain in force till a fresh patta is accepted, or decreed. If however, reliance is placed on the facts that a patta was accepted for fasli 1318 after the new Act came into force and that, that patta would continue in force till a fresh patta is decreed for a subsequent fasli, the reply is that that first sentence in Cl. 3 to S. 52 itself says that a patta for a revenue year shall remain in force only until the commencement of the revenue year for which a fresh patta is decreed. As these suits were brought for fresh pattas to be decreed for fasli 1319, and as they were decreed for that fasli, the patta for fasli 1318, even under the rule enacted in Cl. 3 remained in force only until the commencement of the revenue year for which the fresh patta was decreed, i. e., until the commencement of fasli 1319, and hence it was in force for only one year and had not continued in force for more revenue years than one. Accordingly the proviso at the end of Cl. 3, S. 52 is not applicable to the facts of these cases. Then the other contentions of the appellants related to the terms of certain clauses of the cadapa tendered by the defendant for fasli 1319, which terms have been disallowed by the decrees of the lower appellate Court. Cl. 1 of the cadapa provided that the tenant shall pay the land cess of Re. 0-1-0 per rupee to the defendant's officials, though under S. 73, Local Boards Act, the defendant can claim only half of the land cess from the tenant. It was argued that though the clause provides for the payment of the whole land cess as land cess by the tenant, we must presume that half of that land cess was really made payable by the tenant as rent and that for the

convenience of both the landlord and the tenant, that portion of the rent which is equivalent in amount to half of the land cess was made payable as if it was half of the land cess itself. No foundation has been laid in the evidence for making such an extraordinary presumption and I must repel this contention.

Then it is said that Cl. 4 of the cadapa was wrongly disallowed by the lower appellate Court. That clause provides that kist on the land shall be the first charge on the produce of the land. If that clause merely intended to give a charge to the landlord to the same extent as is given by S. 5, Cl. 1, Madras Estates Land Act, then the clause is superfluous. But if that clause is intended to give the landlord a higher charge, say a charge upon the produce of the land, even after the produce had passed into the possession of a purchaser from the tenant, then it is a charge which is unreasonable and the lower Court acted, in my opinion, rightly in refusing to give such an extended charge to the landlord. The next contention relates to Cl. 5. That again makes some provision in favour of the landlord which is also provided for by S. 42, Cl. (a), Estates Land Act. If the landlord (defendant) was intended to obtain the same benefit under this Cl. 5, as he is given by S. 51, Estates Land Act, then Cl. 5 is superfluous. If he wants some more extended benefit [the extension to be of a vague and undetermined character as I understand Cl. (5)], then the lower appellate Court was justified in refusing to give him such a larger privilege. The last contention relates to Cl. 10 of the cadapa. That clause is to the effect that the tenant shall deliver at the house of the landlord sankarnami mamool, namely three seers of ghee, one cartload of fuel, one cartload of dry hay, jaggery and one cock. It is argued that this is part of the rent. I am unable to accept this contention. It is a clause which comes at the very end, the penultimate Cl. 9 evidently being intended to be the last clause appropriate to a muchalika as such. In the case of *Krishna Chandra Sen v. Sushila Soondury Dasse* (1) it was held that where there was a stipulation for payment of Rs 4 in lieu of certain quantities of jack fruit, bamboos and fish and, where that stipulation was contained

in a clause perfectly distinct from that containing the payment of rent which was payable in instalments (in this case also the rent was payable in instalments), that the provision for such a payment was not a provision for payment of rent but for payment of presents. Further, on comparing all the five different cadapas in these appeals it will be seen that while the rent varies, this sankarnami mamool payable by each tenant is exactly the same. This also indicates that sankarnami mamool is not part of the rent as it does not vary with the extent of the holding or the amount of the proper rent payable. It has also been pointed out by the lower appellate Court that the land cess which is calculated at the rate of one anna in the rupee on the amount of the rent is not calculated upon the value of these sankarnami mamool presents. Hence I am clear that these payments are no part of the rent. But then it is argued that even if it is not part of the rent, it is a sum which has been lawfully payable under the contract between the landlord and the tenant before the new Act came into force; and that such a payment has not been rendered unlawful by any provision contained in the new Act. I am not quite sure that even under the old Act the promise to make these presents was a lawful contract which could be legally enforced. I think that even as the agreement to make such presents does not come under the definition of a contract which requires consideration to support it (for however long such payment might have been made by the tenant out of respect to the landlord), it was not legally enforceable payment even when the old Act was in force. Even if for argument's sake it be assumed that it was an enforceable agreement under the old Act, it seems to me, that S. 143 of the present Act debars the landlord from exacting from his tenants "under any name or any pretence anything in addition to the rent lawfully payable." As I have found that this is not rent, it cannot be recovered by the landlord even if it is something other than the rent which is lawfully payable under the provisions of the new Act.

In the result I would dismiss all these ten second appeals with one set of costs in each of the five pairs of connected appeals.

(1) [1899] 26 Cal. 611=3 C. W. N. 608.

Seshagiri Aiyar, J.—I entirely agree; I wish to add a few words only with reference to two of the points argued before us. Reading Cls. 2 and 3 of S. 52, Estates Land Act, it seems clear to me that the object of the legislature was, where there has been a consolidated contract for more than a year, that there should be no sudden change in the relationship of the parties, and that there should be a year of grace before the new conditions come into force. In this case the only year for which patta was tendered was fasli 1318 after the Act came into force. This is not a case where under Cl. 2 there had been a contract for more than one revenue year and therefore the proviso to Cl. 3, S. 52, has no application; the District Judge was right in his conclusion.

As regards Cl. 10 in the patta Mr. Sarma has strenuously argued that the items mentioned therein were lawfully recoverable by the mookhasadar under the old Act, and as the mookasa is in a hilly tract these payments entered in Cl. 10 must be taken to have been part of the rent which was stipulated between the tenant and the mookasadar, and as such it is claimable as rent. Mr. Sarma concedes that, unless he can bring these payments under the designation of "rent lawfully payable" mentioned in S. 143, his argument must fail. In the first place the fact that he himself never paid to Government the road-cess calculated upon this amount is against his claiming this amount as rent. Nor does he levy from the tenant local cess under S. 73, Madras Local Boards Act, upon these items. Therefore it is clear that these items have never been regarded as rent. I think that these payments originated in a mamool to grant supplies to the mookasadar or his officials who come to inspect the holding each year, and they have continued to be paid voluntarily by the tenant to the mookasadar. As pointed out by the learned Chief Justice and Sir T. Muthusamy Ayyar, J., in *Subramanian Chetti v. Prince of Arcot* (2), payments of this nature cannot be regarded as rent. If they are not rent S. 143 is a complete bar and the plaintiff is not entitled to recover them.

I therefore concur in holding that the

second appeals should be dismissed with costs.

S.N./R.K.

Appeals dismissed.

A. I. R. 1914 Madras 209

TYABJI, J.

Mariappa Annam—Petitioner.

v.

Harihara Iyer and others—Respondents.

Civil Revn. Petns. Nos. 677 to 679 of 1911, Decided on 21st October 1913, from order of Dist. Munsif, Thirumangalam, D/- 25th April 1911, in Application D/- 21st April 1911.

Civil P. C. (5 of 1908), O. 21, R. 89—Application need not be in writing or signed by applicant.

An application under O. 21, R. 89 need not be in writing or signed: 25 Cal. 216 and 7 Bom. L. R. 263, *Foll.* [P 209 C 2]

M. Narayanswami Aiyar—for Petitioner.

T. Rangaramanuiachariar—for Respondents.

Judgment.—No authority has been cited to me for showing that the application referred to in O. 21, R. 89, Civil P. C., should be in writing or signed by the applicant or his pleader. *Abdul Latif Moonshi v. Jadub Chandra Mitter* (1) and *Mathuri v. Konda i* (2) are cited to me and they furnish, it seems to me, sufficient authority for the arguments of the learned pleader who appeared for the petitioner. If any written application is necessary, then the petitioner's affidavit, dated 21st April 1911, seems to me to be sufficient to satisfy the requirements of law. I am of opinion that the District Munsif proceeded in a manner which was quite unwarranted and with a disregard to the ends of justice, which must be regretted. The orders of the District Munsif, dated 25th April and 11th July 1911, and the order of the District Judge, dated 29th August 1911, are set aside and the application, dated 21st April 1911, remanded to the District Munsif for disposal according to law. The parties will bear their own costs throughout.

S.N./R.K.

Case remanded.

(2) [1878-80] 2 Mad. 146.

(1) [1898] 25 Cal. 216.

(2) [1905] 7 Bom. L. R. 263.

A. I. R. 1914 Madras 210 (1)

SADASIVA AIYAR AND SPENCER, JJ.

Chellagali Chinnigadu and others—Defendants—Appellants.

v.

Kappala Venkatarayudu—Plaintiff—Respondent.

Second Appeal No. 1711 of 1912, Decided on 19th January 1914, from decree of Tempy. Sub-Judge, Rajahmundry, in Appeal Suit No. 15 of 1912.

Contract Act (1872), S 74—Bond providing payment of principal and interest on certain date—25 per cent more to be paid on default and 12½ per cent interest per annum was to be charged till realization—Provision was held to be penal.

Where a bond provides that principal and interest shall be paid on a particular date, that on default in payment on that date 25 per cent of the principal and interest at 12½ per cent per annum shall be charged on the consolidated amount till its realization, the provision is penal and therefore unenforceable. [P 210 C 1]

B. Narasimha Row—for Appellant.*V. Ramesam*—for Respondent.

Judgment.—The appellate Court ought to have considered and decided issue 3 in this case.

That issue relates to the question whether the provision in the bond sued on, namely that on default of payment by the defendants of the principal sum with 12½ per cent interest per annum within 10th January 1906, 25 per cent, of the total amount of the principal and interest due till then should be added to the debt and that the defendants should be liable for this consolidated sum with interest at 12½ per cent till payment is a penal provision. On that issue, we hold that the term to add 25 per cent to the debt is of a penal character and we allow (as damages for default) an additional sum of Rs. 31-5-0 instead of the sum of Rs. 104-9-4 claimed by the plaintiff. In the result the lower appellate Court's decree will be modified by awarding to the plaintiff Rs. 449-10-6, interest thereon at Rs. 12½ per cent per annum from 10th January 1906 till date of plaint and further interest at 6 per cent. on the total from date of plaint till realization.

The defendants will pay proportionate costs to the plaintiff throughout on the sum due till date of plaint on the above calculation and (defendants) bear their own costs.

S.N./R.K.

*Decree modified.***A. I. R. 1914 Madras 210 (2)**

WHITE, C. J., AND TYABJI, J.

Ramaswami Naik and others—Defendants—Appellants.

v.

Ramanadhan Chetty and others—Plaintiffs—Respondents.

First Appeal No. 53 of 1905, Decided on 5th December 1913, from decree of Sub-Judge, Madura West, in Original Suit No. 10 of 1903.

(a) Evidence Act (1 of 1872), S. 34—Entries in regularly kept books of account are admissible only if corroborated by other evidence.

Entries made in books of account, kept in the usual course of business, are relevant and admissible in evidence under S. 34, only when there is other evidence to corroborate the entries. [P 211 C 2]

(b) Evidence Act (1 of 1872), S. 32 (2)—Person making entries not available—Entries are admissible even without corroboration.

Where the person who made the entries cannot be found, the entries are admissible in evidence under S. 32 (2), even though they are not corroborated: 22 Bom. 294, Ref. [P 214 C 1]

(c) Evidence Act (1 of 1872), S. 73—Documents not otherwise admissible are relevant for ascertaining genuineness of signature—Court may institute comparison without expert's help.

Documents not admissible in evidence otherwise, but the signatures on which are admittedly the executant's become relevant under S. 73, even for the sole purpose of ascertaining, by comparison of handwriting, the genuineness of signatures on disputed documents. In such cases the Court itself may institute the comparison and draw the inference without the aid of an expert swearing to the results of the comparison: *Cobbet v. Kilminster*, 4 F. & F. 490; *Reg. v. Harvey*, 11 Cox. C.C. 546, Ref.

[P 214 C 2]

(d) Contract Act, S. 54—Contract of loan for consolidated sum—Lender refusing to advance full amount—Interest at contract rate cannot be claimed.

Where a contract of loan is for a consolidated sum of money to be paid from time to time, and the lender refuses to advance a very small balance remaining due to the borrower on the contract, the lender puts an end to the contract by his conduct, and cannot claim interest at the contract rate. [P 215 C 2]

K. Srinivasa Aiyangar—for Appellant.*S. Srinivasa Aiyangar and C.V. Anantakrishna Aiyar*—for Respondents.

White, C. J.—This is an appeal from a decree in a suit on a bond executed by the defendant's mother in favour of the plaintiff. The date of the bond is 4th February 1897. The bond recites that the defendants have borrowed from the plaintiff for stamp for the valuation of a suit Rs. 1,500, and that the sum which

the defendants received on the date of the bond in the shape of a hundi drawn on the plaintiff's firm for other miscellaneous expenses is Rs. 3,500, the total being Rs. 5,000.

The case of the defendants is that under this bond they had, in fact, received not more than a sum of Rs. 1,500. This sum of Rs. 1,500 is made up of Rs. 1,250 which they admit having received on 18th February 1897, and of Rs. 250 in respect of their liability on promissory notes given prior to the execution of the bond. The plaintiff's case is that he advanced Rs. 1,500 on the date of the bond, that he advanced a further sum of Rs. 1,250 on 18th February and that he made a series of further advances in small sums, which amounted in the aggregate to a sum of Rs. 4,856-4-9.

The evidence on behalf of the plaintiff with reference to the alleged advance of Rs. 1,500 on the date of the bond is that of the plaintiff himself. He says: "Rs. 1,500 in cash was given to the defendant's mother on the date of the bond. A hundi for Rs. 3,500 was given to her then." He says that he gave it direct to her. His statement of the payment of Rs. 1,500 to the mother was not cross-examined and the mother was not called. In that state of things, I hold that the payment of Rs. 1,500 was proved.

As regards the Rs. 1,250 which the plaintiff alleges was paid on 18th February, the evidence is that of plaintiff's first witness who was a man in the plaintiff's employ. He says that this Rs. 1,250 was paid to Pachai Ammal, the mother, by a man named Meenakshi Sundaram who was at that time the plaintiff's manager. There was some cross-examination with regard to this evidence, but the mother, as I have stated, was not called. That being so, I think I must hold that the payment of Rs. 1,250 was also proved.

As regards the other amounts claimed by the plaintiffs, there are no particulars attached to the plaint, but we are told that the particulars are to be found in accounts which the plaintiff says were kept by Meenakshi Sundaram. This man is no longer in the plaintiff's employ and the question we have to consider is whether there is sufficient evidence to warrant us in upholding the decree of the learned Judge with reference to the

alleged advances other than the sums of Rs. 1,500 and Rs. 1,250 to which I have referred.

Meenakshi Sundaram was not called as a witness. A man who had been in the service of the plaintiff was called, and he proved that the entries in the ledger account Ex. D were in the handwriting of Meenakshi Sundaram. There is, I think, no evidence that the day book, Ex. C, or at any rate, the entries in the day book on which the plaintiff relies, were in the handwriting of Meenakshi Sundaram. The form of the ledger account indicates that it was kept in the ordinary course of business.

The learned Subordinate Judge in connexion with these accounts refers to Ss. 31 and 32, Evidence Act. Under S. 31 entries made in a book of account regularly kept in the course of business are relevant, but they are not sufficient evidence to charge any person with liability. So far as S. 31 is concerned, there must be something more than the mere entries, although the entries appear in a book regularly kept in the ordinary course of business. S. 32 provides that written or verbal statements made by a person who is dead or who cannot be found are relevant facts in certain cases. Amongst these cases enumerated is the case, "when the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty."

As regards S. 32, the evidence is relevant if the conditions of the section are satisfied. The plaintiff says that these written statements of Meenakshi Sundaram to be found in an account, kept in the ordinary course of business, are relevant, because Meenakshi Sundaram cannot be found. First, we have to satisfy ourselves, if there is evidence on which we can hold that Meenakshi Sundaram cannot be found. It must be admitted that the evidence is not strong. The plaintiff's fourth witness, the accountant to whom I have referred, in answer to a question by the Court, said: "I do not know the whereabouts of Meenakshi Sundaram." It is pointed out by the learned vakil for the appellants that the plaintiff who is the man's late master and who would be likely to know the

whereabouts of Meenakshi Sundaram was not asked anything about it. We have also in evidence two or three applications for the summoning of Meenakshi Sundaram as a witness in which his name is mentioned. The summonses however are not before us. There is no question that he was not called as a witness. That is the evidence, and although I feel some doubt about it, I think we are warranted in holding for the purpose of S. 32 that there is evidence that this particular man cannot be found.

Certain evidence is relied on as corroborating the evidence furnished by the account, and it is contended that this evidence, taken with the account is sufficient for the purpose of S. 34, to charge the defendants with liability. We have heard a good deal about Ex. H which is said to corroborate one entry of Rupees 33-6-0 to be found in Ex. D. Ex. H is a letter which purports to be signed by the defendants' mother to Meenakshi Sundaram in which she directs him to pay her a sum of Rs. 33. This document was, apparently, put in evidence, not when the defendant was in the witness-box who could speak to the handwriting of Pachai Ammal, but when the arguments were completed. There is an endorsement on the back of the document that the defendant's vakil, in the absence of his client, was not prepared to admit the signature. However the learned Subordinate Judge who had the document before him points out that this particular document was produced along with certain other documents and he says that, on comparing her admitted signatures and other document with the signature in this document, he finds that the latter document, was in fact, signed by Pachai Ammal, the defendant's mother.

In the circumstances, the question is, is this admissible under S. 73, Evidence Act? I am of opinion that it is. The English law which is, to a certain extent adopted in S. 73 is thus laid down in Taylor on Evidence, para. 1870. It seems clear first that any writings, the genuineness of which is proved to the satisfaction, not of the jury but of the Judge, may be used for the purposes of comparison although they may not be admissible in evidence for any other purpose in the course; and next, that the comparison may be made either by witnesses acquainted with the handwriting or by

witnesses skilled in deciphering handwriting, or without the intervention of any witness at all, by the jury themselves or in the event of there being no jury, by the Court." Here the learned Judge compared the disputed signature with the undisputed signature and came to the conclusion that the signature which the vakil was unable to admit was, in fact, the genuine signature of Pachai Ammal the defendant's mother. There is therefore corroboration of one of the items in the ledger (Ex. D). We have also an admission by the mother which is spoken to by the plaintiff. He said with reference to the account: "There are entries in those accounts regarding the sums paid by him to Pachai Ammal. On being asked by me subsequently, she also admitted the receipt of those sums." That is the evidence on which the plaintiff relies for the purpose of establishing that the various sums mentioned in the account were in fact advanced.

The strong points on behalf of the defendants are, first, that none of these alleged advances were endorsed upon the hundi, Ex. B, as required by the hundi itself, and secondly a letter which was written by the plaintiff on 11th October 1897 to Pachai Ammal in which he declines to make any further advances, and in which he says: — "Enough with the loss to me of Rs. 1,500 that I had paid to you. I cannot give you further sums of money." However, the conclusion I have come to, on the whole, is that, as there is relevant evidence sufficient to enable us to say that we can support the conclusion at which the learned Subordinate Judge arrived, namely, that the plaintiff has made out that the sums which he says were advanced on the bond were, in fact, advanced by him.

So much for the appeal. Then there is the memorandum of objections. The learned Judge gives the plaintiff a decree for Rs. 4,856-4-9 the amount claimed, with interest at $4\frac{1}{2}$ per cent per mensem on the sums paid from the date of payment up to 11th October 1897. The 11th October 1897 is the date on which the plaintiff wrote his letter saying that he was not prepared to make any further advance, and it was contended in support of the learned Judge's view that the plaintiff was not entitled to interest after 11th October, that the plaintiff

must be taken to have broken his contract to pay Rs. 5,000 on 11th October 1897 and that being so, he became disentitled to claim any interest after that date. It is quite clear that Rs. 4,856-4-9 which was owing by the defendants to the plaintiff on 11th October 1897 was not paid. It is also clear that the sum in respect of which the plaintiff gave the notice that he did not intend to fulfil his contract on 11th October 1897 comes in round figures to only Rs. 150. However, we have come to the conclusion that we are not bound to give the plaintiff interest at the contract rate after 11th October 1897. I think that the letter of 11th October 1897 (Ex. 3) may be taken to be an intimation by the plaintiff that he intends to put an end to the contract. I think that we can support the learned Judge's finding that he was not entitled to contract rate. But I think he is entitled to interest for the money which was owing on 11th October 1897 and has not been paid up to now. We fix the rate of interest for the time since the date of the letter, Ex. 3, at 6 per cent. The result will be that the appeal is dismissed with costs, and the memorandum of objections is allowed to the extent indicated. We make no order as to the costs of the memorandum of objections.

On behalf of the plaintiff, Mr. Ananthakrishna Aiyar undertakes that he will not execute the decree against the defendants personally.

Tyabji, J.—I agree.

With reference to the items for Rs. 1,500 and Rs. 1,250, I have nothing to add, but I should like to say a few words as regards the other items and as regards the sufficiency of the evidence for supporting the plaintiff's claim relating to those other items.

That evidence consists in the main of the accounts produced. The first question with reference to the accounts is whether they are admissible in evidence. In order that they should be admissible under S. 32, Evidence Act, the person who wrote the accounts should be either dead, or one who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable. It is clear that the learned

Judge had the provisions of S. 32 in mind; he refers to it in his judgment and he himself put the question to one of the witnesses whether the writer of the accounts, Meenakshi Sundaram, could be found. The answer was that he could not. Neither the learned Judge nor the defendants questioned any other witness on the point. In addition, we have the fact that Meenakshi Sundaram's name appears in five of the lists of witnesses, and it is stated to us that, it appears from the endorsement on the summonses that on each of these five occasions, efforts were made to serve the summons on the witness, and that these efforts were fruitless. It seems to me therefore that the Judge was warranted in holding that Meenakshi Sundaram could not be found and that, therefore, the first preliminary requirement of S. 32 was satisfied.

It is true that there is no definite finding as regards the accounts having been kept in the regular course of business; but I agree that, looking into the nature of the accounts produced and considering the fact that no objection was taken to the admissibility of the account on the strength of their not having been kept in the regular course of business it is too late for the appellants now to take that objection. Had the objection been taken prior to the accounts having been admitted in evidence the plaintiffs would have had the opportunity of proving that the accounts were kept in the regular course of business. Without going the length of implying that the same reasoning should always apply it seems to me proper in the circumstances of this case to assume that the plaintiffs were permitted to tender the accounts in the Court on the assumption that they were kept in the regular course of business, and that the fact that they were so kept was admitted by the defendants so as to make it unnecessary for the plaintiffs to prove it affirmatively.

If the accounts were admissible under S. 32 it was argued before us on behalf of the respondents that S. 34 did not apply. On the other hand the learned pleader for the appellants contended that S. 34 is the specific provision of the law relating to the weight to be given to accounts and S. 32 must be read together with S. 34 when the question

arises not only as regards the relevancy and admissibility of accounts, but also as to the weight and the probative force of accounts admitted in evidence. No authority was cited to us on the point by either side during arguments but at a late stage our attention was called to *Rampyara Bai v. Balaji Sridhar* (1) in which it was held that if the accounts are relevant under S. 32 (2) they do not require in law any such corroboration as becomes necessary in the case of accounts relevant only under S. 34.

We have not had the benefit of hearing the learned pleaders on that decision and I therefore do not wish to express either assent to or dissent from the proposition laid down in it. But in the circumstances of the present case and sitting in a Court which has appellate jurisdiction as to facts no less than as to law I have no hesitation in saying that in my opinion there would be no sufficient evidence for charging the defendants with liability if the evidence consisted of the accounts alone uncorroborated by other circumstances showing that the payments which the accounts mentioned were actually made. For these accounts are written by a person in the employment of the plaintiffs who had admittedly to be prosecuted for dishonest dealings and who according to the suggestion on behalf of the plaintiffs themselves is keeping out of the way because of his dishonest dealings. It would indeed be strange if the accounts which would not be sufficient evidence for charging another with liability are to be given additional probative force by the fact that the person who wrote them is dishonest and cannot be found.

The corroboration on which the respondents rely consists, in the first instance of a document (Ex. H) purporting to be written by the defendant's mother Pachai Ammal who, it is admitted, was representing the defendants and negotiating with the plaintiffs for the loan which is the subject-matter of this suit and carrying on the litigation which it was the object of the loan to finance. It was argued before us that Ex. H was not proved. The signature on Ex. H was not admitted by the learned vakil for the defendants in the lower Court: there is an endorsement on it to that

effect but there were other admitted signatures on documents which were before the Court and the learned Judge by a comparison of these signatures with the signature on Ex. H held that Ex. H was a genuine document signed by Pachai Ammal who purported to sign it. This was done evidently under S. 73, Evidence Act, and the question therefore arises whether the Judge rightly considered that the document could be proved by a comparison made by himself of the disputed handwriting with the handwriting that was admitted to be genuine.

Section 73, Para. 2, permits the Court itself to compare words or figures of the disputed and of the undisputed documents. It is true that para. 1, S. 73 is not equally clear. But the law in England seems to be that the Court or the jury may itself compare the two writings and that on a comparison so made it may be held that the document is or is not satisfactorily proved notwithstanding that no expert witness is called to compare the two writings and to depose on oath to the result of the comparison. This was held in *Cobbet v. Kilminster* (2), though in *Reg. v. Harvey* (3), Blackburn, J., pointed out the caution with which this provision of the law should be given effect to and in the case before him he expressly prevented the jury from comparing the disputed and undisputed documents. These decisions make it clear however that the question whether or not a document is genuine may be determined by the Judge himself making such a comparison of the document as is referred to S. 73, Evidence Act, and it is in his discretion to avail himself of the power to do so. I am not prepared to say that the learned Judge was wrong in the circumstances of this case in coming to the conclusion that Ex. H was genuine. Amongst these circumstances I include the fact that Ex. H had been produced and deposited in Court by the plaintiffs more than a year prior to the occasion when it was adduced in evidence, that Pachai Ammal was not called by the defendants, that beyond a bare denial of the genuineness of that document the defendants did not take any steps to show that it was not genuine. Had the document been suddenly produced in

(1) [1904] 28 Bom. 294=6 Bom. L. R. 50.

(2) 4 F. & F. 490.

(3) [1867-70] 11 Cox. C. C. 546.

Court so as to leave no opportunity to the defendants to deal with its genuineness, and so as to cast suspicion on the document, and had the learned Judge then on a mere comparison of the handwriting come to the conclusion that the document was genuine without giving due weight to the other circumstances throwing suspicion on its genuineness, then I might have felt bound, sitting in an appellate Court, to re-consider the question of its genuineness with greater stringency than is now necessary. But in the circumstances of this case it seems to me that we ought to proceed on the basis that the document was rightly allowed to be adduced in evidence and rightly considered to have been proved to be genuine.

Exhibit H therefore corroborates the accounts in regard to one particular item. The item, in itself, is small, but considering that the case for the defendants was that no money was paid subsequently to the two items to which I have referred at the beginning of this judgment, and considering the terms in which Ex. H is couched, it seems to me that it furnishes a certain, though a slight, amount of corroboration of the rest of the accounts. To that must be added the fact that the plaintiff alleged that the whole account had been shown to Pachai Ammal and that Pachai Ammal admitted that it was correct and that the sums shown therein as due were actually due. The plaintiff was not cross-examined on this statement. The learned Judge asked him certain questions with reference to these allegations, and the plaintiff mentioned the name of a person who was present as a witness on the occasion when Pachai Ammal admitted the correctness of the account, though that person was not called as a witness on behalf of the plaintiffs. It seems therefore to me that there is just sufficient evidence to show that the case of the plaintiffs does not rest hardly on the accounts proved under S. 32 and the plaintiffs' case therefore technically satisfies the requirements of S. 34. On the other hand, there is no evidence of the defendants disproving any of the particulars referred to by the plaintiffs in their accounts. Many of them could certainly have been disproved if they had been incorrect, and disproved, it seems to me, conclusively and without much difficulty. Taking all these matters

into account it seems to me that we should not be justified in interfering with the finding of the learned Judge that, as a matter of fact, Rs. 4,856-4-9 were advanced by the plaintiffs in accordance with the items in the accounts. Another reason why it seems to me that the decision of the learned Judge should not be interfered with is the fact to which I have had occasion to refer that the learned Judge himself put questions to the plaintiffs' witnesses and was anxious to get at the truth of the plaintiffs' case, and it was after making these efforts that he came to the conclusion that the plaintiff had proved his case.

Coming to the question of the memorandum of objections, I agree that technically the plaintiff was guilty of breaking the agreement evidenced by Ex. A, so that it seems to me that we cannot say that the plaintiff is entitled, as a matter of right, to claim interest given to him under Ex. A. I say that, because on 11th October 1897 the plaintiff wrote to defendants' mother saying that he would advance no further moneys. At that time, under the bond Ex. A, the whole amount of Rs. 5,000 had not been advanced, but a sum of about Rs. 150 was still due. The plaintiff was therefore technically in the wrong in refusing to advance that sum on 11th October 1897. Under the Interest Act 28 of 1855, where there is an agreement to pay interest, the Court may grant it at a rate not exceeding the rate agreed upon: the fact that the plaintiff had not acted in strict conformity with his part of the agreement is one reason why I think we ought not to award interest at the rate agreed upon. To that I must add the fact that the plaintiffs are suing seven years after the time when they could have sued for the payment of this amount, and according to their claim in the plaint they became entitled to a sum several times in excess of the sum originally advanced viz., Rs. 20,136. Taking all the circumstances into consideration, it seems to me, that the most equitable order to pass would be to permit the plaintiffs to receive interest at the rate of 6 per cent for the whole period following 11th October 1897. I therefore agree in the order proposed by the learned Chief Justice.

S.N./R.K

Appeal dismissed.

A. I. R. 1914 Madras 216

SADASIVA AIYAR, J.

Gontla Venkata Pitchayya—Petitioner.
v.*Soudagar Mahommad Abdul Kareem Beg Saheb and others*—Respondents.

Civil Revn. Petn. No. 558 of 1911, Decided on 11th February 1914, from order of Dist. Judge, Kistna, in Misc. Appeal No. 5 of 1911.

Civil P. C. (1908), O. 9, R. 13—Ex-parte decree—Process server need not prove likelihood of indefinite absence of defendants for effecting substituted service—Evidence apart from return can be received by Judge—High Court will not interfere in such case—**Civil P. C. (1908), S. 115.**

In order that substituted service of a summons by affixing it to the door of the defendant's house in his absence may be effectual, it is not necessary that the return of the process-server should show that there is a likelihood of defendant being absent for a long period, so as to entitle the process-server to affix it to the door of the house. The Court may from other circumstances of the case and upon other evidence taken by it, come to a conclusion upon the question. A High Court will not interfere in a case of this kind under S. 115: 21 *Mad.* 324, *Foll.*; 29 *Mad.* 324, *Dist.*; 1 *I.C.* 163, *Diss. from.* [P 217 C 2; P 218 C 1]

P. Narayanamurthi and V. Ramadoss—for Petitioner.*Advocate-General and P. Nagabushanam*—for Respondents.

Judgment—Defendant 1 is the petitioner in revision. As ex-parte decree was obtained by the plaintiff against the petitioner for specific performance of an unregistered written agreement by which the defendants agreed to execute a registered rent deed in favour of the plaintiff. This ex-parte decree was passed on 16th August 1910. The first defendant was not personally served with the defendant's summons in the suit. His permanent residence was Bezvada and the suit was brought in the Bezvada District Munsif's Court. When the process-server went to serve him with the summons on 2nd July 1910, defendant 1's gumasta said that defendant 1 had gone to Tirupati and so the duplicate summons was affixed to the outer door of his house. The process-server was solemnly affirmed on 5th July 1910 and deposed to the truth of his return to the above effect. The District Munsif treated the service by affixture as service duly made, and after examining one witness for the plaintiffs, who proved that the unregistered agreement was executed by defendant 1, gave a decree

against defendant 1 (decree was also passed against the other executant of the agreement, defendant 2, but we are not concerned now with that matter).

When the suit for the specific performance (Original Suit No. 360 of 1910) was brought, the law in Madras seems to have been that an unregistered agreement to execute a rent deed could be used and was admissible as evidence in a suit for specific performance of that agreement: see *Konduri Srinivasa Charlu v. Gottumukla Venkataraya* (1). The fact that in February 1910, Benson and Krishnaswamy Aiyar, JJ., had doubted the correctness of that decision and had referred the matter to the Full Bench: see *Narayanan Chetty v. Muthia Servai* (2), was probably not known in the mufassil then. The District Munsif, therefore, on 16th August 1910, treated the unregistered agreement on which the suit No. 360 of 1910 was brought in his Court for specific performance as admissible in evidence and passed his ex-parte decree on that date. On 23rd August 1910, defendant 1 put in a petition to the District Munsif to set aside the ex-parte decree on the ground that he had gone on a pilgrimage to Benares in May 1910, that he returned to Bezvada only about 13th August 1910, that he did not then know of the suit having been brought against him, that the ex-parte decree of 16th August 1910, which was passed about three days after he returned to Bezvada, came to his knowledge only on 22nd August 1910 and on these grounds he applied to set aside the ex-parte decree. This petition was dismissed by the learned District Munsif on the ground that defendant 1 must have been informed by his clerk of the affixing of the summons in July to the outer door of defendant 1's house, that the District Munsif did not believe the allegation in defendant 1's affidavit, (that defendant 1 had gone to Benares) because the endorsement on the summons showed that he had gone only to Tirupati and that defendant 1 had signed "the suit agreement." On appeal, the learned District Judge confirmed the order of the District Munsif refusing to set aside the ex parte decree. The learned District Judge's reasons are that defendant 1 who was absent when the process-server took the summons for

(1) [1907] 17 M. L. J. 218.

(2) [1910] 8 I. C. 520=35 *Mad.* 63.

service to his house, was not temporarily absent, but was absent for an indefinite period, and that the service by affixture was correctly effected in such a case and could be treated as "due service." It was argued in this Civil Revision Petition No. 558 before me that the endorsement of the process-server itself shows that defendant 1 was not duly served (see the second ground of the petition), and that "the Court below failed to see that the plaintiff's suit was not maintainable on the face of it, as no suit could be brought on the basis of an unregistered agreement to lease: vide Full Bench decision of *Narayana Chetty v. Muthia Servai* (2): see the fifth ground of the revision petition. This case *Narayana Chetty v. Muthia Servai* (2) was decided on 3rd November 1910, the reference to the Full Bench having been made by Benson and Krishnaswamy Aiyar, JJ., as I said before, on 8th February 1910. This ground of the revision petition lends some support to the argument of the learned Advocate-General (who appeared for the respondent in this case) that defendant 1 knowing of the suit, allowed it to be decreed ex parte on 16th August 1910, as he was ignorant of the fact that the decision of *Kondari Srinivasa Charlu v. Gottumukkla Venkataraya* (1) had been doubted by a Bench of this Court in February 1910 and that the matter had been referred to a Full Bench, that he (defendant 1) after 16th August 1910 came to know of the fact and that thereupon he put in a petition on 23rd August 1910 to set aside the ex-parte decree. The decision of *Narayanan Chetty v. Muthia Servai* (2) has also been reported in the authorized reports as *I.L.R. 35 Mad. 63*.

The argument of the learned vakil for the petitioner before me was that as the process-server has merely stated in his return that defendant 1 (petitioner) was alleged to have gone to Tirupati and as the process-server did not add that the date of defendant's 1 return to Bezwada was not known or was indefinite, the service was not duly made and that under O. 9, R. 13, he (defendant 1) was entitled to have the ex-parte decree set aside when the summons was not duly served. He relies upon several cases one of which is *Abraham Pillai v. Donald Smith* (3). That case of *Abraham Pillai v. Donald Smith* (3) goes however too

(3) [1906] 29 Mad. 324.

far and has been doubted in *Kasivisvanathan Chetty v. Arunachalam Chetty* (4) and it is also the decision of a single learned Judge. *Kasivisvanathan Chetty v. Arunachalam Chetty* (4) follows *Sankaralingam Mudali v. Ratnasabapathy Mudali* (5), in which it was held that if the absence of the defendant is for an indefinite period, service by affixture was sufficient. Whether the absence is for an indefinite period or not has to be ascertained from the circumstances of the particular case. The learned vakil (Mr. P. Narayanamurthi) for the petitioner contends that unless the process-server's return expressly shows that the person who gave the information to the process-server of the absence of the defendant from his usual place of residence is stated in the return itself to have added that the date of the return of the defendant to his usual place of residence is not known, the Court could not legally accept the service as due service. I am unable to accept this contention. The Court might find the indefiniteness of the period of absence not only from the express words in the return (if there are such express words), but also from the other circumstances as appearing from the return.

In the case of *Sankaralinga Mudali v. Ratnasabapathi Mudali* (5) in which it was held that the Subordinate Judge was justified in declaring the defendant as duly served with summons on the basis of the process-server's return, I find on looking into the printed records that the process-server merely said in his return that "the families of the said person's house and the owner of the neighbouring houses say that it was two days since the defendant went to Tinnevely" and that he (the process-server) therefore affixed it to the street-door. In the present case the information that defendant 1, a resident of Bezwada, had gone on a pilgrimage to Tirupati and not to a neighbouring village reasonably led to the presumption that his absence was indefinite as the District Judge points out. If defendant 1's case is true that he had left Bezwada on a pilgrimage to Benares a month before the summons was affixed to the outer door, the presumption is still stronger that his absence was for an indefinite period. Following *Sankaralinga*

(4) [1911] 12 I. C. 420.

(5) [1898] 21 Mad. 324.

Mudali v. Ratnasabapathy Mudali (5) I hold that the Munsif was justified in declaring that defendant 1 was duly served and in passing an ex-parte decree against defendant 1 (petitioner). In the case of *Sitaram Swami v. Kalandi Patra* (6) where the defendant had left the jurisdiction of the Court (as in this case), it was held that the affixing of the summons to the outer door of his house could be rightly held by the Court as due service. In that case also, there was no express statement by the process-server that the date of the return of the defendant from Vizagapatam (to which he had gone) from his usual place of residence, (in Cuttack) was not known and yet it was held that service by affixture could be legally held to be sufficient. In the case of *Sitaram Swami v. Kalandi Patra* (6) reliance was placed for the defendant upon the observations of *Sakina v. Gouri Sahai* (7), *Sakharam v. Padmakar* (8) and *Abraham Pillai v. Donald Smith* (3) (just as these decisions were relied on by the petitioner's vakil in this case), but as pointed out by Mookerjee and Carnduff, JJ., "in some of these cases the rule was too broadly stated, and it may be a question whether the decision in every one of these cases can be justified upon the most liberal interpretation of R. 17." The above case of *Sitaram Swami v. Kalandi Patra* (6) followed *Sankaralinga Mudali v. Ratnasabapathy Mudali* (5) and I also propose to follow that case *Sankaranlinga Mudali v. Ratnasabapathy Mudali* (5) in preference to the other cases.

Lastly, this is a petition for revision under S. 115, and I am very doubtful whether even if the lower Courts were wrong in their law that service under these circumstances by affixture was due service, whether they could be considered as having acted without jurisdiction or illegally or with material irregularity, I am inclined to doubt the correctness of the decision of *Wazir Khan v. Naqui Yawar* (9) which held that interference in revision can be properly made in such a case. Of course, in a case of patent and extreme hardship, the powers under S. 15, Charter Act, could be invoked and used by this Court.

(6) [1911] 13 I. C. 127.

(7) [1902] 24 All. 302=(1902) A. W. N. 63.

(8) [1906] 30 Bom. 623=8 Bom. L. R. 757.

(9) [1909] 1 I. C. 163.

In the result this civil revision petition is dismissed with costs.

S.N./R.K.

Petition dismissed.

A. I. R. 1914 Madras 218

SADASIVA AIYAR AND SPENCER, JJ.
N. S. Natheir Sahib—Plaintiff—Appellant.

v.

Kadir Moideen Rowther—Defendant—Respondent.

Letters Patent Appeal No 38 of 1913, Decided on 19th November 1913, from judgment of Oldfield, J., in Second Appeal No. 1665 of 1911.

(a) Letters Patent (Madras), S. 15—Order awarding costs is judgment within S. 15.

An order awarding costs even if discretionary is nevertheless a "judgment" within the meaning of S. 15, Letters Patent, and is appealable: 8 I. C. 340, *Foll.* and 17 M. L. J. 569, *Diss. from.* [P 218 C 2; P 219 C 1]

(b) Civil P. C., S. 35—Both parties blamed for litigation—Costs should not be awarded.

Where both parties to a case are to blame for litigation, costs should not be awarded to either. [P 219 C 1]

T. M. Krishnaswami Aiyar—for Appellant.

V. K. Venugopal Naidu for K. R. Subramania—for Respondent.

Sadasiva Aiyar, J.—A preliminary objection is taken that no appeal lies under S. 15, Letters Patent, as the question decided by the learned Judge of this Court related only to costs of the litigation. Reliance is placed on the decision of *Saravana Mudaliar v. Rajagopala Chetty* (1) and on Letters Patent Appeal No. 9 of 1909, which follows *Saravana Mudaliar v. Rajagopala Chetty* (1) without discussion. Not only is the decision of *Saravana Mudaliar v. Rajagopala Chetty* (1) not reported in the authorized reports, but the learned Chief Justice and Wallis, J. seem to have hesitated to arrive at a similar conclusion in Original Side Appeal No. 1 of 1907 and the authority of that case has been seriously impaired by the observation in the judgments of the learned Chief Justice and Krishnaswamy Aiyar, J. in *Tulja Ram Rao v. Alagappa Chettiar* (2). The judgment of the learned Chief Justice shows that the fact that the adjudication relates to a question in the decision of which the Court is vested with a discretion, does not prevent the adjudication being a judgment from

(1) [1907] 17 M. L. J. 569.

(2) [1910] 8 I. C. 340=35 Mad. 1.

which, when pronounced by a single Judge, an appeal could be brought under S. 15, Letters Patent. The reason given by Sir V. Bhashyam Ayengar, J., in *Saravana Mudaliar v. Rajagopala Chetty* (1), based upon the practice of English Courts in respect of allowing appeals against costs which are matters of discretion, does not it seems to us, affect the question whether an adjudication as to costs is a judgment from which an appeal lies under the Letters Patent: see also *Westgate v. Crows* (3). I agree with the judgment to be just now pronounced by my learned brother on the merits of the appeal and the order to be passed in respect of costs in all the Courts, and we overrule the preliminary objection.

Spencer, J.—My learned brother has dealt with the preliminary objection and I agree with him in thinking that the judgment of the learned Judge of this Court who decided the second appeal is not a mere order as to costs but is a judgment open to appeal. On the merits it may be that the District Munsif did not clearly keep in view the principles of law under which a conditional tender is not to be regarded as a legal tender: see *Chunder Caunt Mookerjee v. Jodoonath Khan* (4). But he was right in taking notice of the plaintiff's conduct in attempting to abuse the process of the Court by obtaining an order of arrest before judgment in order to bring pressure on a debtor whom he must have known to be willing to pay the amount for which the suit was subsequently filed. The Subordinate Judge also seems to have been under a misapprehension that the claim in the suit was for the the whole amount of Rs. 800.

On the whole I am of opinion that each party was to a certain extent to blame for the litigation, and that the plaintiff should not have been made to pay the defendant's costs in the first Court. Our order allowing this Letters Patent appeal is therefore that each party shall bear his own costs throughout.

S.N./R.K.

Appeal allowed.

A. I. R. 1914 Madras 219

WHITE, C. J. AND OLDFIELD, J.
M. J. Sivarama Pillai and others —
Defendants—Appellants.

v.

V. Veerappa Pillai—Plaintiff — Respondent.

City Civil Court Appeal No. 8 of 1913, Decided on 12th March 1914, from decree of Madras City Civil Court in Original Suit No. 281 of 1912.

(a) Civil P. C. (1908), O. 21, Rr. 31 and 33 (1)—Suit for restitution of conjugal rights—Strict proof of marriage is essential—General evidence of marriage may presume that necessary marriage ceremonies were gone through in absence of contrary proof.

In a suit for restitution of conjugal rights very strict proof of marriage is essential; but in the absence of proof to the contrary only the general evidence of marriage is sufficient to justify the presumption that all the necessary marriage ceremonies were performed: 28 Cal. 37 and 12 Cal. 140, *Dist.* [P 220 C 2]

(b) Civil P. C. (1908), O. 21, Rr. 31 & 33—Imprisonment as mode of execution of decree for restitution of conjugal rights abolished under new Code, still Court can pass effective decree—If minor wife is not handed to husband without sufficient cause, execution may proceed against her parents as well as their property.

The new Civil Procedure Code has abolished imprisonment as one of the modes of executing a decree for restitution of conjugal rights, but still a Court can pass an effective decree; and where the wife is a minor her parents can be directed to hand her over to her husband, and in case of their default or failure to show sufficient cause therefor, execution can proceed against their persons as well as property: 1 All. 501, *Dist.* [P 221 C 1,2]

V. N. Kuppa Row—for Appellants.

S. Duraisami Aiyar—for Respondent.

Judgment.—It is argued first that the City Civil Court Judge should have granted the adjournment asked for by defendants on 10th January 1913. We gave them a special opportunity to satisfy us that their absence, and particularly that of defendant 1, on that date was unavoidable. But his affidavit now produced does not convince us that it was, or that in view of his conduct throughout the case his deliberate intention was not to protract the proceedings. We therefore cannot interfere with the decision on this ground.

On the merits exception has been taken to the learned Judge's finding against defendant's objection to the marriage between plaintiff and defendant 3 on the ground that the necessary ceremonies were not completed. The foundations for that finding were plaintiff's general

(3) [1908] I. K. B. 24=77 L. J. K. B. 10=97
L. T. 769=24 T. L. R. 14.

(4) [1877-78] 3 Cal. 468=1 C. L. R. 470.

evidence that all the essential ceremonies were performed and the absence of any evidence to contradict it; and it is alleged that they were insufficient, because strict proof of the marriage being necessary, the learned Judge should have found, firstly, what the particular ceremonies essential to a valid marriage were, and, secondly, whether each was performed. The decision in *Surjamoni Dasi v. Kalikanta Dasi* (1) has been relied on in support of this contention; and, no doubt, the head-note of that case supports it. We do not think however that the proposition thus generally stated can be reconciled with the only authority cited in the judgment, which is in point, or that the intention was to enunciate it as of general application and without reference to the pleadings and findings then before the Court.

We observe with due respect that the effect of the only authority referred to, which was in point as dealing with a claim for restitution of conjugal rights, and not with a question of inheritance, *Brindaban Chandra Kurmoker v. Chandra Kurmoker* (2), appears to have been misapprehended. For that decision was wrongly referred to as based on the materials before the Court independently of or concurrently with the presumption arising from the evidence of the celebration of a marriage, since the presumption was in fact regarded as outweighing the finding against the validity of the marriage, based on the absence of evidence of the performance of one ceremony. The weight of the latter of these two cases as a departure from the opinion of the same Court in the earlier is consequently impaired.

Next the judgment in *Surjamoni Dasi v. Kalikanta Dasi* (1) contains no full statement of the pleading, in which the validity of the marriage was denied, or regarding the course of the trial. It does however indicate that the parties differed as to the particular ceremonies essential to a valid marriage and realized the necessity for proof of them, the insufficiency of the lower Court's finding being the basis of this part of the decision. The finding of the first appellate Court is extracted in the judgment, and it did not deal definitely with the matter in contest. That of the Court of first

instance is summarized; and, though we must respectfully express our inability to reconcile the references to it with the learned Judge's conclusion, it is material that it was rejected also on the ground that the trial was defective. The case before us can be distinguished on the ground that defendants must be taken to have declined at the trial to dispute the necessity for particular ceremonies and that the Court's general finding was therefore justified by the pleadings and the course of the proceedings.

The plaint in the present case alleged generally that the marriage between the plaintiff and defendant 3 took place in accordance with law and custom. The written statement contained a general denial that the necessary ceremonies had been fully completed. On 7th October 1912, when issues were framed, defendant 1, defendant 3's father and guardian ad litem, was called on to file a further written statement within two weeks as to what ceremonies were left unperformed. This he did not do. He was also in another connexion called on to appear on 21st October 1912 in person. When the case was taken up on 28th October 1912 he was examined and said: "I do not know who was the priest, who officiated at the marriage or what his caste was. I cannot say what the other ceremonies of marriage were, which were not performed in this case. The tali tying ceremony took place." Clearly, when defendant 1 made these statements, he had had full warning that he would have to specify the omitted ceremonies. It was reasonable for the learned Judge to call on him to do so in order that time might be saved and plaintiff's evidence might be restricted to essential points; and we cannot dismiss his failure from consideration. At the next hearing he was absent and his pleader withdrew from the case. A decision in plaintiff's favour was accordingly given on his evidence alone, his witnesses (including, it is said, the officiating priest) not being examined. The finding under consideration is general, but it is in terms of that evidence, that all the marriage ceremonies were duly performed. We hold that after defendant 1's implied refusal to place the necessity for and performance of particular ceremonies in issue, nothing more specific was possible or necessary. This objection to the decision therefore

(1) [1901] 28 Cal. 37=5 C. W. N. 195.

(2) [1886] 12 Cal. 140.

fails. The next contention is that the decree should have included a direction under O. 21, R. 33 (1), forbidding execution against defendant 3 by her detention in prison. Such a direction was not asked for at the trial. It can still be given by the lower Court. And no special circumstances have been brought to our notice which render it advisable that we should give it now.

Defendants 1 and 2 complain next of the injunction in the decree, requiring them to deliver defendant 3 into the custody of plaintiff within a month, urging that, though she is a minor and during the trial admittedly was under their control, they should not be liable to commitment for disobedience to an order, which could not be enforced against her, and which owing to her recalcitrance or to other causes beyond their control they may be unable to obey. The injunction, they concede, would not be open to objection, if it merely restrained them from preventing plaintiff obtaining possession of her. The authorities cited in support of this are *Lall Nath Misser v. Sheoburn Pandey* (3) and *Gatha Ram v. Mookita Kochin* (4). In the first case the ground of the decision is not clearly stated, and it was observed that an injunction against the person detaining the minor wife would in any case have been unjustifiable, when there was no decree against the minor herself. In the second the relevant portion of the decision was obiter and dealt directly only with enforcement of the decree against the wife, not the other defendants, who were detaining her. Both cases were decided with reference to S. 200, Act 8 of 1859, the Code then in force, which might be supposed to have authorized the view that restitution decrees were merely declaratory because it made no separate provision for their execution. It is possible that it was in consequence of the views expressed in those cases that in Act 9 of 1877 explicit provision was made in S. 260 for the enforcement by imprisonment or attachment of property of decrees in such suits and in S. 259 for the similar enforcement of those in suits for the recovery of a wife. In the present Code the reference to suits for recovery of a wife has been omitted from O. 21, R. 31. and the provi-

sion for enforcement of decrees in restitution suits in R. 32 is qualified by R. 33, conferring discretion on the Court to refuse to enforce them by imprisonment. The result is that since 1877 the law has included explicit provision for the enforcement of such decrees without restriction of its applicability in the case either of the wife or other defendants. And accordingly the passing of a decree enforceable against the latter being contemplated, and the only question remaining being as to its form, we conceive that it should be framed in the most effective manner possible. The form of injunction proposed by defendants was considered in *Ainasi Kuar v. Suraj Prasad* (5), and it was held that a person, who allowed the wife to reside in her house did not infringe it. The wife in that case was of full age, and no doubt, on that account no more stringent injunction would have been appropriate. Here, the possession of a minor being in question, there was no reason why the lower Court should not frame its injunction, as it has done, in a more effective way to secure to plaintiff the relief it was decreeing. It is not suggested that defendants 1 and 2 will have to comply with the decree by delivering defendant 3 to him in Burma, where he is employed or anywhere except at their home on his demand. If they are unable to do so, they will have an opportunity of showing that the cause was beyond their control before execution issues against them or their property. We do not consider that the decree was framed wrongly with reference either to the law or the circumstances of the case and we therefore confirm it in this respect.

The remaining ground of appeal argued is against the order directing defendants to pay all plaintiff's costs notwithstanding that a portion of his claim, separately valued at Rs. 220, for the recovery of certain property was withdrawn. Clearly defendants should not have been made liable for the court-fee on this amount, and the decree must be modified to exempt them from liability in respect of it. The appeal is allowed to this extent, but is dismissed in other respects. Defendants will pay plaintiff's costs. The time within which they must deliver defendant 3 to the plaintiff is extended to

(3) [1878] 20 W. R. 92.

(4) [1875] 23 W. R. 179=14 B. L. R. 298.

(5) [1875-78] 1 All. 501.

one month from the date of any demand he may make after this judgment.

S.N./R.K.

Appeal allowed.

*** A. I. R. 1914 Madras 222 (1)**

SADASIVA AIYAR AND SPENCER, JJ.

Shankara Raja—Defendant—Appellant.

v.

Srirama Desikachariar—Plaintiff—Respondent.

Appeal No. 281 of 1912, Decided on 26th November 1913, from order of Dist. Judge, Chingleput, in Execution Petn. No. 14 of 1912.

*** Civil P. C., (1908), O. 21, R. 2—Vakalat to execute decree gives implied authority to receive from judgment-debtor money out of Court—Entry of satisfaction to extent of money received therefore is legal — Civil P. C., O. 3, R. 4.**

A power given to a vakil to execute a decree includes impliedly a power to receive from the judgment-debtor money outside the Court. An order of the Court recording satisfaction of the decree in the event of the amount received by the vakil is therefore legal and proper; 17 I. C. 139, *Foll.* [P 222 C 2]

V. Ratnasomanadhan—for Appellant.

N. Viswanadha Aiyar—for Respondent.

Judgment.—We think that the power of the vakil to execute the decree on behalf of his client implies a power to receive money from the judgment-debtor outside the Court on behalf of his client. The dictum in *Palaniappa Chettiar v. Arunachalam Chettiar* (1), that a power to execute a decree implies even a power to realize the amount of the decree by an assignment of the decree, supports the above view.

The specific provision in the vakalat that the vakil could draw from Court moneys which are realized in execution does not necessarily negative the power of the vakil empowered to execute a decree to receive the money on his client's behalf outside the Court from the judgment-debtor. Reliance is placed by the appellant's counsel on R. 138 of the Civil Rules of Practice. In that rule, the phrase "payment out of Court" does not mean payment of money due by and in the hands of one person to and into the hands of another person outside of Court, but it means payment of money which is in the deposit of the Court to another person so as to take it out of the Court deposit. Further, R. 138 merely pro-

hibits the Court from empowering a party's vakil from receiving money deposited in Court in favour of that party unless the vakalat empowers the vakil to draw such money. It is to enable vakils to draw such deposited moneys that vakalats contain the provision enabling the vakils to draw such moneys and not for the purpose of indicating that, even when a vakil is authorized to act in execution proceedings, he has not got the power to receive on his client's behalf moneys paid to him by the judgment-debtor in satisfaction of the decree. Moneys so paid to the satisfaction of the authorized vakil are paid to the satisfaction of the decree-holder client.

We therefore hold that the lower Court's order recording part satisfaction to the extent of the amount of Rs. 45 paid to the appellant's vakil by the judgment-debtor was correct. In this view it is unnecessary to consider the effect of the razinamah petition filed by the appellant and his vakil in the suit brought by the vakil.

The appeal is therefore dismissed with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 222 (2)

SADASIVA AIYAR AND SPENCER, JJ.

Lingam Krishna Bhoopathi Deo Garu—Defendant—Appellant.

v.

Raja of Vijayanagaram and another—Plaintiffs—Respondents.

Appeal No. 145 of 1913, Decided on 7th January 1914, from order of Dist. Judge, Vizagapatam, D/- 26th March 1913.

(a) Civil P.C., (5 of 1908), S. 37—Privy Council transmitting decree to High Court—High Court receiving it does purely ministerial act—District Court whose decision is appealed against is still Court "which passed the decree" for recognition of transferee decree-holder and ordering execution—Civil P. C. (1908), Ss. 38 and 42.

Where the Privy Council transmits its decree to the High Court, the High Court in receiving and filing it does purely a ministerial act. The District Court whose decision was appealed against does not thereby cease to be a Court "which passed the decree" for the purpose of recognizing the transferee decree-holder and ordering execution at his instance: 28 *Mad.* 466, *Foll.* [P 224-C 1]

(b) Power of Attorney—Construction.

Where a power of attorney executed in favour of an agent contains the following terms: "to conduct and manage all other, the estate, property, moneys, affairs and concerns of the

(1) [1912] 17 I.C. 139.

zamindari, and in all respects as fully and absolutely as the principal himself is empowered to do, and (subject so aforesaid) to do, perform and carry out all such acts, and deeds whatever as may be considered requisite for the above purposes as amply and effectually as the principal could do in his own proper person if these presents had not been executed" the words are wide enough to give the agent power to assign a decree to another person even for less than the decree amount: 17 I. C. 139, *Foll.*

[P 224 C 2, P 225 C 1]

T. Rangachariar for *R. Srinivasa Aiyangar, V. Ramesam* and *B. Narasimha Rao*—for Appellant.

P. Narayanamurthi—for Respondents.

Sadasiva Aiyar, J.—I entirely agree with the judgment just now pronounced by my learned brother. The appellant's *vakil* relied on the close similarity between the terms of O. 45, R. 16, and the terms of the last sentence of S. 42, Civil P. C. O. 45, R. 16, says that orders in execution made by the Court which executes the order of His Majesty in Council "shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the execution of its own decrees." The last sentence of S. 42, Civil P. C. states that "the orders of a Court executing a decree sent to it for execution by another Court shall be subject to the same rule in respect of appeal as if the decrees had been passed by itself." On this similarity of wording it was argued that just as a Court to which the decree of another Court is sent for execution cannot entertain applications under O. 21, R. 16 or S. 50, Cl. (1), so even the Court of first instance whose decision ultimately went to the Privy Council could not entertain such applications because His Majesty's order had to be sent to it for execution by the High Court. I do not think that this argument is sound as it ignores, as pointed out by my learned brother, the principle underlying S. 37 of the Code which defines the expression "the Court which passed the decree" as including the Court of first instance so far as the powers of that Court relating to execution of the decrees passed by the appellate Courts are concerned.

As regards the construction of the power-of-attorney, Ex. A, I think that the power to manage a big zamindari estate must include the power to transfer for a reasonable consideration a decree amount due to the estate. Cl. 24 of the

power-of-attorney, Ex. A, confers, in my opinion, on the manager the power to execute deeds and conveyances necessary for the purpose of effectuating such transfers as are incidental to the business of estate management.

Again, as regards the decision of *Palaniappa Chettiar v. Arunachalam Chettiar* (1) the principal himself in that case repudiated the act of his agent as beyond the scope of his authority, whereas in the present case the principal by his conduct ratified the act of his agent: see para. 10 of the lower Court's judgment and, in fact, it was not denied that the principal had received the purchase-money for the transfer from his agent's transferee and consented to the transferee executing the decree.

I, therefore, concur in dismissing the appeal with costs.

Spencer, J.—Two grounds of appeal are pressed. It is contended (1) that the order of the District Court recognizing the transfer of the decree by the manager and agent of the estate of the Maharaja of Vijayanagaram in favour of respondent 2 and allowing the latter to execute the decree was an order made without jurisdiction, the proper Court which should pass such an order in a case, which had gone up to the Privy Council in appeal from a decree of the High Court which confirmed the original decree of the District Court being the High Court.

(2) that Mr. Fowler, as attorney of the Maharaja, was not expressly authorized under the power, which is Ex. A to transfer decrees obtained by his principal for less or indeed for any amounts.

No direct authority has been quoted in support of the first proposition. It is sought to be inferred from the language of O. 45, Rr. 15 and 16, read along with Ss. 38, 39 and 42, Civil P. C. Reference has also been made in the argument to the decision of *Swaminatha Aiyer v. Vaidyanatha Sastri* (2) in which it was held that an application under S. 234 of the Code of 1882 (corresponding to S. 50 of the present Code) to execute a decree against the legal representatives of a deceased judgment-debtor must be made to the Court which passed the decree and not to the Court to which it has been transferred for execution, and the deci-

(1) [1912] 17 I. C. 139.

(2) [1905] 28 Mad. 456=15 M. L. J. 116.

sion in *Hurish Chunder Chowdhry v. Kali Sunderi Debi* (3) is cited as an instance of the High Court disposing of a similar question arising in the execution of an order of Her Majesty in Council. But, in my opinion, the position of an original Court, which itself passed a decree against which appeals have been carried out to the Privy Council when it receives the order of His Majesty in Council, transmitted to it by the High Court, is not to be compared with the position of a Court to which the decree of another Court has been transferred for execution. They are totally different positions.

Order 21, R. 16, permits a transferee of a decree to apply for execution of the decree to the Court which passed it. S. 38 permits a decree to be executed either by the Court which passed it or by the Court to which it is sent for execution. S. 37 defines the expression "Court which passed a decree" as including the Court of first instance where there has been an appeal. Similar words are used in O. 45 R. 15, where it is provided that the Court from which an appeal to His Majesty has been preferred shall transmit the order of His Majesty in Council to the Court which passed the first decree appealed from. The act of the High Court in receiving and filing an order of the Privy Council is a purely ministerial function: vide observation in *Premalall Mullick v. Sumbhoonnth Roy* (4). It is so provided that the High Court should act as an intermediary for carrying out the orders of His Majesty in Council because the Privy Council does not deal direct with subordinate Courts.

In the present instance the petition of the transferee decree-holder to transmit the order of the Privy Council with a prayer for a direction to bring him on record in that capacity came before a Bench of this Court and the learned Judges who disposed of his application (the Chief Justice being one of the Bench) expressly refused to make any directions. Without treating him as having no locus standi to make the application they transmitted the order, without prejudice to his right to take, and the original decree-holder's right to give, an assignment of the decree in question.

(3) [1883] 9 Cal. 482=12 C. L. R. 511=10 I. A. 4 (P. C.).

(4) [1895] 22 Cal. 960.

In *Hurish Chunder Chowdhry v. Kali Sunderi Debi* (3) the question was not one of recognizing a transfer of a decree whether one of two co-plaintiffs ought to be permitted to execute a decree without the concurrence of the other plaintiff. Their Lordships of the Privy Council refrained from deciding whether the learned High Court Judge usurped a jurisdiction which did not belong to him, although they were inclined to think he had not done so. His order was set aside on other grounds, namely that it was erroneous to suppose that a decree can only be executed as a whole and not partly by one of the plaintiffs.

I therefore find nothing irregular or contrary to law in the action of the District Court in permitting the transferee to execute the decree, nor has the original decree-holder raised any objection to his doing so.

In support of the second contention, we have been referred to the case of *Palaniappa Chettiar v. Arunachallam Chettiar* (1) and contra to the case of *Veukata-ramana Aiyar v. Narasinga Rao* (5).

Every document must be construed with reference to its particular terms and differently worded documents afford but little assistance for correctly construing the document concerned in this case. We have referred to the power-of-attorney concerned in *Pallaniappa Chettiar v. Arunachallan Chettiar* (1) and we find that the scope of the agent's power was far more limited than that of the powers conferred under Ex. A. The learned Judges who decided that case observed that there was no clause of a comprehensive character which would show that the principal intended to confer plenary powers on his attorney, to deal with all the properties and rights belonging to him. While it is true, as laid down in that case, that established law requires a power-of-attorney to be construed strictly, it is also correct to hold that when an agent has a general power-of-attorney to act in some business or series of transactions he may be assumed to have all usual powers.

I feel no doubt that the words in Ex. A "to conduct and manage all other the estate property, moneys, affairs and concerns of the zamindari in all respects as fully and absolutely as the principal himself is empowered to do

(5) [1913] 18 I. C. 135.

and (subject to aforesaid) to do, perform and carry out all such acts and deeds and things whatsoever as may be considered requisite for the above purposes as amply and effectually as the principal could do in his own proper person if these presents had not been executed," do confer on the Maharaja's manager such plenary powers as would include the transfer for a proper purpose to another person of decrees obtained in the name of the Maharaja himself apart from other words which occur later in the same document.

I would therefore dismiss this appeal with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 225

SADASIVA AIYAR AND SPENCER, JJ.

K. K. Narayanan Nambudripad—Petitioner—Appellant.

v.

M. K. Krishna Pattar and others—Counter-Petitioner—Respondents.

Appeals Nos. 122 and 123 of 1912, Decided on 19th December 1913, against appellate order of Sub. Judge, South Malabar, in Appeal Suits Nos. 108 and 132 of 1912.

(a) Transfer of Property Act (4 of 1882), S. 108 (i)—Suit to redeem kanom mortgage—Decree directing payment of decree amount within six months—Mortgagee was held to be holding mortgage property under lease of "uncertain duration."

Where in a suit to redeem a kanom mortgage, the decree directs the mortgagor to deposit the decree amount within six months from the date of the decree, the kanom mortgagee thus directed to be redeemed must be deemed to hold the property mortgaged under a lease of "an uncertain duration." [P 225 C 2]

He is therefore entitled to cut and carry away the paddy crops on the land raised by him during the period of six months before the deposit of the money: 24 Mad. 47 (F.B.), *Foll.* 13 Mad. 15, *Dist.* [P 225 C 2]

(b) Transfer of Property Act (4 of 1882), S. 108 (i)—Principles of S. 108 (i) apply to kanom demise.

The principle of S. 108 (i) can be applied to a kanom demise as a rule founded on reason and equity. [P 226 C 1]

C. V. Ananthakrishna Aiyar—for Appellant.

A. Narayana Sarma and N. K. Krishna Aiyar—for Respondents.

Sadasiva Aiyar, J.—The kanom mortgagee, while he is also a lessee (see Second Appeal No. 786 of 1912), has as lessee even higher rights than an ordinary

lessee: *Vasudevan Nambudripad v. Valja Chathuachan* (1).

Following *Second Appeal* No. 786 of 1912, I would hold that paddy plants raised by a kanom mortgagee-judgment-debtor are improvements and if the respondents (mortgagee judgment-debtors) had only the rights given them by the Malabar Improvements Act, they would be entitled to claim $\frac{1}{3}$ ths of the value of the plants if they were "sold by public auction to be cut and carried away."

But the principle embodied in S. 108, Cl. (i), T. P. Act (which principle, so far as my knowledge goes, is also the common law of this country) allows to a lessee, whose lease of uncertain duration determines by any means except the fault of the lessee, a right to carry away all the crops planted or sown by him. In the present case, the decree sought to be executed does not fix a certain date for the termination of the kanom lease but merely allows the mortgagor decree-holder to deposit the decree amount on any date between 23rd March and 23rd September 1909, and thus to put an end to the lease on that uncertain day between 23rd March and 23rd September. The lease thus became by the decree a lease of uncertain duration and the mortgagee lessee was therefore entitled to reap the harvest raised by him and to appropriate the entire crops raised by him.

The cases quoted by the appellant's learned vakil as regards the rights of mortgagors and mortgagees who have not been given, by the statute or customary law of the country, the positions also of lessors and lessees are not relevant to the decision of this appeal.

The appeal is therefore dismissed with costs. Appeal against appellate order No. 123 of 1912 follows.

Spencer, J.—I feel a certain degree of hesitation in following the judgment in *Second Appeal* No. 786 of 1912, to which my learned brother was a party, because I doubt whether the words in S. 10, Malabar Compensation for Improvements Act (1 of 1900), "plants spontaneously grown during the period of the tenancy or sown or planted" include annual crops such as paddy.

But I think in respect of growing crops the respondent is entitled to the benefit of the principles enacted in S. 108 (i), (1) [1901] 24 Mad. 47 (F.B.).

T. P. Act, seeing that a kanomdar has certain rights usually belonging to lessees as well as those belonging to mortgagees.

It is true that S. 117, T. P. Act, excludes agricultural leases from the operation of S. 108 except so far as the Local Government has, by notification, extended its provisions to any particular area but in *Vasudevan Nambudripad v. Valia Chathu Achan* (1) it was observed that a kanom demise was not a purely agricultural lease and that rules in this Act which are founded on reason and equity might with propriety be applied to cases of this sort.

The provisions of S. 108 (i) are in accordance with the common law right by which a tenant for an uncertain period has under the name of emblements the benefit of growing crops of such species as ordinarily repay the labour by which they are produced within the year in which that labour is bestowed. Although a kanom demise is usually for a fixed period of 12 years, the period is often, as in this case, exceeded and if the kanomdar is left in any uncertainty as to the date when his rights may be redeemed I consider that he holds under a lease of uncertain duration. In this case six months' time was given from the date of the appellate decree to pay the money for redemption which would extend the time till 23rd September 1909, but the crops were actually harvested on 15th September 1909, and the appellant was put in possession a few days later.

Ramalinga v. Samiappa (2), which was cited by appellant's pleader, was a case of a mortgagee in possession who claimed the value of crops from an execution purchaser. The mortgagee in that case did not stand in the same position as the kanomdar in the present case who had certain rights of a tenant as well as those of a mortgagee.

I agree that these appeals should be dismissed with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 226

SPENCER, J.

On difference between
SUNDARA AIYAR AND SADASIYA
AIYAR, JJ.

D. Srinivasa Iyengar—Appellant.

v.

Thiruvengadathaiyangar—Respondent.
Second Appeal No. 355 of 1911, Decided on 10th February 1914.

(a) **Hindu Law—Marriage** (*Sundara Aiyar and Spencer, JJ.*)—Reasonable expenses for performance of marriage of male coparcener if incurred out of family funds are necessary expenses binding on other co-parceners.

Per *Sundara Aiyar and Spencer, JJ.*—As a marriage is an obligatory samskara for Hindus the reasonable expenses of performing the marriage of a male member of a coparcener, if already incurred out of family funds, are necessary expenses and must be treated as binding upon the other coparceners. [P 236 C 1]

(b) **Hindu Law**—(*Sundara Aiyar and Spencer, JJ.*)—Marriage samskar must be performed out of family funds—Expenses of marriage of unmarried person must be set apart at partition.

Per *Sundara Aiyar and Spencer, JJ.*—As the marriage is a samskara and it is not usual to omit it and it is necessary that samskaras should be performed out of family funds the expenses for the marriage of unmarried coparceners should be set apart at partition of the joint family property. [P 238 C 2]

(c) **Hindu Law**—(*Sadasiva Aiyar and Sundara Aiyar, JJ.*)—Joint family manager making proper expenditure should add surplus to family fund—Family member cannot claim share of part profits on ground of separate residence—But excluded member can call for accounts of profits during exclusion and get his share out of profits unaccounted for.

Per *Sadasiva Aiyar and Sundara Aiyar, JJ.*—As the manager of a Hindu family is expected, after making all proper expenditure, to add any surplus that may be left to the family funds, no member of the family is entitled to claim a share of past profits on the ground of a separate residence, but if he is excluded by the act of the manager he is entitled to call upon the manager to account for the profits received during the time of his exclusion and to get his share of such profits as the manager is unable to account for. [P 228 C 1]

(d) **Hindu Law**—(*Sadasiva Aiyar and Sundara Aiyar, JJ.*)—Infant member living separate not through manager's fault—Infant in partition suit was held not entitled to mesne profits.

Per *Sadasiva Aiyar and Sundara Aiyar, JJ.*—Where an infant member of a Hindu family was living separately not owing to any fault on the part of the manager of the family :

Held: in a suit for partition by the infant, that he was not entitled to recover mesne profits, i. e., a share of the past profits. [P 228 C 1]

(e) **Hindu Law**—(*Sadasiva Aiyar and Sundara Aiyar, JJ.*)—Award of maintenance to

Hindu mother on partition—Mother includes stepmother.

Per *Sadasiva Aiyar* and *Sundara Aiyar, JJ.*—In awarding maintenance to a Hindu mother in partition of family property, the word "mother" should be taken as including the "stepmother." [P 230 C 2]

(f) Hindu Law—(Sundara Aiyar, J.)—Brother whose marriage was performed before family partition cannot object at partition to provision for marriage expenses of his unmarried brother.

Per *Sundara Aiyar, J.*—A brother who has had his own marriage performed before partition of the family property is not entitled at the time of partition to object to a provision being made for the marriage expenses of his unmarried brother. [P 230 C 1]

(g) Hindu Law—(Per Sadasiva Aiyar, J.)—Distinction between ancestral and self-acquired property unknown to ancient Hindu Law—Paternal estate includes father's self-acquisition and means estate which son can inherit or obtain through his relations to his father.

Per *Sadasiva Aiyar, J.*—The distinction between the ancestral and the self-acquired property of a father was not known to the ancient Hindu law. The expression "paternal estate" when used in Hindu law books does not mean the father's self-acquisition alone, but merely means the estate which the son can inherit or obtain "through his relations as such son" to his father. [P 231 C 1]

(h) Hindu Law—(Per Sadasiva Aiyar, J.)—Initiated brothers are not bound to perform marriage samskara for uninitiated brothers and expenses for future marriages of latter cannot be deducted out of patrimony before decision.

Per *Sadasiva Aiyar, J.*—As the marriage of males is not an indispensable samskara the initiated brothers are not bound to perform the marriage samskaras for their uninitiated brothers, and, therefore, the expenses of the future marriage ceremonies of the latter ought not to be deducted out of the patrimony before it is divided. [P 234 C 2]

T. Natesa Iyer—for Appellant.

K. R. Rangaswami Aiyangar—for Respondent.

Sundara Aiyar, J.—The suit in this case is one for partition by a Hindu minor. Defendant 1 is the plaintiff's step-brother. Defendant 5 is the plaintiff's mother and defendant 1's step-mother. Defendant 6 is the plaintiff's elder sister. Defendants 5 and 6 were made parties on the ground that provision should be made for the maintenance for the former and for the maintenance and marriage and other expenses of the latter. The first question raised in second appeal is whether the plaintiff is entitled to a share of the amount recovered from a Life Insurance Company on a policy of insurance taken out by Doraisami Iyengar, the father of the plaintiff and

defendant 1. The policy states that it was taken for the benefit of Doraisami's wife and two sons of whom the wife and one of the sons died, and defendant 1 alone was left; but both the Courts have found that the premia for the policy were paid out of funds belonging to the whole family. This finding has been attacked in second appeal; but we are unable to interfere with it. It was argued that the finding of the lower appellate Court was based in part on the supposition that Doraisami Iyengar was the managing member of the family and that this was not the fact. But no objection was taken to the finding on this ground in the memorandum of second appeal; nor does Doraisami Iyengar's management seem to have been denied in the lower appellate Court. The plaintiff was, therefore, rightly held entitled to a share of the insurance money.

The next question is whether the decree in the plaintiff's favour for mesne profits for two years before the suit is right. It was alleged by the plaintiff that he and his mother were turned out of the family house and had to live elsewhere. The Subordinate Judge has found that the plaintiff has failed to prove that they were turned out of the house; but he allowed mesne profits, because he held that a minor plaintiff is entitled to recover mesne profits in a suit for partition. I am of opinion that there is no foundation for this view. The case relied on by the Subordinate Judge, *Krishna v. Subbanna* (1), does not support it. In that case it was observed: "If an adult member is not excluded, but chooses to live apart from the manager, then as he did not choose to enforce partition, it may be very reasonable that, apart from the consideration of fraud or misappropriation by the manager, the principle above stated should be applied to him." (That is, the principle that the manager is not bound to account for past transactions or past income). "But the principle cannot apply to the cases of an infant member, who has been excluded by the manager from the family house and from enjoyment of the property. The infant is, by reason of infancy, incompetent to authorize the act of the manager, or, at all events, cannot be legally bound by any authorization in fact given during his infancy. Moreover,

(1) [1884] 7 Mad. 564.

the infant being excluded cannot be assumed in point of law or fact to have known of any act of the manager." The observations relate primarily to a suit for account, including an account of past profits. An infant who has been excluded from commensality was held entitled to an account of past profits during the period of his exclusion. They do not support the view that the mere fact that the infant was living separately, when it was not due to any fault on the part of the manager, would entitle him to recover a share of the profits.

The manager of a Hindu family is entitled to spend the income for the benefit of all the members of the family. It is unnecessary to consider whether a member living separately could make a claim for the expenses of his maintenance; for that is not the question raised for decision before us. The manager, after making all proper expenditure, is expected to add any surplus that may be left to the family funds. No member is entitled to claim a share of past profits on the ground of his separate residence. If he is excluded by the act of the manager, he has, no doubt, been held then entitled to call upon the manager to account for the profits received during the time of his exclusion. The manager would then be entitled to credit for all proper expenditure including any investments made, in which of course the excluded member would be entitled to share. With respect to any profits for which the manager is unable to account, the excluded member would be entitled to his share of them. There is no reason why the same principle should not apply to a minor coparcener. No authority has been cited in support of the application of a different principle. The question here is not one of the right to an account. No doubt, one reason for refusing an account to an adult coparcener suing for partition has been stated to be that "every adult member of an undivided joint family, living in commensality with the karta, must be taken as between himself and the karta, to be a participator in, and authorizer of, all that is from time to time done in the management of the joint property to this extent, namely, that he cannot without further cause call the karta to account for it: *Abhay Chandra Roy Chowdhury*

v. Pyarimahan Guha (2). This reason would not, of course, be applicable to the case of a minor member. But the point has no bearing in deciding whether a minor is entitled to claim mesne profits. The claim for mesne profits must therefore be disallowed. The Subordinate Judge's decree awarding 61½ on this account must be set aside.

The next question is whether the expenses of the plaintiff's upanayanam and marriage and defendant's marriage were rightly provided for in the decree for partition. *Jairam Nathu v. Nathu Shamji* (3) and *Mahadeva Pandia v. Rama Narayana Pandia* (4) are clearly in support of the plaintiff's case. Two contentions have been raised in this Court:

(1) That such provision can be made only out of the separate or self-acquired property of the father of the parties, and cannot be made out of the ancestral property of the father derived from his father; and

(2) that the plaintiff is entitled to have a provision made only for his upanayanam and not for his marriage, the latter not being a necessary samskara according to Hindu law.

The first contention is entirely without foundation. Mr. P. R. Ganapathy Aiyar, the learned vakil for the plaintiff, who has argued the question very fully, relies on certain passages in the *Mitakshara*. Yajnavalkya's text, Chap. 2, verse 124, does not expressly refer to the ceremonies to be performed for the brothers, the text being to the effect that "uninitiated sisters should have their ceremonies performed by those brothers who have already been initiated, giving them a quarter of one's own share." But the text has been interpreted by commentators as including the ceremonies of brothers too. The *Mitakshara* in Chap. 1, S. 7, Verse 3, expressly provides: "If any of the brethren be uninitiated when the father dies who is competent to complete their initiation? Uninitiated brothers should be initiated by those, for whom the ceremonies have been already completed." Verse 4 lays down: "By the brethren who make a partition after the decease of their father, the uninitiated brothers should be initiated at the charge

(2) [1870] 5 B. L. R. 347=13 W. R. 75 (F.B.).

(3) [1907] 31 Bom. 54=8 Bom. L. R. 632.

(4) [1903] 13 M. L. J. 75.

of the whole estate." Reliance is placed on Chap. 1, S. 6, Verses 14, 15 and 16. These verses deal with the power of the father to make gifts to one or another of the sons. The power to make gifts is now regarded as confined to the separate or self-acquired property of the father. The contention is that these verses show that S. 3, Verse 1, dealing with partition after the father's decease—"Let sons divide equally both the effects and the debts, after (the demise of) their two parents," relates only to the self-acquired property of the father. To a question put to the appellant's vakil from the Bench, which text then provides for the division of the father's ancestral property his answer was that S. 5, Verse 1, does so. "But among grandsons by different fathers the allotment of shares is according to the fathers." But this verse is intended merely to show that where the brothers have an unequal number of sons, the grandsons take per stirpes and not per capita. S. 1, Ch. 1 was referred to us as showing that the father and his sons have equal rights in property descending from the grandfather. But this does not help the contention that S. 5, Verse 1, Ch. 1 and S. 3 taken together show that the provision in S. 7 for the samskaras of the uninitiated brothers and sisters is intended to be made only out of the self-acquired property of the father.

Reference is also made to the Smrithi Chandrika Ch. 4, Verses 36 and 37. Verse 36 cites a text of Vishnu which runs thus: "The text of Vishnu that 'the initiations of unmarried daughters are to be defrayed in proportion to his own wealth' is applicable either to a case where no partition of heritage takes place from there being an only son, or to a case where brothers live in union." Verse 37 is in these terms: "Hence, Vyasa, brothers whose investiture and other ceremonies have not been performed are to be initiated in due time from the paternal wealth alone by brothers whose sacraments have already been completed. Unmarried sisters are also to be initiated by their elder brothers according to law." The word 'alone' is the translation of the Sanskrit word "Eva", the meaning being that the "paternal wealth" must be used for the purpose indicated. The use of the word "paternal" is relied on as showing that only the father's own wealth

was intended. But this contention cannot be upheld. The language is comprehensive and would take in all ancestral property. The same observation applies to similar texts of Brihaspathi and Narada in Verses 38 to 41. There is nothing to show that the author of the Smrithi Chandrika understood the expression "paternal wealth" as meaning the self-acquired property of the father. The texts cited from the Madaviya, pp. 17 and 18 of Burnell's edition, the Viramitrodaya, p. 81 of Sitarama Sastri's Hindu Law Books, and the Vivada Chintamani, p. 49, of the same book, do not carry the case any further. I must hold that the plaintiff is entitled to have funds set apart for his ceremonies out of the ancestral property which descended to plaintiff and defendant 1 from Doraisami Iyengar.

The second contention is that the ceremonies for which the plaintiff is entitled to have provision made do not include his marriage. It is argued that marriage is not a necessary ceremony in the case of a Brahmin male and the case of *Gocindarazulu Narasimham v. Devabhotla Venkatanarasayya* (5) is relied on. That case decided that a debt borrowed for the expenses of the marriage of a coparcener could not be enforced against the other coparceners. That position has been considerably shaken by the observations contained in *Devulapalli Kameswara Sastry v. Polavarapu Veeracharlu* (6). The learned Chief Justice who was a party to the judgment in the earlier case was subsequently prepared to reconsider his view. The question has been elaborately considered by Krishnaswami Aiyar, J., in *Devulapalli Kameswara Sastry v. Polavarapu Veeracharlu* (6) and by Chandavarkar, J., in *Sundrabai Tarji Dagdu Pardeshi v. Shivanarayan Ridkarna* (7). I have nothing to add to the reasons given by those learned Judges for holding that a marriage is a proper ceremony for a Brahmin and an obligatory ceremony for all with extremely few exceptions: see also West and Buhler, p. 781, Strange's Hindu Law, Vol. 2, pp. 286, 288, Sircar's Hindu Law (3rd edition), p. 245, S. 292. But I do not think that it is necessary to rest the decision in this case on the ground that

(5) [1904] 27 Mad. 206.

(6) [1910] 8 I. C. 195=84 Mad. 422.

(7) [1908] 32 Bom. 81=9 Bom. L.R. 1366.

marriage is absolutely obligatory. There are, no doubt, texts in favour of the position that the initiatory ceremonies in the case of the three higher castes end with the upanayanam: see Smrithi Chandrika, Ch. 4, V. 42, which is supported by the author of Vivada Chintamani: see Seetarama Sastri's edition, p. 4. The Smrithi Chandrika text has been explained by Chandavarkar, J., in *Sundrabai Javji Dagdu Pardeshi v. Shivanarayana Ridkarna* (7). It was decided very recently in *Gopalakrishnamaraju v. Venkatanarasa Rau* (8), by a Full Bench of this Court, after the arguments in this case were heard that marriage is considered an obligatory ceremony for Hindus except in the case of one who is prepared to live the life of a perpetual Brahmachari or of a Sanyasi and that a debt borrowed for the marriage of one of the coparceners is binding on all. This judgment, in my opinion, practically concludes the point raised in this case. Defendant 1 has no right to compel the plaintiff to abjure marriage and to become either a Naishtika Brahmachari or a Sanyasi.

The plaintiff has the right to become a Grihasta and to live the life which is ordained for Brahmins in general; marriage is an indispensable ceremony (Avasyam Kartavyam) for all except the most spiritually advanced persons. The family property should provide the means for such an initiatory ceremony. There can, at any rate, be no doubt that marriage is regarded as a most proper ceremony for every Hindu. This is sufficient to justify the plaintiff's claim for a provision for his marriage. Defendant 1 has been married at the expense of the family. There is no reason for treating the brothers differently. Modern custom is, undoubtedly, in favour of allowing the provision. In deciding what ceremonies are regarded as proper and necessary regard should be had, in my opinion, to the sentiments of the community, especially when there is a difference of opinion amongst text-writers. I am also prepared to hold that a brother who has had his own marriage performed at the family expense is not entitled to object to a similar provision being made for the other brothers. The Subordinate Judge's view, therefore, must be upheld with respect to the allotment both for the plain-

tiff's upanayanam and for his marriage. In the result the appeal must be allowed in so far as the award of mesne profits is concerned and dismissed in other respects.

Memorandum of Objections:—Respondent 1 has put in a memorandum of objections objecting to the lower Court's refusal to make a provision for the maintenance of defendant 5, the plaintiff's mother. A preliminary objection was raised by Mr. Ganapathy Aiyar to the memorandum on the ground that defendant 5, who appealed against the decree of the District Munsif disallowing a provision for her maintenance has not herself appealed to this Court against the disallowance and that it was not competent to the plaintiff to do so. The ground on which the Subordinate Judge refused to make an allotment for defendant 5's maintenance was that her maintenance should come out of the plaintiff's own half-share of the property and cannot be enforced against defendant 1's half-share. Defendant 1, (i. e., the plaintiff) is, therefore, affected by the judgment and is interested in disputing its correctness. Defendant 5 is a party to the second appeal. This Court has power under O. 41, R. 33, Civil P. C., to pass such decree as it thinks proper dealing with the rights of all the parties before it. The preliminary objection must be disallowed.

On the merits the memorandum is entitled to succeed. The question was decided so long ago as 1870 in *Sivananania Perumal Sethurayer (Zamindar of Orcad) v. Meenakshi Ammal* (9) by Holloway and Innes, JJ. The Smrithi Chandrika supports her claim: see Ch. 14, Verse 14:—"The word mother includes a step-mother." In verse 7 a text of Vyasa is quoted: "Even childless wives of the father are pronounced equal sharers and so also are all the paternal grandmothers: they are declared equal to mothers:" see *Kumaravelu v. Virana Goundan* (10). The basis of the mother's right is, as pointed out by the author, the interest that she has by reason of her relationship to her husband. This reason is equally applicable to the step-mother. Mr. Ganapathi Aiyar's argument that the question was not really considered in *Sivananania Perumal*

(9) [1869-70] 5 M. H. C. 377.

(10) [1882] 5 Mad. 29.

(8) [1912] 17 I. C. 308.

Sethuroyer (Zamindar of Orcad) v. Meenakshi Ammal (9) cannot be accepted.

The same view was apparently taken in *Subbarayalu Chetty v. Kamalavalli Thayaramma* (11) though the decision itself proceeded on another ground. The case relied on by the Subordinate Judge, *Hemangini Dasi v. Kedarnath Kundu Chowdhry* (12), was based upon the express provisions of the Dayabhaga according to which the stepmother's right is only against the share of her sons.

The Subordinate Judge must be requested to return a finding on issue 7. He will also find whether defendant 5 is in possession of any family jewels as distinguished from her own stridhanam jewels and if so what is their value. One month will be allowed for the findings and seven days for objections.

Sadasiva Aiyar, J.—I have had the advantage of perusing the judgment of my learned brother in this case. I agree with him in all the conclusions formulated in that judgment except on one point which however is not unimportant. I am therefore obliged to write the following separate judgment and I shall notice in it only two points of Hindu law, one point on which I regret I have to differ from, and the other point on which I agree with my learned brother.

The distinction between the ancestral and the self-acquired property of a father was not known to the ancient Hindu law. The expression "paternal estate," when used in Hindu law books, does not mean the father's self-acquisition alone, but merely means the estate which the son can inherit or obtain through his relation as such son to his father. In *Gudimetla Venkatarazu v. Bollozu Kottaya* (13) I have attempted to show that, according to the Shastras, sons had no right in the property which belonged to their father till both their father and mother were dead. Sanka and Likhita state (see Jagannatha, p. 199) that even the properties acquired by the sons themselves independently of their father cannot be partitioned among them while the father lives since the sons are not their own masters in respect of any wealth so long as their father lives. Harita Smriti also says the same. Manu says that three persons, including a son,

can have no wealth of their own so long as their superior is alive. Of course, we cannot now wholly go back to the ancient law of the Shastras and we have to accept the Mitakshara which, relying mainly on a supposed text of Gautama, gives to the sons, by their mere birth, rights in the (self-acquired and ancestral) properties of the father. This supposed text of Gautama is not found in Gautama's institutes now and is opposed to the undoubtedly genuine text of Gautama, that property is acquired only in five modes, viz. inheritance, purchase, partition, seizure, or finding. Even if it is genuine it can only mean that "birth" gives the son an inchoate and contingent right to inherit from his father or mother on their death and not a right in present in their property as soon as he is conceived.

The text of Yajnavalkya in respect of ancestral immovable property not being at the disposal of the father must be interpreted in the light of the moral obligation of a Grihasta to provide for the support of his wife and children, because not only those already born but even those thereafter to be born to him, require maintenance and support according to Vyasa's text. There are passages in the Smritis to show that to pass the ownership in immovable property, the consent of even neighbours and the whole of his village is requisite, the unrestricted private ownership and right of alienation in landed property having been greatly discouraged in some portions of the long past period of Hindu civilization. In fact the Mitakshara (Ch. 1, S. 1, slokas 24 to 27) clearly says that the father is not master of the immovable property acquired even by himself. The text of Yajnavalka about the ownership of father and son being equal in wealth received from the grandfather was merely intended as a moral injunction prohibiting the unequal division of the grandfather's wealth between the father and sons. In fact this text has been rightly interpreted as giving only a figurative ownership to the sons in order that the father might fulfil his moral obligation of not making an unequal division of such property between himself and his sons. It was not at all intended to give a legal right of present ownership in ancestral property to the son. Some other commentators explain

(11) [1911] 10 I. C. 347=35 Mad. 147.

(12) [1889] 16 Cal. 753=16 I. A. 115.

(13) [1916] 16 I. C. 139.

the text by saying that it was intended that, where the father died, leaving a son and grandsons by the deceased son, the grandsons by the deceased son should obtain a share equally with their uncle. In other words it was intended that the surviving son alone as the nearest sapinda, should not take the whole of the estate to the exclusion of the grandsons by the deceased son. It was therefore stated that the right of inheritance after the grandfather's death is the same in the case of the son and the grandson (by a pre-deceased son). The son is never considered in the ancient text-books as the true owner of any property so long as his father or mother is alive: see Jagannath's Digest, p. 283. Yajnavalkya says that among those whose fathers are deceased the allotment of shares is according to the father's. Katyayana similarly says: "Should a brother die before partition his share shall be allotted to his son provided he has received no fortune from his grandfather. The son's son shall receive his father's share from his uncle or from his uncle's son." As I have said already it may be to avoid the consequences of the logical effect of the dictum that the estate belongs to the nearest sapinda that the Smriti texts make the son, the grandson and the great-grandson of the deceased owner to equally partake (per stirpes in the case of the grandson and the great-grandson) the estate of the deceased owner instead of the son alone taking the whole as such nearest sapinda. But if a great-great-grandson is left, he cannot claim to inherit any share of his great-great-grandfather's property directly from the deceased owner.

The Mitakshara, having laid down the principle of present right by birth instead of a mere figurative right, has led to a very large amount of anomalies in the Hindu law. To adapt the language of Beaman, J., in a recent Bombay case (that learned Judge was referring to the Mahomedan law): "There seems now little hope of expecting from the vast entanglements of the Mitakshara Hindu law anything like consistent principles or intelligible classifications, and every single rule seems to be open to innumerable exceptions many of which appear to conflict in principle with the main rule." This modern main rule as to the right by birth was in hopeless conflict with the son's undoubted legal liability under the ancient Hindu

law to pay his father's debts and hence the Privy Council have been obliged to virtually destroy this rule by allowing the validity of alienations effected to discharge the father's debts provided they are not illegal or immoral. This alleged right by birth is also ignored when the father was given the right to alienate his self-acquisitions, even if they were immovables. This same right by birth has led to the so-called right of survivorship unknown to the ancient Hindu law. It has also virtually killed the numerous texts which show that the great-great-grandson has no right to inherit directly the property of his great-great-grandfather, if the great-great-grandfather at his death left nearer descendants. The clear texts, see Manu, slokas 186 and 187 of Chap. 9, and the text of Katyayana which deny the right of the great-great-grandson to inherit could not be explained away except by much involved ingenuity. Such misapplied ingenuity has been abundantly shown by the commentators who wrote the Viramitrodaya, the Smriti Chandrika, the Madhaviya, the Vivada Chintamani and the Vivada Ratnakara. These unsatisfactory commentaries the Courts have been obliged to accept as making the rule as to the non-existence of succession and inheritance beyond the third descending line inapplicable to the cases governed by the Mitakshara law: see the elaborate judgment of my learned brother Sundara Aiyar, J., in *Abhinana Purna Priga Vaedagi Bhaskar Tirumal Rao Saheb v. Arni Rangasawmy Rao Saheb* (14). For myself, I am unable to interpret the texts of Manu and Katyayana as intended only to apply to cases where the property to be inherited was the acquisition of the great-great-grandfather, because the Mitakshara confers right by birth even in self-acquisitions to the sons' and through them, of course, to the grandsons and great-grandsons. I am clearly of opinion that the Mitakshara principle of right by birth utterly destroys the rule laid down in the texts of Katyayana and Manu that the great-great-grandson has no claim to inherit directly his great-great-grandfather's property.

When therefore the Hindu law books treated of partition of the paternal estate—I would put it rather as the paternal estate—they did not mean to confine

themselves to the partition of the father's self-acquired estate, because according to the ancient law both his self-acquisition and his ancestral estate are his own and are parental estate so far as the sons are concerned. As my learned brother has pointed out, there are no separate chapters in the Smritis or even in the commentaries treating of the partition of self-acquired estate apart from the ancestral estate of the father. The only difference made is between partition during the father's lifetime and partition after the father's death. Mr. Ganapathi Iyer has attempted to confine the texts of Yajnavalkya and other Smriti writers (Vishnu, Vyasa, Brihaspati and Narada), which required initiated brothers to set apart from the paternal property the expenses of the initiation of uninitiated brothers and sisters before dividing the paternal property, to the father's self-acquired properties, and this attempt to restrict these texts to the self-acquired property of the father has, in my opinion wholly failed. In fact, Narada says that if no wealth of the father exists, the ceremonies of uninitiated brothers must, without fail, be defrayed by the brothers already initiated contributing funds out of their own private wealth. Thus when the initiated brothers are bound even in the absence of any property inherited by themselves to spend money for the Samskaras of their uninitiated brothers, it is impossible to hold that they are not bound to meet those expenses out of the property which they inherit from their father's ancestral estate.

We now come to the question as to what are the Samskaras of uninitiated brethren, the expenses of which have to be first set apart from the inheritance before it is divided among all the sons. (Formerly, sisters also had shares in the inheritance along with their brothers and the texts about expenses of initiation refer to both uninitiated brothers and sisters). Brihaspati's text clearly points to the Samskaras in question, viz., those which the brothers initiated by their father had to perform for their brothers and sisters whose initiation had been left incomplete by the father at his death, such initiations which are morally obligatory on the father being rounded up by the upanayana ceremony. His text is as follows: "For younger brothers, whose thread investiture, etc., ceremonies

have not been performed, their elder brothers shall perform them out of the collected wealth of their father." If the expenses of the marriage Samskara were also intended to be set apart before partition that Samskara would have been mentioned in preference to the thread investiture ceremony. The word "Dvijati Samskara," as used in the Shrimad Bagavatam and other sacred books, is intended to apply only to that important Samskara which initiates the Hindu into his caste, viz., the upanayana ceremony.

It is well known that females also, according to the Shastras, had the upanayana Samskara performed in former ages, just like males though now the Vivaha Samskara has become practically the only Samskara for females. But even now, at the time of the Vivaha Samskara most of the previous Samskaras are rapidly gone through for females. The Smriti Chandrika is clearly of opinion, that the ceremonies contemplated by Narada's text commence with jatakarma and end in upanayana. Now the Samskaras are variously numbered 8 to 48 and even more: see also Jagannatha introduction, p. 30. The Savitri or the ceremony of investiture is the 7th when numbered from jatakarma according to the Samskara Ratnamala and the 8th or 10th when numbered from Garbhadanam according to other works. Marriage or Vivaham comes as the 14th or 16th ceremony. That the marriage of males is not considered an indispensable Samskara is clear to me after a perusal of several of the ancient Shastric books.

The late Dewan Bahadur Raghunatha Rao, a very learned, accurate, and unprejudiced Sanskrit scholar, has, in my opinion, conclusively shown in his work that marriage both for males and females is optional and not obligatory. The late Krishnaswami Aiyar, J., while inclined to attach great importance to the Vivaha ceremony: see *Devalapalli Kameswara Sastri v. Povaraju Veeracharu* (6) admits that the Jabala Upanishad, Manu, Yajnavalkya, and Mitakshara lay down that a Hindu can go straight from the Brahmacharya stage after upanayana to the Sanyasashrama stage without having been a Grihastha and having had the Vivaha Samskara if he has conquered his animal passions during the Brahmacharya stage. (Yad Ahareva Viramet Tad

Ahareva Pravrajat): see also Mitakshara, Prayaschitta Kandam on Yati Dharma. We have the well-known text of the Bhagavatham that animal sacrifices, intoxicating liquor, sacrifices, and marriage are not obligatory Samskaras but are intended only for those who have not conquered their desire for flesh, spirituous liquors and sexual gratification.

Loke Vyarayamishamadhya Sita Nithyastu Jantoh nahi tatra chodana Vyavasthitis tashchirivaha Yagna sura Grahair Asu nirvithi rishta.

The texts which praise the Grihashthashramam as supreme are only what are known as arthavada and laudatory texts intended to encourage the married house-holder to perform his duty of maintaining the other three Ashramas, and were clearly not intended to really lay down that the Grihashthashrama is superior to the other Ashramas. In fact in the Bhagavatham and other religious works and also in the Smritis the married stage is in several places despised as the Jaghanyasarama and it is clearly laid down that apart from the exceptional cases of Jnana Sanyasis like Janaka a man who dies as an ordinary Grihashthashramee will be merely moving round and round in the three lower worlds, whereas the Naishtika Brahmacharya, the Vanaprastha and the Sanyasi alone can go to the higher four worlds after passing to which there is no further involuntary return to the rounds of births in the three lower worlds. Marriage is only a Vikalpavidhi and it is not a Nitya or Apurvavidhi. It is either a Niyama Vidhi or is only a Parisankhyavidhi. Even Chandavarkar, J., in *Jarji Dagdu Pardeshi Sundarabai v. Ridkarna Shivanarayana* (7), does not state that marriage is always obligatory but only that it might "become obligatory" in the cases and for the reasons he has set forth (p. 93, 1st line). As regards the texts quoted by Krishnaswami Aiyar, J., which ordain that a man should discharge his three (or five) debts and that he should procreate sons by marriage to discharge one of those debts, viz., the debt due to his Pitris there are numerous passages in the Shastras to show that when real Vairagya is obtained and real undivided devotion to the Supreme Lord, the debts to Devas, Rishis, Bhootas, Aptas, fellow-men and Pitris all become non-

existent and completely discharged and that on the very day such Vairagya and devotion are obtained that very day you should give up the wordly life. The learned Judge himself does not state that marriage is a compulsory Samskara even for the man who is not fit to pass at once to the Vanaprastha stage but that it is "practically compulsory": see *Devulapalli Kameswara Sastri v. Polavarpu Veeracharlu* (6). The Bhagavatham says:

Devarshi Bhootapta Nirinam Pitrinam na Kinkarao Nayamrineecha Rajan Sarvatmana yassaranam Saranyam Gato, Mukundam parihritya Kartam.

Now according to the texts (see especially Narada quoted in the Smriti Chandrika p. 59 of Mr. Krishnaswami Ayyar's translation) which require the initiated brothers to perform the ceremonies of their uninitiated brethren it is clear that it is only those ceremonies which the deceased father was expected and bound to perform for his sons if he was alive that the initiated brothers had to perform in the place of their father for their uninitiated brothers. "What is left to the father's property after the father's obligations have been discharged let the brothers divide." Now what are those ceremonies? Manu says: "Let the father himself perform the eight ceremonies which perfect the second birth of a twice-born man like the ceremony on conception." Thus it is clear that the father is under an obligation to perform only up to the upanayana ceremony the Samskaras to be performed for his son. Vivaha is a ceremony which is performed after a man attains his majority and depends on his own will and option. It is therefore perfectly clear to me that the marriage Samskara is not one of the Samskaras which the initiated brothers have to perform for their uninitiated brothers and the expenses of the future marriage ceremony of the uninitiated brother is therefore not intended by the texts to be deducted out of the patrimony before it is divided. I am glad to have for the above view the support of that very learned Judge the late Krishnaswami, Aiyar, J., who has said in *Devulapalli Kameswara Sastry v. Polavarapu Veeracharlu* (6): "There is also another reason for separating marriage from Samskaras that precede it for as pointed out

at p. 300 of the Digest, it is not a Samskara which a father does for the sons as he does in the case of the preceding Samskaras but one in which the son himself participates as the active agent." The learned Judge further on says: "The marriage of an unmarried brother is certainly not a duty cast on the married brothers when there is no patrimony." The texts of Narada make the initiated brothers perform the Samskaras of uninitiated brothers even out of their own acquisition if there is no patrimony and as the Samskaras so made obligatory on the initiated brothers are the same whether there is patrimony or not if such Samskaras cannot include the marriage Samskara in the one case, they cannot include it in the other case also. In the case of uninitiated sisters as the marriage ceremony has now taken the place of their upanayana the marriage expenses must be met or set apart but in the case of uninitiated brothers I think we must stop at the upanayana ceremony as even the Smriti Chandrika does not venture to go beyond the expenses of the upanayana ceremony obligatory in the patrimony. If we go as far as the optional sacrament of marriage, why should we not go to the 30 and odd sacraments which follow the marriage sacraments, and where are we to stop? In these days when it is deemed essential to postpone the marriage of boys till their education is completed, I am not prepared to allow any money for the future marriage of a minor boy to be set apart several years before the marriage is likely to take place. The making of such provision will be the holding out of a temptation to the boy and his widowed mother to hasten the marriage before he completes his education and such early marriages are utterly opposed to the Shastras. The question decided in *Devulahalli Kameswara Sastry v. Palavarapu Veeracharla* (6) was that the expenses of the marriage of a male Hindu are expenses incurred on account of "family necessity" because they are reasonable and proper expenses. That question is quite a different question from that which we are now considering, viz. whether the expenses of such marriage ought to be set apart at a division among the brothers as the expenses of an obligatory Samskara, under the texts of Narada and other sages. The expression

"family necessity" and "family benefit" have always been liberally construed to include the expenses for purposes usually and reasonably incurred according to the status of the particular family, and that question was recently decided in *Gopalakrishnamaraju v. Venkatanarasa Raju* (8) by a Full Bench of which I was a member, but the present question as to the expenses of what Samskaras have to be set apart at partition has no connexion with the question decided by the Full Bench, the decision of the Full Bench merely affirming that where the marriage had taken place and where therefore the Vivaham sacrament of male was found to have been obligatory owing to the unfitness of that male member for the life of a Naishtika Brahmacharya or of a Sanyasin the reasonable expenses which had been incurred for his marriage were proper family expenses which would support the alienation of family property made for meeting such expenses.

I wish to add that in these times, when the giving of Varasulkam is so rampant, it is very problematical that any expenses need at all be incurred for a boy's marriage when he comes of marriageable age and on that ground also I should hold that the allowance of Rs. 150 to the minor plaintiff for his marriage expenses is based on a remote speculative necessity. In this case, the plaintiff is only a boy of five years old and to speculate about his marriage expenses now seems to me to be a great deal premature. In the result I would modify the lower Court's decree by deleting the provision made in it to the extent of Rs. 150 for the plaintiff's marriage, plaintiff being a child five years old his marriage if it takes place at all in future, having to be postponed till he is 24 according to the Shastras, it being problematical whether his marriage instead of entailing expense may not even be a source of pecuniary profit to him when it occurs and the Hindu law contemplating the expenses up to upanayanam alone being set apart at the time of division for the benefit of uninitiated brothers. In other respects, I agree with the judgment of my learned brother and I agree in the order proposed by my learned brother to be passed in this case as regards the question of defendant 5's maintenance.

Sundara Aiyar, J.—As my learned brother does not agree with my view on the question of the plaintiff's right to have provision made to defray the expenses of his marriage we refer under S. 98, Civil P. C., for decision of a third Judge the question whether when one only of two coparceners in a Hindu family has been married at the family expense, the other coparcener, a minor, is entitled at a partition of the family property to have provision made for his marriage out of it.

(This second appeal coming on for hearing on 5th February 1914 under the provisions of S. 98, Civil P. C., upon hearing the arguments of Mr. T. Natesa Iyer, vakil for the appellant, and of Mr. K. R. Rangaswami Aiyangar, vakil for respondent 1 and respondent 2 not appearing in person or by pleader and the case having stood over for consideration till this day, the Court expressed the following):

Opinion

Spencer, J.—The authorities for the proposition that marriage for Hindus is an obligatory Samskara quoted in the judgment of Sundara Aiyar, J., namely *Degulapalli Kameswara Sastry v. Palavarapu Veeracharu* (6), *Sudarabai Jarji Daydu Pardeshi v. Shivanarayana Ridkarna* (7), *Gopalkrishnamaraju v. Venkatanarasa Raju* (8) and the books on Hindu Law by West and Buhler, p. 781, Sarkar p. 245, and Strange, Vol. 2, p. 286, are so weighty that I cannot usefully add anything in my own words to what is contained therein. I therefore take it that it is settled law that the reasonable expenses of performing the marriage of a male member of a coparcenary, if already incurred out of family funds, are necessary expenses which must be treated as binding on the other coparceners.

The further question to be decided is, supposing that the separation of a minor's estate takes place by partition from the family estate before his marriage has been performed, whether provision should be made for an expense that may never be actually incurred for some reason or other, such as the minor remaining unmarried, dying young, or passing to the Sanyasi Asramam (ascetic stage) without passing through the Grihasthasramam (married-stage). This question arises out of modern conditions. In the ancient

history of the Hindu joint family I imagine that it must have been most unusual to have partitions effected before the parents died. In the event of a minor who has obtained partition of his share dying without issue his estate will revert to his heirs according to the rules of Hindu succession and this will include the unspent provision, if any, made for his marriage, so that the other members of the family will not lose unfairly by making provision for the minor's marriage beforehand. Instances of a man becoming a Sanyasin without passing through the stage of Grihasthasramam appear to be so exceptional that it seems hardly necessary at partition to contemplate the possibility of the abnormal happening. In this connexion I may quote the words of Krishnaswami Aiyar, J., in *Devulapalli Kameswara Sastry v. Palavarapu Veeracharu* (6). He says: "Except for him who has thus qualified for entry direct into other Asramas than that of householder, the stage of householder is practically compulsory;" and at p. 430: "Both the commentators of Manu and the commentators of Yajnavalkya have come to the conclusion after a full discussion of Sruti and Smritis texts that the stage of householder is obligatory on all the twice born. But to those who have pursued the path of non-attachment, Naishtika Brahmacharya or perpetual studentship an entry from studentship into the stage of the hermit or ascetic direct is open." Moreover, when a Hindu renounces wordly affairs, it is usual for him to relinquish also his property in favour of other members of his family.

The considerations of expediency which appear in the judgment of Sadasiva Aiyar, J., do not appeal much to me, unless they can be supported by the sacred texts or by established custom. For such considerations there is generally much to be said on the other side to balance or outweigh them. The learned Judge's observation, that a provision for marriage will serve as a temptation to the boy and his widowed mother to hasten the marriage before he completes his education, and that such early marriages are utterly opposed to the Shastra, does not seem to me to be a sufficient reason for altogether withholding such a contribution from family funds. Principles cannot be created out

of particular cases in which unfortunate results have ensued. In some cases, if a minor's guardian is his mother, there may be a risk of the minor being pushed into an improvident early marriage. In other cases there may be some security that the marriages will be deferred to a reasonable age. I doubt whether the evil of early marriages can be prevented by judicial pronouncement anticipating a change in popular opinion. Again the learned Judge remarks that the practice of varasulkam being on the increase may obviate any expenses being incurred on the boy's side. So long as the boy's parents have, as a general rule, to incur some expenses at his marriage, I should hesitate to describe the allowance for marriage expenses a "remote speculative necessity." In the family concerned in this case defendant 1 has been married out of family funds. It is probable that the plaintiff will marry and it is equitable that when he does he should be treated like his brother.

Turning to the authorities, Sadasiva Aiyar, J., refers to the texts of Narada which make the initiated brothers perform the Samskaras of uninitiated brothers even out of their own acquisition if there is no patrimony. He proceeds to argue that as the Samskaras so made obligatory on the initiated brothers are the same whether there is patrimony or not if the marriage Samskara is not included in the one case it cannot be included in the other case also. He would set apart the marriage expenses of uninitiated sisters for the reason that the marriage ceremony has now taken the place of upanayanam, but in the case of uninitiated brothers he would stop at the upanayanam ceremony. For this view he quotes the Smriti Chandrika. In Mr. Krishnaswamy Aiyar's Translation Chap. 4, verse 40, Narada states: "For those whose initiatory ceremonies have not been regularly performed by the father those ceremonies must be completed by the brethren out of the patrimony." Verse 41 goes on: "If no wealth of the father exists the ceremonies of brethren must, without fail be defrayed by the brothers already initiated contributing funds out of their own portion." Verse 42 says: "The ceremonies contemplated by this text commence in jatakarma and end in upanayana."

In the next verse the learned author

observes that marriage is not one of the ceremonies that must without fail be performed as the law permits the life of a perpetual student (Naishtika Brahmachari). As regards this text Chanda-varkar, J., in *Sundrabai Jarji Dagdu Pardeshi v. Shivanarayana Ridkarna* (7) remarks: "It (this text) deals only with brothers. And, secondly, even as to them it deals only with the cases of brothers who have no joint estate, and therefore are not bound by any mutual obligations incidental to a coparcenary family;" and at p. 87 he observes: "The word used for 'ceremonies,' whether as applied to brothers or to sisters, is Samskaras. In the case of sisters it can have no meaning if marriage be excluded from it. And if marriage is included in the use of the word with reference to sisters, it must be understood as having been used in the same sense with reference to brothers also since both brothers and sisters are mentioned in the same connexion and the same word is used as to both." Krishnaswami Aiyar, J., in *Deculapalli Kameswara Sastry v. Polavarapu Veeracharu* (6) states: "There can be no doubt that the Smriti Chandrika is no authority for the position that marriage is not an obligatory Samskara." This is sufficient to show that the authority of the Smriti Chandrika upon which the appellant's pleader relies cannot be invoked for the purpose of showing that the Samskara of marriage creates no obligation upon brothers who have ancestral property to meet the cost of the marriages of the other members of the family.

In the judgment of Sadasiva Aiyar, J., Vivaha is referred to as a ceremony performed after the man has attained his majority and depends on his own will and option. It may be true that a man who has overcome his passions can attain salvation without marriage but he does not necessarily become Anasrami or the Vratya (outcaste) if he has in due course entered the other Asramas in order and has remained unmarried.

Whether omission to perform the Samskara of marriage would work forfeiture of caste or status is not in my opinion the true test to be applied for determining whether the expenses of marriage are or are not debts of family necessity which must be provided for.

As observed by Sundara Aiyar, J.: "There can at any rate be no doubt that marriage is regarded as a most proper ceremony for every Hindu. This is sufficient to justify the plaintiff's claim for a provision for his marriage." We may safely be guided by what is considered normal and proper. I would therefore be inclined to take the view that marriage expenses may be 'necessary expenses,' although salvation can be obtained without marriage. It does not follow that because a man in exceptional circumstances can attain salvation without passing through the stage of Grihasthasramam marriage which is introduction to that stage is not a necessary ceremony for the ordinary man. "The ceremonies for the performance of which immovable properties can be alienated by the manager do not include only those for the non-performance of which forfeiture of caste is the penalty": *Devulapalli Kameswara Sastry v. Polavarapu Veeracharu* (6). This decision and that in *Gopalakrishnamaraju v. Venkatanarasa Raju* (8) and in *Sundrabai Javji Dagdu Pardeshi v. Shivnarayana Ridkarna* (7), while laying down that marriage expenses already incurred are binding on the members of a Hindu family, incidentally decided also that marriage is obligatory on Hindus who do not desire to adopt the life of a sanyasi.

The appellant's pleader contends that the above text of Smriti Chandrika is in his client's favour and that there is nothing to the contrary in any other of the ancient writings.

He has also called my attention to the decision of *Govindarajulu Narasimham v. Deverabhotla Venkatanarasayya* (5). This decision appears to have been practically overruled by the later decisions of *Devulapalli Kameswara Sastri v. Polavarapu Veeracharu* (6) and *Gopalakrishnamaraju v. Venkatanarasa Raju* (8). I have shown that the Smriti Chandrika is not really in his favour.

In Colebrooke's Digest of Hindu Law, Book V, Chap. 3, S. 123, the saying of Yajnavalkya appears thus: "For any of the brothers, whose investiture and other ceremonies had not been performed by the father, those ceremonies shall be performed by brothers, of whom the sacraments have been completed." On referring to the text, the literal translation of the Sanskrit is: "Samskaras are to be done for

the uninitiated by those fully initiated." Thus no mention is made in the text of upanayanam, as distinct from other Samskaras. Admittedly however marriage is a Samskara and there is nothing to show that it was intended to be excluded here. In Stoke's Hindu Law Mitakshara, Ch. 1, S. 7. Verses 3 and 4, I find: "If any of the brethren be uninitiated when the father dies who is competent to complete their initiation, uninitiated brothers should be initiated by those for whom the ceremonies have been already completed. By the brethren who make a partition after the decease of their father the uninitiated brothers should be initiated at the charge of the whole estate." Under this there is an annotation by which all the initiatory ceremonies are interpreted by Balambhatta as including marriages. But Balambhatta is not mentioned in Mr. Mayne's Hindu Law as an authority in the south of India, and in *Bhagwan v. Warubai* (15) Chandavarkar, J., remarks that Balambhatta is not regarded by Hindus in the Bombay Presidency as an authority to be accepted without question in the interpretation of Mitakshara. On the broad footing that marriage is a Samskara, that it is not usual to omit it, and that it is necessary that Samskaras should be performed out of family funds, when such exist, I would allow this charge.

Moreover the decisions quoted by me at the outset are to the effect that marriage is an obligatory ceremony; and Sarkar and West and Buhler in their works on Hindu law and Steele's Law and Customs of Hindu Castes, p. 404, declare that the expenses for the marriage of unmarried co-sharers should be set apart at partition.

I consider that the opinion of Sundara Aiyar, J., in this appeal is correct and supported by authority.

S.N./R.K. Order accordingly.

(15) [1908] 32 Bom. 300=10 Bom. L. R. 389.

* A. I. R. 1914 Madras 238

WALLIS, J.

In re Brijruthna Doss Venkati Doss—Insolvent.

Official Assignee—Applicant.

v.

Moorli Doss and others — Counter-Petitioners.

Insolvency Appln. No. 2 of 1890, Decided on 8th December 1913.

* "Insolvency — Insolvent who obtains merely personal discharge can make subsequent acquisition as agent of Official Assignee—Possession therefore of insolvent in such case cannot be adverse possession.

An insolvent, who had obtained merely a personal discharge, can make subsequent acquisitions only as the agent of the Official Assignee. A claim therefore by the Official Assignee to such after-acquisitions even after 12 years' possession by the insolvent, is not barred by limitation. The possession of the insolvent in such a case is not adverse against the Official Assignee. *In re Bennet ex parte the Official Receiver*, (1907) 1 K. B. 149, *Foll.*; 8 Cal. 556, *Diss. from*. [P 239 C 2]

M. O. Parathasarathy Aiyangar for Subbiah Chetty — for Official Assignee.

D. Chamier — for deceased Insolvent.

Facts.—One Brijruthna Doss Venkati Doss filed a petition in insolvency in January 1890 and estimated his liabilities at Rs. 19,000 odd and his assets at Rs. 1,750, the value of certain jewels sold, and a house site worth Rs. 76. On 5th May 1890, he obtained a personal discharge. He carried on business subsequently, and died in 1912 leaving behind him properties worth Rs. 6,000 and four sons as his legal representatives. On 6th November 1913, the Official Assignee took out a notice of motion to reduce these properties to possession and to obtain from Court a vesting order in regard to them. The sons, the legal representatives of the deceased insolvent objected to it on the ground that the properties were not the properties of the deceased insolvent but were their own and even if they were the properties of the insolvent, the claim of the Official Assignee was barred by limitation, as he took no steps to reduce these properties into his possession for more than twelve years. The Commissioner in insolvency, before deciding the other issues in the case, pronounced a preliminary judgment on the question of limitation raised by the legal representatives of the deceased insolvent.

Order.—A preliminary point was raised in this case, that on the face of it, the claim was barred by limitation, on the authority of an observation of Wilson, J. in *Kristocomul Mitter v. Suresh Chander Deb* (1), where the learned Judge says: "But even if I thought the defendant's title was not good on the above ground, it is good on another ground. Nilcomul's possession since 1882 was adverse possession against the Official Assignee." Posses-

sion in that case, as in this, being possession acquired by the insolvent after the insolvency and before his discharge. I have great hesitation in differing from this as from any other proposition laid down by the learned Judge but it is to be observed that these observations were obiter, that no reasons were given for them and that in *Abdul Karim Sahib v. The Official Assignee of Madras* (2), a Bench of this Court, consisting of the learned Chief Justice and Subramaniya Aiyar, J., refused to act on this view which would have afforded a ready answer to the case and preferred to dispose of it on other grounds. Wilson, J. refers to *Herbert v. Sayer* (3), as containing the law as to the after acquired property of a bankrupt. That case suggests—it does not lay down—that such property is to be regarded as acquired by the bankrupt as the agent of the Official Assignee, and that may now be taken to be settled law: [*In re Bennett, ex parte Official Receiver* (4)]. It is not easy to see how, if the bankrupt acquired the property as agent of the Official Assignee, his possession can ever become adverse to the Official Assignee. A man who possessed himself of property in one character, it is well settled, cannot himself alter that character and begin to possess it in another character. However, even if it were held that the possession of the insolvent were adverse to the Official Assignee, there would be the other difficulty which was pointed out in the arguments, namely, that as soon as the property was acquired by adverse possession, by the insolvent the section again vests it eo instanti in the Official Assignee as after acquired property. I hold that the claim is not barred by limitation.

S.N./R.K.

Order accordingly.

(2) [1905] 28 Mad. 168.

(3) [1880] 5 Q. B. 965.

(4) [1907] 1 K. B. 149.

A. I. R. 1914 Madras 239

MILLER AND SADASIVA AIYAR, JJ.
C. A. Subramania Aiyar—Petitioner.
v.

Muthu Ambalam—Respondent.

Criminal Revn. No. 314 of 1913 and Criminal Revn. Petn. No. 260 of 1913, Decided on 3rd September 1913, from order of Sub-Divl. Magistrate, Melur, in Misc. Case No. 17 of 1912.

(1) [1882] 8 Cal. 556 at p. 559.

(a) **Criminal P. C., (1898), S. 144 (2) — Order directing party to open channel in his land is not order under S. 144 (2).**

An order of a Magistrate directing a party to open a channel in his own land is not an order of the kind contemplated by S. 144 (2): 4 *Mad.* 121, *Foll.*; 13 *I. C.* 1000, *Diss. from.* [P 240 C 1]

(b) **Criminal P. C. (1898), S. 144 (2)—Dispute likely to be settled in civil Court — No immediate apprehension of breach of peace — Magistrate should not interfere under S. 144 (2).**

Where a dispute between the parties is likely to be settled by civil Court before the cultivation season, and there is no immediate apprehension of a breach of the peace, it is not a case for interference of the Magistrate under S. 144 (2). [P 240 C 1]

K. N. Aiyar—for Petitioner.

Sidney Smith—for Public Prosecutor.

C. S. Venkatachariar—for Respondent.

Order.—The order of the Magistrate is opposed to the ruling in *In the matter of Lindsay* (1), which is still applicable. The Magistrate had no power, if that decision is correct, to make an order directing the party No. 2 to make a channel through his land. Our attention has been invited to *Ambika Prasad Singh v. Gur Sahai Singh* (2), but we think we should follow the decision of our own Court. Here moreover we are not satisfied that there was any necessity for any order at all. The party aggrieved by the closing of the channel had prosecuted his opponent unsuccessfully, the Court finding that the dispute was purely a civil matter, and we do not see any evidence that there was likely to be any breach of the peace before the cultivation season by which time the matter might be settled by the civil Court.

We set aside the Magistrate's order.

S.N./R.K.

Order set aside.

(1) [1882] 4 *Mad.* 121.

(2) [1912] 13 *I. C.* 1000=39 *Cal.* 560.

A. I. R. 1914 Madras 240

SADASIVA AIYAR AND

SESHAGIRI AIYAR, JJ.

Subba Naidu and another—Defendants
—Appellants.

v.

Venkatarama Naidu and another—
Plaintiffs—Respondents.

Second Appeal No 1348 of 1912, Decided on 11th March 1914, from decree of Dist. Judge, Tinnevely, in Appeal Suit No. 174 of 1911.

(a) **Hindu Law—Joint family—Substantial nucleus—Onus to prove that property acquired is self-acquired lies on those asserting it.**

Where there is a substantial nucleus of family property, the onus to prove that the pro-

perty, afterwards acquired by the father was his self-acquisition, lies on those who assert it to be such property. [P 240 C 2]

(b) **Hindu Law—Inheritance—Tumour in nasal cavity and nose is no disqualification for inheritance.**

A mere tumour in the nasal cavity and on the nose is not a sufficient disqualification for inheritance as it is not congenital: 26 *Mad.* 133, *Foll.* [P 240 C 2]

M. D. Devadoss—for Appellants.

C. Narasimhachariar—for Respondents.

Judgment.—The only questions in this second appeal are:

1. Whether the learned District Judge fell into any error of law in finding on the evidence that the plaint lands were joint family properties in the hands of the plaintiff's father and not his self-acquired separate property.

2. Whether the plaintiff is disqualified from inheritance under the Hindu law and whether the District Judge's omission to give a finding on this point necessitates a remand.

As regards the first question, the finding of both Courts is that there was a substantial nucleus of ancestral funds. In such a case (see *Mayne*, para. 291), that is, where there is a substantial nucleus of family property of which the father was the manager, the onus would lie on those who assert that any property afterwards acquired in the name of the father was acquired without detriment to that property and was his self-acquisition. The lower Courts have found that the defendants (appellants) failed to discharge that burden and we think they were right.

As regards the question of plaintiff's alleged disqualification we have very little doubt that the learned District Judge's omission to refer to it in his judgment was because the defendants (appellants before him) did not argue it in the District Court and practically gave up that contention. If it was necessary to go into that question we do not think we shall come to a different conclusion from the District Munsif who held that plaintiffs' disease relied on as a disqualification was not congenital. Even if it was congenital the nature of the disease (a tumour in the nasal cavity and on the nose) is not one of the diseases which disqualifies a person from inheritance; (see *Manu*, para. 596), but only such congenital disqualifications as blindness, dumbness, etc. Whether some of

these texts as to disqualifications are in force nowadays has been doubted in *Venkata Subba Row v. Purushottam* (1) and *Kayarohana Pathan v. Subbaraya Thevan* (2).

We dismiss the second appeal with costs.

S.N./R.K.

Appeal dismissed.

(1) [1903] 26 Mad. 133 = 12 M.L.J. 262.

(2) [1913] 19 I.C. 690.

A. I. R. 1914 Madras 241

MILLER, J.

(On difference between)

SANKARAN NAIR AND AYLING, JJ.

In re. Village Munsif Ramaswami Gounden and others — Accused — Petitioners.

Criminal Revn. No. 385 of 1913 and Criminal Revn. Petn. No. 311 of 1913, Decided on 21st October 1913, from judgment of Dist. Magistrate, Salem, in Criminal Appeal No. 8 of 1913.

Criminal P. C. (1898), S. 439—(Miller and Ayling, JJ.)—Going into question of appreciation of evidence is discretionary with High Court (Sankaran Nair, J., contra).

Miller and Ayling, JJ.—In revision it is in the discretion of a High Court to exercise its power of going into the question of appreciation of evidence: 22 Cal. 998, *Foll.* [P 243 C 2, P 244 C 1]

Sankaran Nair, J. (dissenting)—Where there has been misappreciation of evidence and convicted person claims to be heard to show that the lower Courts have misappreciated that evidence, and that he has been unjustly convicted, it is not open to a Judge to say that it is within his discretion to permit or refuse him to do so or not. No doubt the sections only say that the High Court may interfere in revision, but "may" is the only word that could be used.

[P 242 C 2]

T. Rangachariar - for Petitioner.

Public Prosecutor - for the Crown.

Sankaran Nair, J.—The facts are thus briefly stated by the District Magistrate: "The case is a serious one. For years the villagers of Edhagansalai have kept down the prices of the local toddy shops by combination, using their ill-gotten gains for various communal purposes. An attempt was made by an outsider three years ago to defeat the combination, but failed." It appears from the evidence that the villagers refused him land, food and water and he had to give up his business and pay a fine. In 1913, another outsider, who is the complainant in the case, came forward at re-sale of the shop. The District Magistrate finds that on that occasion threats of a sinister character were used to deter him from bidding, and accused 14 to 18 and

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26 are the persons who are found by the District Magistrate to have used such threats. After the re-sale to the complainant he had difficulty in getting the trees marked and in getting a shop in the village for the sale of toddy. Three of the petitioners here, who are accused 4, 5 and 19, are amongst the persons who endeavoured to thwart him. The District Magistrate then states: "The villagers had the audacity to hold a panchayat and pass resolutions to take every possible means of ostracising him and rendering his position insupportable;" and the persons who took a prominent part in doing so are petitioners 1, 2, 3, 5, 7, 11, 12, 15 and 16.

In the case of the persons above named, he confirmed the order of the Sub-divisional Magistrate directing them to execute bonds to keep the peace for a period of one year.

So far as accused 12, 14 to 18 and 26 are concerned the finding of the District Magistrate is supported by the evidence of the complainant and certain other witnesses, who, no doubt, are interested persons. But their evidence is corroborated also by other witnesses; and though the evidence appears to be suspicious in some respects, in revision I am not prepared to say that the lower Courts should not have accepted it. I confirm the order of the lower Court.

Next, as regards the petitioners 4 and 19: the finding is based upon the evidence of P. W. 8. His evidence is to the effect that he allowed the complainant to mark six cocoanut trees that belonged to him for toddy, but on accused 4 and 19 with another accused remonstrating with him and telling him that the villagers had decided not to give any trees to the complainant he told him that he could not give the trees. He says that he was afraid of going against the wishes of the villagers. Subsequently the Station House Officer and others went to him, and at their request he says he gave him three trees. It may be that the complainant has a cause of action against accused 4 and 19, or those for whom they acted for having interfered with him, but I do not see how this is any evidence against these accused that they are likely to commit any breach of the peace. I would therefore set aside the order of

the lower Court so far as these accused are concerned.

As to the other accused persons Nos. 1, 2, 3, 5, 7 and 11, the District Magistrate does not find that the villagers did anything illegal or that they were not within their rights in holding a panchayat and passing resolutions to ostracize the complainant. Of course, if they did anything illegal for the purpose of ostracising the complainant, then they will be guilty. Otherwise I do not see why they were not entitled to do so. The villagers are entitled to hold a panchayat to prevent a stranger from coming to their village to sell toddy and to take any steps not illegal or unlawful, even to the extent of rendering his position insupportable. The evidence against them is to the effect that they said: "We should decide that nobody should let their trees to him for being tapped. We should not give a site for the shop. We should not pay for toddy if we drink in the shop. We should have our tress marked for Pothanur and other trees and thus spoil him. We should damage the spathes." The sentence which is material is that last one in which they say they should damage the spathes. The other witnesses give similar evidence. There are a few incriminating words amidst a large number of others which are not illegal or unlawful. The witnesses do not say whether all of them spoke the same words or whether some of these sentences were spoken by a few of the accused and the rest by others. In fact the evidence is indefinite and vague. It does not bring home to anyone of the accused the incriminating words, and a person should be responsible only for the words he used or spoken with his consent, express or implied. The District Magistrate has rightly found that the panchayat are not responsible for the words spoken by some, and accordingly set aside the order against many of them. It follows, it appears to me that, unless the evidence is clear that these accused spoke the incriminating words, no order should be passed against them. The evidence, moreover, is of interested witnesses. The truth appears to be that these villagers adopted towards the complainant the same tactics which were successful in the case of his predecessor. But the witnesses have put a few incriminating words in their mouths to bring them within the clutches of the

criminal law. I am therefore of opinion that the order of the lower Court, so far as these accused are concerned, must be set aside.

It was then suggested that in revision we are not entitled to interfere with the order of the lower Court, if there is evidence to support the finding. I am not prepared to say so far as these accused are concerned, that there is no evidence to support the findings. But it has now been settled by a series of decisions of this Court and of the Bombay and Calcutta High Courts that in revision it is open to the High Court to consider whether there has been any misappreciation of evidence; and if the Court has power to do so and if a convicted person claims to be heard to show that the lower Courts have misappreciated the evidence in the case and that he has been unjustly convicted, it is not, in my opinion, open to a Judge to say that it is within his discretion to permit or refuse him to do so or not. No doubt the sections only say that the High Court may interfere in revision, but I think the word "may" is the only word that could be used in the sections. It is to be remembered that a difference of opinion in the appreciation of evidence does not necessarily require an interference with the order of the lower Court which may be upheld on other grounds.

I would therefore modify the order of the lower Court as indicated above.

Ayling, J.—As regards accused 4, 12, 14 to 19 and 26, I agree in the view taken by my learned brother. There is undoubtedly sufficient evidence on record to justify the order for security in the case of accused 12, 14 to 18 and 26; and I would decline to interfere.

Against accused 4 and 19 there is nothing but the evidence of P. W. 8 to the effect that they and accused 5 asked him not to give trees to P. W. 1 for tapping as the villagers had decided that no trees should be given. No threat is alleged, and I do not consider that this evidence is such that any Court could legitimately draw the inference that these accused were likely to commit a breach of the peace. I agree that the order as regards these accused (4 and 19) should be set aside.

There remains the case against the other accused 1, 2, 3, 5, 7 and 11. The evidence against them relates to the

panchayat, in which the District Magistrate finds them to have taken a prominent part. The proceedings at this panchayat are described by P. Ws. 1, 3, 4 and 7. Naturally the accounts given by these witnesses of what was said are not identical: it would be very suspicious if they were.

P. W. 1's account has been given in the judgment of my learned brother. P. W. 3, after referring to a special threat of accused 12 to set fire to the shops, continues: "They (the villagers) also said that if liquor was ever drunk no payments should be made, that no site should be given for locating the shop. They also said we should be beaten when going to our houses from the shops. They said that I should be treated like Sengoda Pathan in the matter of cattle. I am afraid of the villagers. Now I always go with two or three people from my shop to the village. It is all out of fear for their threats."

P. W. 4 says that, when P. Ws. 1 and 3 refused to give up the shops, "Then the villagers threatened them. They said that none should drink at their shops, that none should exchange fire and water with them, that they should be subjected to all losses, that none should pay for liquor drunk, that the spathes of the marked trees should be damaged, that site should not be given for the location of the shop, and that the shops, if constructed, should be set fire to."

P. W. 7's account is much like that of P. W. 1.

It seems to me that if the general sense of these four accounts be regarded, it shows that such threats were expressed and such a spirit manifested on the part of those assembled as to render it likely that a breach of the peace would be committed by any of them and especially by those who took the most prominent part in the proceedings. The District Magistrate has in the exercise of his powers under S. 125 cancelled the bonds of those who are simply stated to have been present taking a lenient view of their conduct but the six persons whose case I am now considering are stated to have been the prominent members of the panchayat both by P. W. 7 and by P. W. 1, who represents them as the spokesmen. I do not think it is neces-

sary in a case of this kind to prove the words uttered by each individual.

This evidence appears to have been accepted in the Courts below, and in my opinion it affords a sufficient basis for the order sought to be revised.

It seems to me that this is as far as we need go. I may remark that I see no reason why the evidence I have referred to should not be accepted; but I certainly do not think this is a case in which the Court is called to exercise its power (in my view a discretionary power) of going into the question of appreciation of evidence. I would refer to a single case only *Keshab Chuader Roy v. Akhil Metey* (1), for a succinct summary of the general principles which should guide a High Court in the exercise of its powers under S. 439, Criminal P. C.

With great respect therefore I feel constrained to differ from the view taken by my learned brother, and would dismiss the petition in so far as it relates to these accused.

By the Court. — The case of accused 1, 2, 3, 5, 7 and 11 will be posted before a third Judge under S. 429, Criminal P. C. The order of the lower Courts, so far as accused 4 and 19 are concerned, is set aside and as against the rest confirmed.

(This case coming on for hearing under Ss. 439 and 429, Criminal P. C., upon perusing the petition and the judgments of the lower Courts and the opinions of the Hon'ble Sankaran Nair, J., and the Hon'ble Ayling, J., in respect of the case of accused 1, 2, 3, 5, 7 and 11, embodied in the judgment of the Court herein dated 21st October 1913 and the record in the case and upon hearing the arguments of Mr. T. Rangachariar for the petitioners and of the Public Prosecutor for the Government, the Court made the following:)

Order.

Miller, J.—Both the learned Judges who heard the case were of opinion that it cannot be said that there is no evidence to justify the order. I agree with Ayling, J., that the evidence of P. Ws. 1, 3, 4 and 7 is credible and I consider it extremely probable that the threats which they describe were uttered by persons in the panchayat. The panchayat was convened for the purpose of intimidating the purchaser at the auction and

(1) [1895] 22 Cal. 998.

that it did its work by threats is only what one would expect. P. W. 1 says accused 1, 2, 3, 5, 7 and 11 were among the persons who called him up and put the matter to him and actually threatened him with mischief to the trees which he should mark. General corroboration is afforded by P. Ws. 3, 4 and 7 and I can see no sufficient reason to hold that the District Magistrate was wrong in accepting it. I agree with Ayling, J., that there is no ground for interfering with the order of the District Magistrate in regard to the accused before me.

As to the power of the Court hearing a case in revision I do not propose to say anything, but I desire to guard myself from being taken to concur in the proposition of law laid down by Sankaran Nair, J.

The petition of accused 1 to 3, 5, 7 and 11 is dismissed.

S.N./R.K. *Petition dismissed.*

A. I. R. 1914 Madras 244

MILLER AND OLDFIELD, JJ.

Savumian and others—Defendants—Appellants.

v.

Narayanan Chettiar and others—Plaintiff and Defendants—Respondents.

Second Appeal No. 637 of 1912, Decided on 12th December 1913, from decree of Dist. Judge, Ramnad, in Appeal Suit No. 45 of 1911.

Hindu Law—Debts—Mortgage debt contracted by father—Sons claiming exemption from liability on ground of illegality of debt need not prove that creditor had notice of illegality—Burden of proof that he made inquiries and bona fide believed that the debt was for necessary purpose lies on creditor.

In order that the sons of a Hindu father may claim exemption from liability to a mortgage debt contracted by their father on the ground that it was illegal, viz., contracted to redeem jewels pledged to pay a fine imposed upon the father when convicted of a criminal offence, it is not necessary for sons to prove that the creditor also had notice of the illegality of the debt. It is for the creditor to establish that he made inquiries and bona fide believed that the debt was required for purposes binding on the family. Where such inquiry was confined only to ascertaining that the debt was required to redeem jewels pledged to obtain money for payment of fine imposed upon the father, and did not proceed further, viz., to ascertain the nature of the offence of which he was convicted, the inquiry is not sufficient, and the creditor is not protected: 5 Cal. 148, Dist. [P 245 C 2]

S. Varadachariar for K. Sreenivasa Aiyangar—for Appellant.

T. Rangachariar—for Respondents.

Judgment.—We think the evidence adduced on behalf of the plaintiff is insufficient to support the finding that the purpose for which the money was borrowed was such as would bind the interest of defendant 8, who did not join the mortgage. There was no evidence of any family necessity which pressed on defendant 8. We find no evidence that he was convicted in the case in which the fines were levied. And there is no evidence that he or the family was benefited by the payment of the fines, for there is nothing to show the nature of the criminal case or that the jewellery, which, it is said, was pledged to raise the money for the payment of the fine, was jewellery in which he had any interest.

We, therefore, hold that his interest and those of his sons are not bound by the mortgage.

As regards defendants 3 and 4, sons of defendant 1, who died pending this suit, it is contended that they are not bound to pay their father's fine. This proposition so put is not disputed but it is argued on behalf of respondent 1 that the mortgage was really effected to redeem jewellery which had been pledged to raise money for the fine, and the plaintiff did not know that the money was to pay the fine. The facts on this point have not been investigated, because the plaintiff did not divulge his case as to the purpose of the loan, until after the settlement of issues, and the document did not show the purpose. So there was no issue, and the point was not examined before either of the lower Courts.

In these circumstances, we think it necessary to frame an issue and ask the District Judge to record a finding thereon, taking fresh evidence, if any is adduced.

"Whether the plaintiff made reasonable inquiry before lending the money to ascertain the purposes for which it was required, and if so, with what result."

The finding should be submitted within two months after the re-opening of the District Court of Ramnad after the summer recess. Seven days will be allowed for filing objections.

(In compliance with the order contained in the above judgment, the District Judge of Ramnad submitted the following):

Finding.—I am asked to submit a finding on the following issue:

"Whether the plaintiff made reasonable inquiry before lending the money to ascertain the purposes for which it was required and, if so, with what result."

The only evidence before me in addition to what was placed before the District Munsif consists of a further deposition by the plaintiff himself. The plaintiff's case is that he was told by the executants that they wished to redeem family jewels pledged to meet litigation expenses. He admits that he made no further inquiries. He did not ask what jewels had been pledged. He did not ask to whom the jewels had been pledged. He did not ask whether the litigation in question was civil or criminal. A faint suggestion is thrown out that the plaintiff's partner might have made further inquiries but the plaintiff does not even say that the result of any such inquiry was communicated to him. There were special circumstances which ought to have placed the plaintiff on inquiry. The document was not signed by Velluran, the most senior member. The document itself did not state the purpose for which the money was being borrowed. Its very urgency invited inquiry as to its purpose. A very slight inquiry would probably have disclosed the fact that the money or a large portion of it was going to be used for paying off fines imposed by a criminal Court, for the convictions were very recent.

It is urged before me that the borrowers were respectable people and that further inquiries were, therefore, unnecessary. There might be some force in this contention if the borrowers had been thoroughly examined and if the document had declared a purpose binding on the family, but I cannot understand how a money-lender can assume that a respectable person who borrows money from him must necessarily do so for family purposes. That the executants ever said that the money was required for any family purpose is rendered unlikely by the absence of any clause to that effect in Ex. C.

I therefore find that the plaintiff did not make reasonable inquiry before lending money to ascertain the purpose for which it was required.

This second appeal coming on for final hearing after the return of the finding of the lower appellate Court upon the issue

referred by this Court for trial, the Court delivered the following.

Judgment.—In this case the sons have established the fact that the original debt of their father was contracted to pay a fine in a criminal case, and it is conceded that that is not a debt which they are bound to pay. But this debt was secured by a pledge of jewellery and to redeem the jewellery the father executed the hypothecation in suit. The finding is that the creditor ascertained that the money was wanted to redeem jewellery pledged for litigation expenses but went no further, and did not take the trouble to ascertain the nature of the litigation or whether or not the pledge was to secure a debt binding on the sons as he ought to have done.

The objection is taken that it lies on the sons to show that the creditor had notice that the antecedent debt was of a nature to make it irrecoverable from the sons and reliance is placed on *Suraj Bansi Koer v. Sheo Persad Singh* (1), but we do not think that in that case their Lordships had in view the nature of the duty cast upon the lender of the money. Their Lordships say that it lay on the sons to show that the purchaser had notice and were not dealing with the case of the creditor himself. The later case in *Nanomi Babuasin v. Modhun Mohun* (2), which is also relied on does not touch this point, nor do the cases in the Allahabad High Court to which we were referred and which are referred to in *Babu Singh v. Bihari Lal* (3).

In the present case accepting the finding that the creditor made no sufficient inquiry to ascertain the nature of the debt for which the pledge was made, and it being shown that that was not a debt binding on the sons, we must hold that the sons are not liable to pay it.

We allow the appeal and exonerate from liability under the mortgage the shares of defendants 3 and 4, being 2/3rds of the share belonging to defendant 1's branch of the family and exonerate also the interests of defendants 8 to 12 in the mortgaged property.

There will be no personal decree.

(1) [1880] 5 Cal. 148=4 C. L. R. 226=6 I. A. 88 (P.C.).

(2) [1869-70] 13 I. A. 1=13 Cal. 21 (P.C.).

(3) [1908] 30 All. 156=5 A.L.J. 175=(19) A. W. N. 61.

Defendants 3, 4 and 8 to 12 should pay their own costs, and the plaintiff should not receive costs from them in any of the Courts.

S.N./R.K.

Appeal allowed.

A. I. R. 1914 Madras 246

WHITE, C. J., AND SANKARAN NAIR, J.

Gopalachariar—Claimant—Appellant.

v.

Deputy Collector of Madras and another—Respondents.

Appeal No. 244 of 1910, Decided on 8th December 1913, from order of Chief Judge of the Presidency Court of Small Causes, Madras, in Land Case 4 of 1910.

Land Acquisition Act (1894), S. 23—Owner deprived of facilities for irrigation by wrongful act of Municipal Corporation—Corporation subsequently acquiring land for public purposes—Compensation should be calculated not merely on market value but also on amount of damages for deprivation of water rights.

Where by the wrongful act of a Municipal Corporation, the owner of a piece of land classed as wet was deprived of the facilities (in the nature of an easement right) which existed for irrigating such land, and the Municipal Corporation acquired the land itself subsequently for public purposes, in estimating the compensation to be paid to the owner, the calculation must be made not merely on the market value of the land, but also on the amount of damages payable to the owner for the deprivation of water rights of his land. [P 250 C 1]

M. A. Thirunarayanachariar—for Appellant.

P. Duraisami Aiyangar—for Corporation.

Advocate General—for the Crown.

Judgment.—We are unable to agree with the Chief Judge of the Small Cause Court as to the construction of the receipt Ex. L. There can be no question that the plaintiff intended his claim for compensation to be in respect of the loss of crops for one year, and there can be very little doubt that the Corporation knew that this was the claim put forward. Reading Ex. L by the light of Ex. N and the oral evidence in the case, we are of opinion that it was only intended by the parties that the compensation given by the Corporation should be, as the receipt states it to be, compensation up to October 1909, and that it was not intended that the owner should release all claim for compensation in respect of loss which might accrue after the date of the receipt.

This being our view, the question remains whether the claim of the owner

in respect of the supply of water from the tank is a matter which can be taken into consideration in assessing the compensation to which he is entitled. If it is not (assuming the claim to be good), he would, as it seems to us, be entitled as against the Corporation either to have the tank restored or to restore it himself or to recover damages.

We have all the parties before us; it does not seem desirable to leave this question at large and we can deal with this appeal more satisfactorily after it has been adjudicated upon. We accordingly send back the case to the Chief Judge of the Small Cause Court for a finding as to

(i) Whether the owner had any right by way of easement to the water of the tank for the irrigation of his lands?

(ii) Can the Corporation be required to restore the tank, or allow the owner to restore the tank or to make compensation to the owner by way of damages and, if so, the amount?

Further evidence may be taken. All other questions will be reserved.

We are asked by Mr. Thirunarayanachariar to say that the Chief Judge was wrong in holding that the easement had been extinguished. We express no opinion as to this at this stage, as we leave both to the Chief Judge to decide whether there was an easement, and, if so, whether it has been extinguished.

Seven days will be allowed for filing objections to the finding.

(In compliance with the above order, the Chief Judge, Small Cause Court, submitted the following:)

Finding.—In this case, the High Court has called for findings on the following points:

1. Had the owner any right, by way of easement, to the water of the tank for the irrigation of his land?

2. Can the Corporation be required to restore the tank or allow the owner to restore the tank or to make compensation to the owner by way of damages and, if so, the amount?

The owner's lands R. S. Nos. 58 and 59 have been acquired under the Land Acquisition Act. In the Deputy Collector's award, these lands were valued as wet lands; in fact in his letter Ex. 14 now filed, he gives the capitalized value of the difference between the wet and dry outturn at Rs. 1,826-11-3, and it is

an item making up the amount awarded. At the former trial this Court held that the water rights, if any, had been extinguished and should be excluded from consideration and that the land is not worth more than Rs. 50 per ground, the rate adopted by the Deputy Collector. The High Court has not accepted the view of the then Chief Judge and has called for findings.

Fresh evidence has been admitted before me. The claimant called one witness and gave evidence himself and filed Exs. R, S, T, and U; the Corporation examined their Engineer, Mr. Nowroji, and filed Exs. E-1, E-2 and 7 to 10, and 14; the Collector examined one witness and filed Exs. 11 and 13.

As regards the first point: the tank and the tank site were, no doubt, the property of the Government and therefore under S. 15, Easements Act, for the claimant's lands to acquire any right to the water of the tank by way of easement, it must be shown that the right was peaceably and openly enjoyed and as of right without interruption for a period of sixty years. The oral evidence of the claimant and his witness shows that the lands in question were irrigated by the Tangal water in an open peaceable and uninterrupted way as of right for a period of about thirty to thirty-five years previous to October 1908 when the bund was cut by the Corporation. In 1872, when the Corporation constructed their fresh water delivery channel, a passage for the flow of the Tangal water to the claimant's lands was made through the embankment of that channel: see Ex. U. The survey map, Ex. 12, shows the channel clearly. There can thus be no doubt that in 1872 the lands were being irrigated with the Tangal water. Claimant has also produced an earlier document of January 1866, Ex. R, which is an endowment by the Deputy Collector of Madras on a petition by the claimant's grandmother wherein she asserted her water rights and complained of some others taking away a portion of that water. The Deputy Collector refers her to a suit. A suit was brought in the Small Cause Court in 1878 by claimant's mother and a decree was obtained for damages for wrongfully taking her water: see Ex. S. On the claimant's side the earliest evidence is this assertion of the water rights in 1866. It is argued for

the Collector that this is insufficient and that the claimant should show by positive evidence that the enjoyment of this water for irrigation began at least by 1848 or 1849, to prove the sixty years' user.

But it seems to me that where a party proves an open and peaceable enjoyment of an easement as of right for a period of forty to forty-three years, if nothing is established to show how or when the easement began, there is a fair presumption in that party's favour that that enjoyment had a legal origin and the burden is shifted on to the party asserting the contrary to show that either by the enjoyment beginning within the period of 60 years or being by sufferance, or for some other reason, such enjoyment gave rise to no rights. In the case of adverse possession of lands, this has been clearly laid down in several cases; see for example *Sri Raja Chetikani Rama Rau v. Secy. of State* (1), *Krishna Iyer v. Secy. of State* (2) and *Vencatarama Iyer v. Secy. of State* (3). It seems to me the same principle will apply to this case: see *Madub Dass Bairagi v. Jogesh Chander Sarkar* (4). The tank has been in existence from time immemorial and is marked in the old survey map Ex. 11; its only use was apparently for irrigation purposes; it is not shown that it has irrigated any lands other than claimant's land, all attempts to divert the water to other lands being objected to and frustrated by claimant's predecessors. It is also shown by Ex. K that in 1885 the Collector of Madras permitted the holder of lands irrigated, i. e., the claimant, to repair the tank. These circumstances strengthen the presumption in claimant's favour. It is argued for the Collector that there is proof in this case that the enjoyment of the water for the claimant's lands began later than 1857. For this purpose, the old survey map, Ex. 11 of 1857 is relied on. It shows the tank but there is no channel marked in it for carrying the water of the tank to the claimant's lands as there is in the R. S. map of 1897, Ex. 12. It is argued from this that no channel existed and therefore no water flowed from the tank to claimant's lands

(1) [1910] 5 I. C. 882=33 Mad. 1.

(2) [1910] 5 I. C. 121=33 Mad. 173.

(3) [1910] 5 I. C. 118=33 Mad. 362.

(4) [1903] 30 Cal. 281.

in 1857. The water might have flowed without any well-defined channel; in the hot season there may be no water running. We do not know the circumstances under which the plan was made. I think it is not a safe inference to draw from the absence of the channel in Ex. 11 that the lands were not irrigated before the year when it was prepared. The R. S. Register, Ex. 13, describes both these lands as garden lands whereas one at least was a paddy land. It seems to me, therefore that the evidence on the Collector's side is insufficient to rebut the presumption in claimant's favour and I must find that the owner had a right, by way of easement, to the water of the tank for the irrigation of his land.

An argument was urged that as this tank was fed by surface drainage water of neighbouring lands, no length of enjoyment of its water for irrigation purposes would give rise to any rights of easement or interfere with the right of the owner of the tank to drain it and use the site for building or other purposes as he chose; and for this argument the case reported as *Robinson v. Ayya Krishnama Chariyar* (5), referred to in *Narayana Reddi v. Venkatachariar* (6), is cited. The point decided in *Robinson v. Ayya Krishnama Chariyar* (5) is that a person cannot obtain by prescription a right to throw back the water of his own tank on to the lands of another and keep it there till he requires it; in other words, a man cannot insist that his neighbour's paddy land should be kept submerged by the waterspread of his tank for his benefit so as to prevent the latter from draining his lands and cultivating paddy. But it is a very different thing to say that a person cannot obtain by prescription water rights in the tank of another and that the other can always drain away his tank. It is well recognized that water rights can be obtained in tanks belonging to others and where such rights exist, the owner of the tank will be restrained from interfering with such rights. The Privy Council case of *Ramessur Persad Narain Singh v. Koonj Behary Pattak* (7) was a case of a tank belonging to a private owner, as also the case of *Madub Dass Bairagi v. Jogesh Chunder Sarkar* (4).

The view expressed in this Court's judgment under appeal that the easement was extinguished under S. 44, Easements Act and by reason of the claimant obtaining damages therefore has been set aside. It is not argued before me that it has been extinguished in any other way.

On the first point, I find an easement of water from the Tangal tank was attached to the plaint lands and had not been extinguished.

On the second point, it seems to me that a person whose right of easement has been infringed by another may claim either an injunction that his easement be restored by removal of the obstruction, or damage in lieu of the easement as compensation for its loss. There is nothing proved in this case why the claimant's right to have the tank restored should be held to have been lost before the acquisition of his lands. It is not argued before me that such right was lost either because the claimant accepted money compensation for his loss of crops till October 1909 or because buildings have been erected on the site without his objecting. I must find, therefore on the first part of the second point, that the claimant could have required the Corporation to restore the tank or could have claimed damages in lieu of his easement, as he liked. As the lands to which this right is appurtenant have now been acquired, the main question, it seems to me is whether claimant's lands should be valued, for the purpose of ascertaining the compensation payable to him, as wet lands as the Deputy Collector has done, or as dry lands. The further finding I am asked to submit is what damages should be given as compensation for this water right. Deputy Collector's letter, Ex. 14, seems to show that he valued this water right at Rs. 1,826-11-3 as the capitalized value of the difference between the wet and dry outturn; but it is not apparent whence he got the figures or at what rate he capitalized the outturn. The claimant asks me to ascertain the damages by taking the values of these lands as wet lands and as dry lands and deducting one from the other. This method is, no doubt, a reasonable one; but there is always some difficulty in ascertaining such values accurately. The usual methods adopted for ascertaining the value of the lands are (1) calculating from prices paid

(5) [1871-74] 7 M. H. C. R. 37.

(6) [1901] 24 Mad. 202.

(7) [1879] 4 Cal. 633=6 I. A. 33 (P. C.).

for parts of this land itself or for neighbouring lands of similar quality in recent sales, (2) capitalizing the income from the lands. In this case, the lands in the neighbourhood are very inferior to claimant's lands, none of them having any water supply for cultivation. The recent sales Exs. 4 and 5, which show a sale price of Rs. 100 to 125 per cawny, were clearly of inferior lands covered with prickly pear and apparently waste land which was never cultivated. They are therefore of no value in fixing the price of claimant's lands. We find however that a plot, 3 grounds and 2,100 square feet, from this very block was acquired in 1872 for Rs. 300 : see Ex. D. This works out to about Rs. 77 per ground. Ex. D seems to me to be a valuable piece of evidence and cannot be discarded. It is true that the neighbouring lands were acquired at the same time at about Rs. 30 per ground, but it must be remembered that none of them had any water rights attached. No doubt, claimant's witness No. 1 admits that another plot was acquired in 1870 at Rs. 35 per ground ; we have no records of this and do not know in what part of claimant's lands this plot was. The whole of the claimant's land does not seem to be of the same quality ; a portion of it in R. S. No. 59 would seem to be on a higher level and not so good as No. 58 for irrigation and paddy cultivation : see the evidence of Mr. Nowroji and of Lakshmanam. This difference in price may possibly be due to the position of the lands acquired.

The acquisition under Ex. D was, no doubt, so long ago as 1872. But there is no proof that these lands have increased in value to any large extent since then. Landed properties generally have increased in value in Madras lately but these being paddy lands in a remote corner are not likely to have shared to any great extent in that increase. Part of the land, about one-third of it, being on a higher level and cultivated mostly with raggi and vegetables and having two wells, a number of trees, and probably not irrigated by the tank water is not as valuable as the rest of the land. Making allowance for this on one side and for a probable small rise in value of lands since 1872 on the other side, I think it will be fair to take Rs. 70 a ground as the average value of the

whole land with the water right attached. This would give as the total value of the land Rs. 70 by 91 $\frac{1}{3}$ or Rs. 6,393 or in round figures Rs. 6,400.

The value may also be worked out by the method of capitalising the total income of both lands together. Very different estimates of the income are given by the different witnesses, varying from about Rs. 125 which Mr. Nowroji gives to Rs. 2,300 odd which the claimant gives. The land seems to have been assessed by the Municipality at an annual value of Rs. 42 a year which is an extraordinarily low value. The various estimates given by the witnesses seem to me to be unreliable as the Deputy Collector says, as they are not supported by any accounts or written documents. The income, as estimated by the Revenue Inspector and which the Deputy Collector has accepted in his award, is Rs. 377 per year. It seems to me that this is the most reliable estimate. The learned advocate for the claimant points out that the Corporation gave his client a sum of Rs. 800 as compensation for his loss for one year and I should take this as the annual income of the lands. I think it is not right to do this. The amount was paid "without prejudice," : see Ex. 7, and so cannot be taken as an admission on the part of the Corporation. The payment was for all damages up to 31st October 1909. The loss of water for a period from October 1908 to October 1909 not only caused the loss of the crop which was sown in June and July 1908 and which was withered, but also prevented the crop for 1909 from being sown in its proper time, viz. June and July 1909. When the sowing season is past, the land cannot be cultivated with paddy for that year. So that the amount paid would seem to cover the loss of two crops those of 1908 and of 1909. We do not know how the figure Rs. 800 was arrived at; it may also be that, to avoid litigation and as the lands were to be acquired shortly thereafter, the Corporation did not mind paying it as a lump sum. I do not think it is a fair criterion to adopt. On the whole, I am inclined to think that Deputy Collector's estimate of the income is correct and should be adopted, viz. Rs. 377 a year.

But I am unable to accept his view that $12\frac{1}{2}$ years' purchase should be taken

for capitalizing the income. This means that purchasers expect a return of 8 per cent profit on agricultural lands. I do not know what basis there is for this view. It is true that all the lands are not under paddy cultivation; the profits for a portion of this land is derived from raggi, vegetables and trees. Nevertheless I think the estimate of profits expected is too high. Claimant's witnesses put the profits at 3 to 3½ per cent.; they are naturally interested in increasing the price. Six per cent. gross profits would seem to me to be a proper rate to take equivalent to 16 2/3 years' purchase. Calculated from these figures, the value of claimant's lands will be Rs. 377 by 16 2/3, viz., Rs. 6,283. The near approximation of the values arrived at from the two methods is mutually corroborative. I would find Rs. 6,300 in round figures to be the value of claimant's lands with the water rights attached.

Considered as dry lands, the lands in question here would seem to be similar to the lands in the neighbourhood which have been acquired at Rs. 25 and 30. In Ex. 11 the Deputy Collector values it at Rs. 30 per ground. There is no other criterion to go upon for the value as dry land. Taking at Rs. 30 per ground the whole block would be worth Rs. 30 by 91 1/3 or Rs. 2,740.

The difference between the two values would represent the value of the water rights. I find therefore that the amount of compensation payable by way of damages for the water rights of the claimant's land to be Rs. 3,560.

My findings on the questions on which findings are called for are:

(1) The owner had a right by way of easement to the water of Tangal tank for the irrigation of his land; (2) the Corporation can be required to restore the tank or allow the owner to restore the tank or to make compensation to the owner by way of damages, as the owner chooses. The amount of the compensation is Rs. 3,560.

Judgment.—We accept the finding and the decree of the Chief Judge of the Small Cause Court. It must be amended accordingly. The claimant is entitled to interest on the excess. The parties will bear their own costs throughout.

S.N./R.K.

Decree amended.

A. I. R. 1914 Madras 250

WHITE, C. J., AND SANKARAN NAIR, J.
K. A. Amirtha Padayachi and others—
Plaintiffs—Appellants.

v.

Srimath Kachi Yuva Rangappa Kallakka Thola Udayar—Defendant—Respondent.

Second Appeals Nos. 2054 of 1910 and 373 to 376 of 1911, Decided on 19th September 1913, from decree of Dist. Judge, Trichinopoly, in Appeal Suits Nos. 87, 78, 79, 80 and 82 of 1910.

(a) **Landlord and Tenant**—Tenants claiming right to leave portion of holding uncultivated paying rent for cultivated portion only—Zamindar cannot increase rent on uncultivated portion.

Where the custom in zamindari gives the tenant a right to leave a portion of his holding uncultivated for a year paying rent only for the cultivated portion, the zamindar cannot assign on darkhast lands remaining uncultivated and raise rent thereon as that would be, in effect, an enhancement. [P 251 C 2]

(b) **Lease—Conditions.**

A stipulation in a patta not to cut fruit-bearing trees is not improper. [P 251 C 2]

K. Srinivasa Aiyangar and S. Muthiah Mudaliar—for Appellants.

S. Srinivasa Aiyangar and K. Bhashyam Aiyangar—for Respondent.

Judgment.—The plaintiffs asserted that it has been the practice from time immemorial for the tenants in this zamindari to leave a portion of the lands in their possession lie uncultivated. They also asserted that they retained possession of the portion without relinquishing the same to the zamindar and that it was not open to the zamindar to take possession of such land or to let it out on dhar-khast. The plaintiffs further contended that the cultivated land alone was entered in the patta and that rent was paid only with reference to the crops actually raised on the land included in the patta. The zamindar denied any legal and binding custom which would preclude him from claiming rent on the portion of the holding which the tenant may not have cultivated. It is contended before us that the rent assessed with reference to the cultivated land must be treated as rent payable for the entire holding in the possession of the plaintiff including the portion left uncultivated and the zamindar cannot claim to assess this uncultivated land. It is also contended before us that this would be an enhancement of rent and the zamindar is not entitled to enhance this rent. The Judge does not

give any finding upon the custom set up by the plaintiff. Nor does it clearly appear from the Deputy Collector's judgment whether, according to the custom which he finds to be proved, the rent that was paid during the preceding years by the tenants was treated as rent for the entire holding including the portion left uncultivated, or whether it was only the cultivated land for which the tenant paid rent, he having the right to hold the uncultivated portion rent free as a condition of his tenure. On these questions we think it desirable to have a definite finding by the District Judge. The respondent's pleader asks for a finding on the questions whether the zamindar has been letting out the lands uncultivated on dharkhast, and whether he has not refrained from claiming rent on those portions as an indulgence to the tenants. It is not necessary to call for a finding on this question as it is included in the other question whether the plaintiffs have proved a legal custom and what are the incidents thereof.

The Judge will also return a finding on the question what, if any, is the rate of rent payable on the land not cultivated and whether there is any rent payable on such land.

Further evidence may be adduced. The finding will be submitted within two months after the re-opening of the District Court, and seven days will be allowed for filing objections.

(These second appeals coming on for final hearing after the return of the finding of the lower appellate Court upon the issues referred by this Court for trial, the Court delivered the following):

Judgment.—The Judge has found that the tenants "have proved that it has been an immemorial custom in the zamindari for tenants to leave uncultivated from one-eighth to one-fourth of the lands in their holding for one or two years, paying rent only for the cultivated land according to the crop grown thereon, and at the lowest rate, namely horsegram rent for less than one-fourth of a cawni uncultivated in any particular field, and having the right to hold the rest of the uncultivated portion without rent being collected thereon for not longer than two years as a condition of their tenure." Mr. Srinivasa Aiyangar contends that the evidence does not show that the tenants can leave the lands uncultivated for more

than one year. On this point the Judge states in the first part of his finding "one or two years" and afterwards "not longer than two years." The pleader for the appellant is willing that the finding may be accepted with this modification, that "one year" be substituted for two years in the extract given above. The decrees will be modified in accordance with this finding.

The appellant further contends that the stipulation "you shall not, contrary to mamool and without permission, do acts of any kind and cause harm to the fruit trees and forest trees, etc., grown before 1st July 1908, on the lands in your possession," in Ex. D should be omitted as it lays the burden of proving the custom on him, while under S. 12, Madras Estates Land Act, the zamindar has to prove the custom referred to therein. The Deputy Collector held that the tenant was not entitled to cut down fruit bearing trees. There was no appeal by the tenants against the decree of the Deputy Collector. His decision on this point must be restored. As to the other trees, as there is no finding by the District Judge as to the custom, we give no opinion. The question is left open and the stipulation in the document Ex. D will be omitted. Each party will bear his own costs throughout. In other respects the decree of the lower appellate Court is confirmed.

S.N./R.K.

Decree confirmed.

A. I. R. 1914 Madras 251

SANKARAN NAIR AND AYLING, JJ.

M.A. Srinivasa Aiyangar—Plaintiff—Appellant.

v.

Kundasawmy Naicker and another—Defendants—Respondents.

Appeal No. 200 of 1913, Decided on 5th February 1914, from order of Madras City Civil Court, D/- 31st March 1913, in Civil Misc. Petn. No. 324 of 1913.

Civil P. C. (5 of 1908), O. 34, R. 6—Mortgage decree against two defendants—Part adjustment by one defendant by private sale—Decree cannot be passed under R. 6 against one not party to private sale.

Where in a mortgage decree against two defendants one of the defendants makes a part adjustment by private sale, a decree under O. 34, R. 6, can be passed against him, but no such decree can be passed against the defendant who is not a party to the sale, for no procedure under O. 34, R. 5, is followed against him: 2 A. L. J. 353, Dist. [P 252 C 2]

T. Narasimha Aiyangar — for Appellant.

R. N. Aiyangar for *P. Ramanathan* — for Respondents.

Facts.—One M. A. Srinivasa Aiyangar obtained a mortgage-decree against one Kundasawmy Naicker and another for a sum of Rs. 700 odd for the sale of the mortgaged properties. He subsequently arranged with one of the judgment-debtors for a sale to him privately of those properties. The sale being effected on 10th February 1913 he applied for a personal decree on 20th February 1913. The City Civil Court dismissed the application on the ground that he cannot pass such a decree when there is no sale through Court. Against that order the present appeal is filed.

Judgment.—The City Civil Judge has dismissed the application of the plaintiff for a personal decree against defendants 1 and 2 under O. 34, R. 6, Civil P. C., on the ground that the plaintiff failed to bring the mortgaged property to sale in execution of the decree under O. 34, R. 5, Civil P. C., obtained by him. Defendant 1 privately sold the property to the decree-holder for Rs. 500 which, in his application for a decree for the balance under O. 34, R. 6, he has credited towards the decree amount.

Order 34, R. 5, directs the sale of the mortgaged properties and the application of the sale proceeds in the manner indicated therein, and it is only where the net proceeds are found to be insufficient to discharge the decree debt that the plaintiff is entitled to ask for a decree under R. 6. These provisions no doubt contemplate a judicial sale for the decree amount and a decree for the balance. But it is clear it is open to a judgment-debtor to stop the sale by payment of the debt or by adjustment duly certified to the Court. Such adjustment may be made by a private sale. Nor is there any reason for not recognizing a payment in part or a partial adjustment as between the parties thereto. Defendant 1 who sold the property does not dispute the plaintiff's claim; so far as he is concerned the sale in our opinion should be recognized and it follows that the plaintiff is entitled to a decree against him for the balance.

So far as defendant 2 is concerned the sale is not binding on him. He is entitled to insist upon the procedure pre-

scribed by the Code of Civil Procedure being followed. He is not a party to the sale and his right to apply for the execution of the decree under O. 34, R. 5, cannot be taken away by the sale of the property by defendant 1. No decree therefore can be passed against him under R. 6. In the cases cited the contesting judgment-debtor was a party to the sale, and in the case of *Udit Narain Singh v. Baquar Saijad* (1), after the private sale, there was a Court sale for the balance. They have no application to this case so far as defendant 2 is concerned. We confirm the order and dismiss the appeal as against defendant 2 with costs. We reverse the order so far as defendant 1 is concerned and direct the City Civil Judge to restore the application to his file and dispose of it according to law.

The costs will be provided for in the final order or decree.

S.N./R.K.

Decree modified.

(1) [1905] 2 A. L. J. 353=(1905) A. W. N. 124

A. I. R. 1914 Madras 252

SANKARAN NAIR AND SESAGIRI

AIYAR, JJ.

President, District Board, Tanjore — Plaintiff—Appellant.

v.

Muthu Vaira Ambalagaran and others Defendants—Respondents.

Second Appeals Nos. 200 to 203, of 1913, Decided on 9th March 1914.

Madras Estates Land Act (1908)—Cause of action arising before Act—Suit for rent filed after Act—Exchange of muchilika and patta is unnecessary.

No exchange of patta and muchilika necessary to entitle a landlord to sue for rent even where the cause of action arose before Act 1 of 1908 came into force, provided that the suit itself is brought after that date: 21 I. C. 852, *Foll.*

[P 252 C 2]

S. Sreenivasa Aiyangar—for Appellant.

C. V. Ananthakrishna Iyer—for Respondents.

Judgment.—It is now settled law that even though the cause of action arose before the new Act came into force if the suit is after the Act of 1908, no exchange of patta and muchilika is necessary: see *Raja of Karvetinagar v. Pandur Govinda Mudali* (1). We must reverse the decrees of the lower appellate Court and remand the appeals to be

(1) [1913] 21 I. C. 858.

disposed of according to law. The costs will abide the result.

R.M./R.K.

Case remanded.

A. I. R. 1914 Madras 253

WHITE, C. J. AND OLDFIELD, J.

Mahomed Kasim Ali Sahib—Appellant.

v.

Mir Gulam Ali Sahib and others—Respondents.

City Civil Court Appeal No. 19 of 1911, Decided on 9th December 1913, from decree of City Civil Court, Madras, in Original Suit No. 427 of 1910.

Transfer of Property Act (4 of 1882), S. 54—Competition between unregistered sale deed for less than Rs. 100 with delivery of possession and registered sale deed—Latter prevails over former by virtue of S. 54 read with Registration Act, S. 50—Optional registration in case of sale deed actually executed is abolished by S. 54—Registration Act (16 of 1908), S. 50.

Where the competition is between a prior unregistered sale deed for less than Rs. 100 followed by delivery of possession and a subsequent registered deed of sale, the effect of S. 54, T. P. Act, read with S. 50, Registration Act, is to make the latter registered instrument prevail over the earlier unregistered instrument, notwithstanding the fact that there may have been delivery under the earlier instrument. S. 54, T. P. Act, virtually abolished optional registration in the cases of sales, in which a document was actually executed: 5 Cal. 336 and 3 Mad. 46, Foll. [P 255 C 2]

C. Venkatasubbaramiah—for Appellant.

M. A. Theru Narayanchariar—for Respondents.

Facts.—One Mirza Kasim Baig was the owner of house No. 6/52, Sirdar Jung's Garden Street. He sold it on 28th March 1896 to one Mahomed Kasim Ali, defendant 3, for Rs. 50, and delivered to him possession of the house by executing to him a rental agreement. On 18th May 1906 he sold the same to the plaintiff for Rs. 400 by means of a registered sale deed. The suit was by the latter to recover possession of the house sold to him from the former purchaser, and a tenant whom the latter let into possession. It was found by the City Civil Court that the sale in favour of the plaintiff was supported by consideration, and being registered, effect must be given to it in preference to an oral sale pleaded by Mahomed Kasim Ali defendant 3, in the suit. Accordingly, he decreed the suit in favour of the plaintiff. The present appeal is against that decree.

Judgment.—The learned Judge observes that no attempt was made by de-

fendant 3 to show that the property referred to in Exs. 1, 2 and 3 is the same as the property claimed in the plaint. This does not appear to be the case. Exs. 1, 2 and 3 were put in for the purpose of showing that the vendor of the property in question gave a rental agreement to defendant 3 and became his tenant and that defendant 3 obtained decrees for rent against him in respect of the property. The question is whether the property referred to in sale deed, Ex. A, is the same as the property referred to in the rental agreement, Ex. 1, and the decrees Exs. 2 and 3. It appears to us that defendant 3 attempted to show that the properties were the same. The attention of the learned Judge does not seem to have been drawn to Exs. C and Cl which were produced by the plaintiff as title-deeds of the property in question.

We must accordingly ask the learned Judge for an express finding as to whether the house claimed is the house in respect of which the rental agreement Ex. 1 was executed and the decrees Exs. 2 and 3 were obtained. Fresh evidence may be taken if the Judge thinks it necessary or desirable.

The Judge is asked to return the finding in six weeks. Seven days will be allowed for filing objections.

(In compliance with the order contained in the above judgment, the City Civil Judge submitted the following:)

Finding.—The question on which I have to submit my finding is, whether the property referred to in the sale deeds, Ex. A, is the same as the property referred to in the rental agreement Ex. 1 and the decrees Exs. 2 and 3. Comparing the description of the property in Ex. A with that given in Ex. 1, it will be seen that they agree to a very great extent. In both the documents, the Municipal assessment number for the house is the same, namely, 6/52. The ground rent is also the same, namely, 7 annas. Three of the four boundaries are the same in both the documents. The descriptions differ only as regards the northern boundary. In Ex. A, the northern boundary is given as the house of Postmaster Sultan Hussain Khan Sahib, whereas in Ex. 1 it is given as the house of Mr. Takhi Hussain Sahib. On another point also, the two documents differ. In Ex. A the number of the ground rent bill is given as 46

and in Ex. 1 as 44. As regards the Survey Number of the property, Ex. A gives it as 1284/3 which is the re-survey number. In Ex. 1, which apparently came into existence before the re-survey was made, the old survey number is given, the number being 916. Ex. 4, which is an extract from the Madras Re-survey Settlement Register for Triplicane Division, which has been filed in the remand inquiry, shows that the corresponding re-survey number for 916 is 1284/3, which it will be seen is the re-survey number given in Ex. A. It may, therefore, be taken as proved that, as regards the survey numbers also, the descriptions agree as A gives the corresponding re-survey number for the old survey number given in Ex. 1. The difference in the description of the property in the two documents is thus reduced to two points, viz., as regards the description of the northern boundary and the number of the ground rent bill. In all other respects, the descriptions agree and point to the conclusion that the properties dealt with in the two documents are the same.

This conclusion is further strengthened by reference to Exs. C and C1. The plaintiff's next friend, as the first witness for the plaintiff, refers to Exs. C and C1 as the title-deeds for the plaint property, which were given to him by his vendor Mirza Kassim Beg. Exs. C and C1 are two prior sale deeds, dated 27th October 1894 and 15th July 1895 respectively. The date of Ex. 1 is 28th March 1896. The three documents have thus come into existence within comparatively short intervals. Comparing the description of the property in C and C1 with the description in Ex. 1, it will be seen that they agree not only on those points on which Exs. A and I agree, but also on some other points as well. In Exs. C and C1, the same survey number is given as in Ex. 1 viz. No. 916. The ground rent bill number is given as 44 which also agrees with the number given in Ex. 1. The extent of the property is also given in these three documents, viz. C, C1, and I as 1,050 feet. In fact the description of the property in C and C1 is identical with that in Ex. I except in one respect, namely the description of the northern boundary. In C and C1, the northern boundary is stated as the house of Mir Murtuza Hussain Sahib, whereas in Ex.

I, it is given as the house of Mir Takhi Hussain Sahib. The witness Shabbir Hussain Sahib, who has now been examined on behalf of the plaintiff as his witness 6, says that his father who died a year and three months ago was Murtuza Hussain and that he and his father have been living in the house to the north of the plaint house for about 12 or 13 years. Exs. C and C1 describe the house to the north as the house of Mir Murtuza Hussain Sahib. In Ex. A, which came into existence ten years later, the name is given as Sultan Hussain Sahib. According to this witness, he was the brother of Mir Murtuza Hussain Sahib. In Ex. I, no doubt the name is given as Mir Takhi Hussain Sahib. There is no evidence to show who this man was.

Defendant 3 files the ground rent, receipts Ex. V series, which relate to a period from August 1902 to September 1904. The bill number given in these receipts is 44 and the name of the tenant is that of defendant 3. The extent of the land as well as the monthly rent as given in these receipts tally with the corresponding figures given in Ex. I as well as in Exs. C and C1 and hardly leave any room to doubt that they relate to the same land. Defendant 3 has now called Mirza Abid Beg who has attested the rental agreement Ex. 1 executed by Mirza Kassim Beg. This witness says that he is the son of Kassim Beg and that he has attested Ex. I which relates to the plaint house. He also proves that Ex. V series were granted to his father Kassim Beg for the ground rent of the land over which the plaint house stands. Ex. V series were granted by two persons named Syed Mahomed and Syed Meeran Mohideen. The plaintiff's witness 3 Mir Ghulam Ali Sahib, who has been recalled and examined for the plaintiff admits that, at the period to which the receipts relate, these two persons were the lessees of the plot of the land called Naksha property of which the plaint land forms part, and he also admits that the receipts were granted by the said lessees. Ex. V series show that the No. 44 given in Ex. I as well as in Exs. C and C1 as the number of the ground rent bill was then the correct number with regard to the plaint property. The plaintiff has filed Ex. N which purports to be a register for the Naksha property for a subsequent year, viz. 1904. In that re-

gister the number given for the ground rent bill in respect of Mirza Kassim Beg under whom both the parties claim is 46 and a different name is given for No. 44. But the registers for the period corresponding to V series have not been produced. The plaintiff's witness 3 produces only the register maintained by the trustees after the period of lease in favour of Syed Mahomed and Syed Meeran Mohideen expired. Seeing that Ex. C, C1 and I give the ground rent bill number as 44 for the property dealt with by them and that Ex. V series which evidently relate to the same property give also the same number, the fact that in the subsequent register Ex. N, No. 44 relates not to defendant 3's land but to another's and that defendant 3's land has No. 46 which also is the number given in Ex. A (dated in 1906) seems to point to the inference that the bill numbers got changed after the landlords took over the property from the lessees. The plaintiff's witness 3 stated he had the earlier registers also but they have not been produced.

I am of opinion that the evidence already on record and fresh evidence now adduced lead strongly to the conclusion that the property dealt with in Ex. A, namely the plaint house, is the same as the property in respect of which the rental agreement Ex. I was executed. The only circumstance unfavourable to that conclusion is the difference in the description of the northern boundary; but this single discrepancy, which may be due to some mistake cannot, in my opinion, outweigh the inference which has to be drawn from the fact that in all other respects—and I may observe essential respects—the descriptions agree, and the points of agreement are carried much further by the prior title-deeds Exs. C and C1 and the extract from the Settlement Register Ex. IV.

The plaintiff's next friend who argued the case himself had to admit that he cannot say that the plaint property is not the same as that dealt with in Ex. I. If it were not so and the house to which Ex. I relates was a different one, it may be shown what house it relates to, but no such attempt has been made.

I am not referred to Exs. II and III as they do not carry the matter beyond Ex. I.

My finding on the question remitted to me is that the property referred to

in the sale-deed Ex. A is the same as the property referred to in the rental agreement Ex. I and the decrees Exs. II and III.

(This appeal coming on for final hearing on Tuesday the 25th day of November 1913 after the return of the finding of the lower Court on the issue referred by this Court for trial and having stood over for consideration till this day, the Court delivered the following):

Judgment

White, C. J.—I am prepared to accept the learned Judge's finding of fact, but in the view I take as to the law, this finding is immaterial for the purposes of the question we have to decide.

I am of opinion that the effect of S. 54, T. P. Act, read with S. 50, Registration Act, is to make the later registered instrument prevail over the earlier unregistered instrument notwithstanding that there may have been delivery under the earlier instrument.

I would dismiss the appeal with costs.

Oldfield, J.—The plaintiff sues in ejectment on the strength of a registered sale-deed, Ex. A, executed on 18th May 1906. Defendant 3's title is based on an alleged purchase for Rs. 50 from the same person, embodied in an unregistered document, on 28th March 1896, and accompanied by delivery on that date.

The first argument for consideration is that the sale to defendant 3, having admittedly been effected by a document and that document being unregistered, the sale cannot prevail, even though accompanied by delivery, against the subsequent sale by registered instrument. This has been sustained with reference to *Fuzludeen Khan v. Fakir Mahomed Khan* (1) and *Bimaraj v. Papaya* (2). These decisions were, no doubt, prior to the Transfer of Property Act, whilst the documents in question here were subsequent to it. But this is not material, since, as observed in *Krishnamma v. Suranna* (3), S. 54 of the Act virtually abolished optional registration in the case of sales, in which a document was actually executed; and no other portion of the Act has been relied on. On this ground therefore the decision under appeal must be confirmed.

(1) [1860] 5 Cal. 336.

(2) [1881] 3 Mad. 46.

(3) [1893] 16 Mad. 148.

The principle involved in the foregoing was stated correctly at the close of para. 6 of the judgment under appeal and it is presumably only as an alternative ground of decision that the learned City Civil Judge has dealt with the further contention that defendant 3 should succeed in consequence of the alleged delivery to him of the property in pursuance of the sale. He did so by holding that: (1) the taking of a rent deed Ex. I by defendant 3 from Mirza Baig, the vendor, would not in itself entail a transfer of possession; and (2) that Ex. I and the decrees for rent due under it, Exs. II and III, were not shown to relate to the suit property. The latter point has been settled in defendant 3's favour by the finding now before us. As regards the former, it is sufficient that, apart from any general rule, the circumstances of this case preclude a decision in favour of the delivery alleged. For defendant 3's story in consequence of the plaintiff's inadequately explained possession of the title-deeds attracts suspicion; and there is only his own uncorroborated and interested assertion as to the sale or the execution of Ex. I, his accounts in evidence and in his written statement of the enjoyment of the property at the time being discrepant. Exs. II and III were moreover admittedly followed by no recovery of the amounts decreed. This part of the decision therefore could also, if necessary, be sustained.

I concur in dismissing the appeal with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Madras 256

SADASIVA AIYAR, J.

Kanagammal and another—Plaintiffs—Petitioners.

v.

Panchapakesa Odayar and another—Defendants—Respondents.

Civil Revn. Petn. No. 902 of 1912, Decided on 12th February 1914, from order of Sub-Judge, Mayavaram, in Original Petn. No. 359 of 1911.

(a) Civil P. C. (1908), O. 33, R. 5 - Leave to sue should not be refused on insufficient grounds.

Leave to sue in forma pauperis under O. 33, R. 5, ought not to be refused on insufficient grounds: 13 M. L. J. 292 and 4 Mad. 323, Ref. [P 257 C 1]

(b) Civil P. C. (1908), O. 2, R. 3—Plaint presented by plaintiffs claiming different

reliefs against same defendant is not bad for misjoinder of causes of action.

A plaint presented by two or more plaintiffs claiming different reliefs against the same defendant cannot be said to be framed improperly or bad for misjoinder of causes of action: 18 I. C. 764, Ref. [P 258 C 1]

(c) Civil P. C. (1908), S. 141—Court can direct amendment of plaint to separate sustainable from unsustainable reliefs—Such amendment is allowed under S. 141 though pauper application is not plaint within O. 6, R. 1, until admitted under O. 33, R. 8—Civil P. C. (1908), O. 6, R. 1—Civil P. C. (1908), O. 33, R. 8.

Where claims, some of which are sustainable in law and others unsustainable in law, are joined together in one suit, it is open to the Court to direct the applicant to amend his plaint, so as to separate the sustainable from the unsustainable reliefs; and although a pauper application does not become a 'plaint' within the meaning of O. 6, R. 1, until admitted under O. 33, R. 8, the Court has, under S. 141, Civil P. C., a general power to direct an amendment of this kind. [P 258 C 2]

T. R. Ramchandra Aiyer, K. Parthasardhi Aiyangar and A. Sriranga Aiyangar—for Petitioners.

T. Rangachariar—for Respondents.

Judgment.—The plaintiffs are the petitioners. Plaintiff 1 is the mother of minor plaintiff 2. Their application to the learned Subordinate Judge of Mayavaram to be allowed to sue in forma pauperis to obtain reliefs of future maintenance and recovery of arrears of maintenance was rejected by the learned Subordinate Judge. The total value of the reliefs claimed by them was Rs. 11,700. Plaintiff 1 gave the value of the properties belonging to her as Rs. 327 and the value of the properties belonging to the minor plaintiff 2 as nil. The Rs. 327 worth of moveables was, of course, not sufficient to pay the court-fee stamps on the reliefs worth Rs. 11,700, the court-fee required being Rs. 535. The lower Court did not get into the question whether the plaintiff's pauperism was established but it rejected the application on the ground that the requirements of R. 5, O. 33, had not been complied with by the petitioners. That R. 5 says that the Court should reject an application for permission to sue as a pauper (a) where the application is not framed and presented in the manner prescribed by Rr. 2 and 3, (b) where the applicant is not a pauper, (c) where he has within two months next before the presentation of the application disposed of any property fraudulently or in order to be able to apply for permission to sue

as a pauper, (d) where his allegations do not show a cause of action, (e) where he has entered into agreement with reference to the subject matter of the proposed suit under which any other person has obtained an interest in such subject matter. It is difficult to gather from the learned Subordinate Judge's order what particular requirements of R. 5, O. 33, had not been complied with by the petitioners. It is admitted that the questions (b), (c) and (e) arising under R. 5 were not considered or relied on by the Subordinate Judge, and that those clauses need not be considered in dealing with the petitioner's application. We have only to consider Cls. (a) and (d).

As regards Cl. (d), unless the petitioner's allegations in their petition do not show "a cause of action" (that is, any cause of action), the Court cannot reject the application. The Subordinate Judge does not say in his order that the allegations do not show any cause of action. He only says that it is doubtful whether plaintiff 2 can be awarded maintenance if he was entitled to sue his putative father's undivided brother (defendant 1) for partition of the undivided family properties of his said father and defendant 1.

It is the case of the defendants themselves that plaintiff 2 has no such right to sue for partition. If so, plaintiff 2 has undoubtedly a cause of action (if the allegations in the pauper application are true) to sue for maintenance. If again plaintiff 1 is the permanent concubine of defendant 1's deceased brother, her claim for maintenance cannot be said to be groundless. As said in *Vijindra Tirtha Swami v. Sudhindra Tirtha Swami* (1), where there is a ground for reasonable doubt, leave should not be granted and should not be refused. In the Full Bench case of *Rathnam Pillai v. Pappa Pillai* (2) it was held that evidence on the merits of the case of the pauper applicant cannot be gone into in the preliminary investigation of the question whether leave ought to be granted or not and *Koka Ranganayaka Ammal v. Koka Veakatachellapati Nayudu* (3) was followed. It may be that the plaintiffs when they claimed maintenance also on behalf of the two daughters of plaintiff 1, have added a claim which is

not supported by any cause of action vesting in the plaintiffs but Cl. (d), R. (5) does not justify the dismissal of an application simply because some of the several causes of action mentioned by the plaintiffs are not shown to vest in themselves and only the others vest in them. It is only where the plaintiffs' allegations do not show any cause of action as regards any of the reliefs that the application could be rejected under that rule.

We have thus left only to consider whether the application could be rejected under Cl. (a), R. 5. That clause says that if the application is not framed and presented in the manner prescribed by Rr. 2 and 3, it shall be rejected. R. 2 says that the application shall contain the particulars required in regard to plaints in suits and a schedule of any moveable or immovable property possessed by the applicant with the estimated value thereof, and that it shall be signed and verified in the manner prescribed for the signing and verification of pleadings. As regards the particulars required by plaint in suits we have turn to O. 7, R. 1, and those particulars are contained in Cls. (a) to (i), O. 7, R. 1. I am unable to find any defect in the application either by omission of any of the particulars required by O. 7, R. 1, or by the omission of a schedule of property belonging to the applicant or by the omission of the signature and verification of the applicant. Then as regards R. 3, O. 33, that rule requires the presentation of the application by the pauper herself or by an authorized agent and there is no defect alleged in regard to this particular either. The learned Subordinate Judge seems to think that because plaintiff 2's cause of action for her maintenance claim is different from plaintiff 1's cause of action for his maintenance claim, therefore, the application is not framed in the manner prescribed by O. 33, R. 2. I am unable to agree with him. In the first place, O. 7, R. 1, which relates to the particulars to be contained in the plaint and which is incorporated in O. 33, R. 2 does not deal with the question of mistakes of law or fact or mistakes of nonjoinder or misjoinder found in the plaint. It only deals with the question whether the particulars (a) to (i) mentioned in that order are found in the plaint. If they are so found the application is framed in the manner prescribed by O. 33, R. 2, and that is all

(1) [1896] 19 Mad. 197.

(2) [1908] 13 M. L. J. 292.

(3) [1882] 4 Mad. 323.

what O. 33, R. 2, requires. In the second place, I am unable to see that there is any misjoinder of causes of action so far as the claims of plaintiffs 1 and 2 to be awarded maintenance are concerned. O. 1, R. 1, allows several plaintiffs to bring a single suit though the causes of action of the several plaintiffs are different, provided that the transaction out of which their separate claims arise is one and that any common question of law or fact exists in respect of the separate claim. In *Nilmadhab Mitra v. Jotindra Nath Mitra* (4) it was held that a husband and a wife and their son could all join in a single suit to recover the maintenance due to them separately, the words of O. 1, R. 1, Civil P. C. being relied on for that conclusion.

Lastly it is urged that as the plaintiffs claim maintenance on account of plaintiff 1's daughters (plaintiff 2's sisters) also, and as the plaintiffs have no cause of action vesting in themselves to sue for such maintenance, the pauper application which includes such an unsustainable claim must be rejected. As I said before, O. 33, R. 5, Cl. (a), does not allow the rejection of the application on the ground that patently unsustainable claims have been joined in the application to sustainable claims. It is only if the application is not framed and presented in the manner prescribed by Rr. 2 and 3 that the application can be rejected. But it is further contended (a) that the Court has not got the power to direct the application to be amended by striking out that portion of the prayer which claims the unsustainable reliefs, (b) that if the Court has no power to order the application to be so amended, it would be unable to find out the separate value of the sustainable reliefs from the total value of Rs. 11,700 given in the application for both the sustainable and the unsustainable reliefs, and (c) that the Court would again be unable in consequence to find out whether the Rs. 327 which is the value of the plaintiff's properties could cover the court-fees due on the sustainable reliefs and hence whether the application to sue as pauper could be granted as regards even the sustainable reliefs. On these contentions, it is argued that the proper course was taken by the Court under these circumstances when it wholly rejected the application.

(4) [1913] 18 I. C. 764.

As regards the argument under the heading (a), I do not agree with the contention that the Court has not got the power to order the amendment of the application if it is improperly framed through misjoinder of causes of action and reliefs. No doubt, O. 6, R. 17, relates only to the power of the Court to allow parties to alter and amend pleadings; and the word "pleadings" means only plaints and written statements: see O. 6, R. 1; and an application to sue as a pauper becomes a plaint and, therefore, a pleading only after it is granted: see O. 33, R. 8. But the power of a Court to direct a pauper applicant to amend his pauper application is one of the inherent powers of the Court, and it does not require any specific provision of the Civil Procedure Code to enable the Court to exercise this power. I am also of opinion that S. 141, Civil P.C., which makes "the procedure" provided in regard to suits applicable to other "proceedings" also, governs proceedings connected with pauper applications also and thus enables the Court to apply the provisions of O. 6, R. 17, to such proceedings.

In the result, I hold that the learned Subordinate Judge acted illegally and with material irregularity in rejecting the pauper application on the grounds set out by him. I set aside his order and remand the application for proper disposal with reference to the above remarks. I shall make no order as to costs in this Court. Costs in the lower Court will abide.

S.N./R.K.

Order set aside.

A. I. R. 1914 Madras 258

BENSON AND SUNDARA AIYAR, JJ.

Kambam Bali Reddy and others — Accused — Appellants.

v.

King-Emperor — Opposite Party.

Criminal Appeals Nos. 515 and 516 of 1912, and Criminal Revn. No. 27 of 1913, Decided on 11th February 1913, from order of Sess. Judge, Cuddapah, in Criminal Case No. 33 of 1912.

(a) Criminal P. C., (5 of 1898), S. 423 (b) — High Court in appeal against conviction may alter the finding under S. 423 (b) and enhance sentence under S. 439 — Criminal P. C., S. 439.

A High Court, when hearing an appeal against a conviction, may as a Court of appeal, under S. 423, Cl. (b), alter the finding and then as a Court of revision under S. 439

enhance the sentence so as to make it appropriate to the altered finding. [P 260 C 1]

(b) **Criminal P. C., (5 of 1898), S. 403—Appeal not being second trial — Prohibition of retrial under S. 403 is inapplicable.**

The prohibition of re-trial contained in S. 403 does not apply as an appeal to a High Court is not a second trial but a continuation of the trial in the Sessions Court and throws open the whole case to the interference of the High Court: 7 I. C. 861; 10 I. C. 372; 23 Cal. 975; 22 Cal. 377 and 9 All. 144, Ref.; *Criminal Appeal No. 600*; *Criminal Revision Case No. 400 of 1903* and *Criminal Appeal No. 143 (unreported)*, Rel. on. [P 259 C 2]

(c) **Criminal P. C., (5 of 1898), S. 439 (4)—S. 439 (4) refers to case whose trial has ended in complete acquittal and does not limit powers of appeal Court — It limits powers of High Court acting as Court of revision.**

Sub-Section (4), S. 439, Criminal P. C., refers to a case where the trial has ended in a complete acquittal, not to a case where the trial has ended in a conviction but the Court has wrongly applied the law or has wrongly found some fact not proved and has in consequence held that the conviction should be under some section of the Code other than the section properly applicable. The subsection cannot be held to limit the powers of a Court of appeal. It only limits the powers of a High Court when acting, not as a Court of appeal but as a Court of revision. [P 259 C 2, P 260 C 1]

(d) **Interpretation of Statutes — Statute should not be construed so as to involve inconsistency between its different parts.**

The terms of a statute should not be so construed as to involve an inconsistency between its different parts. [P 260 C 2]

S. Swaminathan—for Appellants.

Public Prosecutor—for the Crown.

Judgment.—In this case the five accused were charged with rioting armed with deadly weapons and with having murdered one Chinna Gangayya on 15th May last, offences punishable under Ss. 148 and 302, I. P. C.

The Sessions Judge found the accused not guilty of those offences, but guilty of simple rioting and of culpable homicide not amounting to murder (Ss. 147 and 304, I. P. C.). The accused appeal against their conviction and this Court, as a Court of revision, has given them notice to show cause why they should not be convicted of murder and be sentenced for that offence.

There cannot, we think, be the slightest doubt that the accused are guilty of rioting and in the course of it killed Chinna Gangayya, as found by the Sessions Judge. The evidence on both sides and every argument on behalf of the accused have been so fully and correctly dealt with in the judgment of the Sessions Judge that we do not feel called

upon to re-discuss them in detail. But we shall do so briefly. (After finding on evidence that the five accused (Kambam Bali Reddy, Kambam Inna Reddy, Gajjala Venkata Reddi, Kambam Savari Reddy and Muthapu Pilla Gangayya) were guilty of the murder of Chinna Gangayya, their Lordships observed as follows:)

It is however contended for the appellants that we have no power to remedy the error into which the Sessions Judge has fallen except by ordering a new trial on the charge of murder. We do not accept this contention. S. 423, Cl. (b), Criminal P. C., expressly empowers an appellate Court hearing an appeal from a conviction (as in this case) to alter the finding: see *Appanna v. Pethani Mahalakshmi* (1) and *Golla Hanumappa v. Emperor* (2). The appellants cannot rely upon S. 403, Criminal P. C., and plead the acquittal by the Sessions Court on the charge of murder as a bar to the jurisdiction of this Court because as pointed out in the case of *Queen-Empress v. Jabanulla* (3), the present appeal is not a second trial, but only a continuation of the trial in the Sessions Court. The decision in the case of *Krishna Dhan Mandal v. Queen-Empress* (4), is to the same effect, where it is observed: "When an act or a series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute an appeal from a conviction for any one of such offences must lay the whole case open to the interference of the appellate Court notwithstanding any order of acquittal by the first Court in regard to any of the other offences. The interference of the appellate Court in such a case is directed primarily not against the acquittal, but against the conviction which is called in question by the accused, though if the interference is to be rational and complete, the appellate Court must deal with the whole case." Nor can they rely on the fourth paragraph of S. 439. That paragraph cannot be held to limit the powers of a Court of appeal. It only limits the powers of the High Court when acting not as a Court of appeal, but as a Court of revision. It prevents the High Court when acting as

(1) [1910] 7 I. C. 861=34 Mad. 545=11 Cr. L. J. 534.

(2) [1911] 10 I. C. 372=35 Mad. 243=12 Cr. L. J. 269.

(3) [1896] 23 Cal. 975.

(4) [1895] 22 Cal. 377.

a Court of revision from converting a finding of acquittal into one of conviction. But S. 423, Cl. (b) has no such restriction. The only restriction under that clause is that the Court of appeal cannot enhance that sentence.

It may be observed that under S. 280, Criminal P. C. of 1872, it was enacted that the appellate Court "may alter and reverse the finding and sentence or order" of the Court below, "and may, if it sees reason to do so, enhance any punishment that has been awarded." This power of enhancing the sentence was taken away from the Court of appeal by S. 428 of the Code of 1882, which so far as this matter is concerned, is the same as S. 423 of the present Code. The Courts of appeal include not only the High Court but also all Courts of Session and District Magistrates and in practice all First Class Sub-Divisional Magistrates.

It may well be that the legislature thought that the power to enhance sentences ought not to be entrusted to so large a number of Courts, many of which would, in practice, be comparatively inexperienced. But that reason would not apply to the High Court; and so we find that in S. 439 of the Code of 1882 (which is the same as S. 439 of the present Code) it was enacted that the "High Court may in its discretion, exercise all the powers conferred on a Court of appeal by Ss. 195 423, 426, 427 and 428 or on a Court by S. 338" and, it is expressly added, "may enhance the sentence." The effect of the two sections read together is that the High Court when hearing an appeal against a conviction, may under S. 423 Cl. (b), alter the finding, and then as a Court of revision may under S. 439 enhance the sentence so as to make it appropriate to the altered finding.

Sub S. (4), S. 439 which enacts that "nothing in this section shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction," is not, if rightly construed, inconsistent with this view. The prohibition in sub-S. (4) refers to a case where the trial has ended in a complete acquittal not to a case, like the present, where the trial has ended in a conviction, but where the Court has wrongly applied the law or has wrongly found some fact not proved, and has, in consequence held that the conviction should be under some section of the Code other than the sec-

tion properly applicable. Any other construction would be inconsistent with the power to "alter the finding" given to the Court as a Court of revision by virtue of its power to exercise the power conferred on a Court of appeal by S. 423, Cl. (b) and the terms of a statute should not be so construed as to involve an inconsistency between its different parts. This view is borne out by the language of S. 423, Cl. (a), which speaks of "an order of acquittal" in the sense of an order finding the accused not guilty on any of the charges framed against him when contrasted with the language of Cl. (b) which provides for the appellate Court altering the finding where the accused has been convicted by the first Court on certain charges but not on other charges.

We are not aware of any reported decision opposed to the view we have taken. The observations of the Full Bench in *Queen-Empress v. Balwant* (5) are not applicable to the present case, since in that case there was a complete acquittal and there was no appeal before the High Court against a conviction so as to make S. 423 (b) read with S. 439 applicable, and the effect of that provision was not considered.

On the other hand, this Court has more than once acted in accordance with the view we have taken. In *Criminal Appeal No. 600* and *Criminal Revision Case No. 400 of 1903* (unreported) the second accused was charged with murder (S. 302, I. P. C.). The Sessions Judge acquitted him of that offence, but found him guilty of culpable homicide not amounting to murder (S. 304, I. P. C.) and sentenced him to transportation for life. He appealed to this Court which also gave notice of revision, and this Court (Sir S. Subramania Aiyar, Officiating Chief Justice and Boddam, J.) convicted him of murder and sentenced him to death. Again, in *Criminal Appeal No. 143* and *Criminal Revision Case No. 137 of 1907*, the accused was charged in the Sessions Court with murder (S. 302, I. P. C.), but was acquitted of that offence and convicted only of voluntarily causing grievous hurt (S. 325). The accused appealed to this Court which also gave notice of revision, and the Court (Benson and Wallis, JJ.) held that he was guilty at the least of culpable homicide not am-

(5) [1887] 9 All. 134.

ounting to murder, and added: "We, accordingly, as a Court of revision, convict him of that offence," and it enhanced the sentence. It is true that in neither of these cases was the legality of altering the finding called in question or discussed, but for the reasons already stated we are of opinion that the procedure was legal, though no doubt, the power should in practice, be exercised sparingly, as in fact, it has been in the past.

In the result we alter the finding in the present case to one of murder punishable under S. 302, I. P. C. There was no premeditation and we think the ends of justice will be satisfied by the lesser penalty allowed by law. In lieu of the sentences imposed by the Sessions Judge we sentence each of the five accused to transportation for life.

S. N./R.K. Conviction altered.

* A. I. R. 1914 Madras 261

SADASIVA AIYAR AND SPENCER, JJ.

Ramanathan Chetty and others—Appellants.

v.

Arunachalam Chetty—Respondent.

Appeals Nos. 210 and 211 of 1911, Decided on 26th November 1913.

* Civil P. C. (1908, O. 41, R. 5—Order of appellate Court staying execution—Subordinate Court with knowledge of order cannot proceed with execution proceedings.

A subordinate Court has no jurisdiction to commence, proceed with or confirm an auction sale held in execution when the appellate Court has stayed all proceedings in execution of the decree. It cannot be said that an official communication of the order alone will have this effect. It is sufficient if the order comes to the knowledge of the Court in any manner. The moment an appellate Court has made an unconditional order for stay of execution it becomes an operative order and suspends the power of the subordinate Court to carry on further execution proceedings: 3 I. C. 82; 1 C. W. N. 226, *Diss. from*, 14 I. C. 808; 17 I. C. 78; 33 Cal. 927 at p. 944; *In re the Risco Coal and Iron Company Hookey ex parte* (1861) 31 L. J. Ch. 421; 2 All. 636, *Foll.* [P 234 C 1,2]

L. A. Govindaraghava Aiyar and A. Vishwanatha Aiyar—for Appellants.

S. T. Srinivasa Gopalachariar—for Respondent.

Sadasiva Aiyar, J.—The facts have been set out in the judgment of my learned brother and it is unnecessary for me to repeat them. The petition put in by the defendant 1's sons to set aside the Court auction sale is filed by them not on the ground that they are also parties to the decree (in which the sale

was held), as represented by their father, defendant 1, but as independent persons who owned shares in the property sold and who are entitled in consequence to file a petition under O. 21, R. 90 (old S. 311), to set aside the sale on the ground of material irregularity and consequent substantial injury. I agree with the lower Court in its conclusion that there was no material irregularity in publishing and conducting the sale except that the sale was conducted and concluded after the High Court's order of stay (which is, of course a very material irregularity). No substantial injury is proved to have been caused by any such material irregularity. The property was estimated by the amin as worth only Rs. 56,000 and odd rupees and it was sold for Rs. 68,000.

Defendant 1 from his conduct in these execution proceedings has clearly proved himself to be a cunning litigant and the affidavit produced on his behalf is not reliable even though supported by a telegram from one Palaniappa Chetty who has not been examined. The want of bidders, I am inclined to hold was due to the litigious nature of defendant who had set up his mother-in-law to file claim petitions on behalf of his (defendant 1's) sons to bring a suit on their behalf to put in a revision petition on their behalf against the claim order and to do several other acts more in order to delay and defeat the decree-holder than with the bona fide object of prosecuting any tenable claim. Purchasers will naturally be chary of making bids for the property belonging to defendant 1 and his sons as they are sure to purchase a protracted litigation along with the property. Appeal against Order No. 210 of 1911, in which defendant's sons are the appellants must therefore in my opinion be dismissed. The parties will bear their respective costs.

Coming to appeal against Order No. 211 of 1911, this appeal arises out of a petition filed under S. 47, Civil P. C., and also under O. 21, R. 90, by defendant 1 himself. So far as his application to set aside the sale is grounded on irregularity and substantial injury under O. 21, R. 90, it cannot be granted for the reasons already set out by me in appeal against Order No. 210 of 1911. The contention, under S. 47, Civil P. C., is based on the following facts:

Defendant 1's sons put in a claim petition for release of their shares in the attached houses. The Subordinate Judge dismissed the claim petition on 15th July 1911. On 20th July 1911, Civil Revision Petition No. 378 of 1911 was filed in the High Court to revise the Subordinate Judge's order dismissing the claim petition. On that same date (the 20th July 1911) an ex parte order was obtained from a Judge of this Court stopping all further proceedings in the matter of bringing the attached house to sale in execution of the decree. Notwithstanding the stay order the sale of the properties was concluded on 21st July 1911. The question is whether such a sale is not wholly illegal as having been conducted by the subordinate Judge's Court in violation of an order from a superior Court staying the sale. In *Muthu Kumarasami Rowthen Minda Nayanar v. Kuppusawmi Aiyangar* (1), it was held following *Bisseswari Chowdhurany v. Horro Sundar Muzumdar* (2), that the stay order passed by a superior Court does not become effective till it is communicated to the inferior Court and that an execution sale held by the inferior Court in ignorance of the stay order is a legally valid sale. With the greatest respect, I am unable to agree with the decision though it is in accordance with the case of *Bisseswari Chowdhurany v. Horro Sunder Muzumdar* (2). It seems to me that unless the order of stay or order of injunction passed by the superior Court made it a condition that that order shall take effect only from the date of its communication to the lower Court or to the party enjoined (as the case may be) an order suspends the power and jurisdiction of the lower Court to conduct further proceedings "from the moment when the order of the superior Court was passed." I do not think that I could put the reasons for this view better than they have been enunciated in the judgments in the cases of *Sati Nath Sikdar v. Ratnamani Naskar* (3) and *Hem Chandra Kar v. Mathur Santhal* (4) and I shall therefore not attempt it. In the result, I would set aside the sales concluded on 21st July 1911 by the Subordinate

Judge's Court of Ramnad as having been held without jurisdiction after the passing of the order of this Court staying the sale which order was dated 20th July 1911, and I would direct that a fresh sale be held after fresh proclamation. A sale held without jurisdiction may in a sense be said to be a sale vitiated by material irregularity but it is unnecessary to rely on S. 311 (O. 21, R. 90) in order to set aside such a sale, that is, it is unnecessary to prove substantial injury also but the irregularity is so grave that in the words of their Lordships of the Privy Council in *Mulkarjun v. Narhari* (5); "it is sufficient by itself to entitle the judgment-debtor to vacate the sale." Parties will bear their respective costs in both Courts. I might be permitted to remark that in respect of a stay order passed by an appellate Court, it seems to me advisable, in order to avoid future complicated litigation, to provide usually that the order shall take effect only from when the order is communicated to the lower Court which has to guide itself in accordance with such order.

Spencer, J.—The facts, which are not denied, are that a sale of the appellants' immovable properties in execution of decrees was commenced on 17th July and concluded on 21st July 1911.

On 20th July, an order was passed in the High Court directing an interim stay of the sale. A telegram was sent by the vakil in Madras to the vakil in Madura informing him of the result of the petition in the High Court, and it reached Madura soon after noon the same day. The Subordinate Court of Ramnad was thereupon moved by a petition accompanied by affidavit to stay the sale.

The Subordinate Judge refused to act on the telegram when he had not received official confirmation of the information, rejected the application and directed the sale to proceed. The sale was completed on the following day and was subsequently confirmed on 2nd September after the High Court's stay order had been received. Meanwhile, the stay order having proved ineffective, was cancelled by the High Court on 3rd August. Applications to set aside the sale were dismissed by the Subordinate Judge on 29th August, and the judgment-debtor and his sons now appeal.

(5) [1901] 25 Bom. 337 at p. 348.

(1) [1909] 3 I. C. 82=33 Mad. 74.

(2) [1897] 1 C. W. N. 226.

(3) [1912] 14 I. C. 808.

(4) [1912] 17 I. C. 78.

Arguments have been addressed to us on the questions: (1) whether the stay order of the High Court took effect from the time when it was pronounced or from the time when it was officially communicated to the Court under whose orders the sale was held, (2) whether the sale that was completed in spite of such an order was thereby invalidated, or whether a mere irregularity has been committed for which the judgment-debtors must prove that they have sustained substantial injury before they can claim to have the sale set aside.

The first of these questions has been the subject of judicial decision in *Muthu Kumaraswami Rowthan Minda Nayanar v. Kuppusawmi Aiyangar* (1), *Bisseswari Chowdhurany v. Horro Sundar Mozumdar* (2), *Hukum Chand v. Kamalanand Singh* (6) and *Mianjan v. Man Singh* (7).

In the above-mentioned judgment of this High Court, the earlier decision of the Calcutta High Court, which declared that an order of an appellate Court under S. 545, Civil P. C., (now O. 41, R. 5), to stay execution of a decree from which an appeal is pending, being of the nature of a prohibitory order, would only take effect when communicated was followed in preference to the later decision of the same High Court.

In *Freeman on Execution*, Arts. 32 and 33, it is stated: "A supersede, as properly so called, is a suspension of the power of the Court below to issue an execution on the judgment or decree appealed from; or if a writ of execution has issued, it is a prohibition emanating from the Court of appeal against the execution of the writ. It operates from the time of the completion of those acts which are requisite to call it into existence." The effect of an execution issued pending a stay thereof granted by the Court is considered and declared to be, of course, irregular and capable of being quashed on motion. The author then proceeds to make the following observation: "But it may happen that for want of such motion the execution is never arrested, and property is seized and sold thereunder. In such case, as in all other cases of irregular execution, the authorities are conflicting, some asserting that the writ, having erroneously issued, remains in force till the error is corrected;

and others maintaining that the Court for the time being having no power to issue the execution, the writ is void."

I consider that there is much force in the observation of Woodroffe, J., in *Hukum Chand v. Kamalanand Singh* (6), that there is no reason why the operation of an order of the High Court should be made contingent, say, upon the due performance of the duties of the post office.

To adapt the words of that learned Judge to the circumstances of the present case before the lower Court completed the sale, this Court had ordered that it should not be done. In the same case, Mookerjee, J., observed that the moment that the High Court has made an unconditional order for stay of execution, it becomes an operative order and suspends the power of the subordinate Court to carry on further the execution proceeding.

The same idea found expression in the words of Westbury Lord Chancellor, in *In re the Risca Coal and Iron Company, Hookey Ex parte* (8): "I shall abide by a rule of convenience; certainty in the matter is convenience; certainty you attain by abiding by the date of the order; uncertainty you introduce when you depart from that date. A variation from the common rule of abiding by the record is introduced by a departure from that date. Great laxity of practice would be introduced and encouraged by a departure from that date."

It is not necessary in these proceedings that we should go to the length of deciding whether the view taken in *Muthu Kumaraswami Rowthan Minda Nayanar v. Kuppusami Aiyangar* (1) that the order only became effective when communicated to the subordinate Court was right or wrong. The circumstances of that case were sufficiently dissimilar to distinguish it from the present case. In that case, there was no communication of the order received at all when the sale took place. In this case, the Court had information, though of an unauthenticated character, and it was moved to stay the sale.

In *Bisseswari Chowdhurany v. Horro Sundar Mozumdar* (2), it was held that a sale was not void in law if held under circumstances in which there was nothing to fix the decree-holder with any know-

(6) [1906] 33 Cal. 927.

(7) [1879] 2 All. 686.

(8) [1861] 31 L. J. Ch. 429.

ledge that the sale was ordered to be postponed, the Court executing the decree knew nothing of it, there was a valid subsisting order for sale and the sale took place in pursuance of that order. It is implied that it would not be so if the Court and the decree-holder were aware of the order of postponement. As stated in Mr. Freeman's book at p. 125: "The plaintiff and the officer charged with the execution of a writ, on being informed of a stay of execution, whether resulting from an order of Court or from such a compliance with the law as to create such a stay, should discontinue their proceedings. If they persist in disregarding the stay and in acting under the execution, they are no longer entitled to its protection."

I am decidedly of opinion that the lower Court in the present instance acted injudiciously in not postponing the sale in order to ascertain the truth of the information brought to its notice that the High Court had directed the sale to be stopped, if any doubt was felt as to the authenticity of the telegram.

This was the view taken by the Calcutta High Court in *Hem Chandra Kar v. Mathur Santhal* (4), in a case where a subordinate Court refused to take any notice of a telegram from the petitioners' wakil in the High Court intimating the orders of the High Court. Similarly in *Sati Nath Siklar v. Ratnamani Naskar* (3), where a District Munsif refused to act on an affidavit accompanied by a letter written by a wakil of the High Court that the High Court had ordered an ad interim stay of proceedings for the ascertainment of mesne profits, it was held that the act of the Munsif amounted to a contempt of the authority of the High Court and that the arm of the High Court was long enough to reach any person who behaved in such a manner, and that the order was wholly without jurisdiction and should be cancelled.

In *Mian Jan v. Man Singh* (7) it was held that a sale held, notwithstanding an order of postponement was unlawful and invalid and should not have been confirmed seeing that it was wholly illegal. In *Nonid Singh v. Mt. Sohun Koer* (9) the sale was not treated as void, but was set aside by the Court treating the order for postponement as invalidating the

sale notification, in the publication of which there was consequently considered to be an irregularity. This course must be adopted here. There can be no doubt that a substantial rumour that the High Court had ordered that the sale should not proceed was calculated to affect the freedom with which intending bidders would be tempted to come forward and offer bids, if they possessed a knowledge that the whole proceedings were likely to be rendered infructuous in consequence of order already made.

In this case also, the auction lists printed in Civil Miscellaneous Appeal No. 211 of 1911 show that the plaintiff's wakil was the only bidder on the 20th and 21st July. I therefore think that there is ground to suppose that the judgment-debtors sustained substantial injury by the properties sold on these two days being knocked down to the plaintiff. The subordinate Court may also be treated as having acted without jurisdiction when it continued a sale which the High Court had ordered to be stopped. I will allow both these appeals to the extent of setting aside the sales held on 20th and 21st July, and I would order that the parties in these appeals to bear their respective costs in both Courts in consideration of the obstructive attitude of the judgment-debtors throughout the execution proceedings.

S.N./R.K.

Appeal allowed.

A. I. R. 1914 Madras 264

MILLER AND SADASIVA AIYAR, JJ.

Abdul Rahiman Nachiyal—Plaintiff—Appellant.

v.

Muhammad Nurdin Maracayer and another—Defendants—Respondents.

Civil Appeal No. 178 of 1910, Decided on 12th December 1913, from decree of Sub-Judge, Negapatam, in Original Suit No. 21 of 1909.

(a) **Pardanashin Lady—Doctrine of independent advice should be applied only where pardah system is rigorous.**

The doctrine of "independent advice" should be applied only where the pardah system is rigorous and even voluntary, deliberate acts of a pardanashin woman should not be lightly set aside: 7 I.C. 166, *Ref.* [P 266 C 1]

(b) **Mahomedan Law—Gift by wife to husband does not require strict proof of its being voluntary.**

Under Mahomedan law a gift by a wife to her husband does not require strict proof of its being of a voluntary nature. [P 266 C 1]

(9) 4 N. W. P. H. C. R. 135.

(c) **Mahomedan Law—Gift of undivided share capable of division in donor's possession is valid if possession is transferred to donee.**

A gift of an undivided share in property capable of division and in possession of the donor is valid if such possession is transferred to the donee, although a mere registered gift deed without transfer of such possession is not valid: 14 I.C. 993; 30 *Mad.* 519 and 30 *Mad.* 305, *Ref.* [P 266 C 1, 2]

T. Rangachariar and *S. Varadachariar*—for Appellant.

T. R. Ramachandra Aiyar, K. N. Aiyar and *T. R. Venkatarama Sastri*—for Respondents.

Sadasiva Aiyar, J.—This case is in a manner connected with the four appeals in which judgment was just now pronounced by me. The plaintiff in the suit out of which this appeal has arisen is defendant 1 in the Suit No. 15 of 1908, out of which those four appeals arose. The two defendants in this suit are defendant 13 and defendant 3 respectively in that other suit. I shall call the plaintiff and the defendants in these suits as defendant 1, defendant 13 and defendant 3. I shall also call Sultan Mohideen Nachiyal, defendant 13's wife, as defendant 2 in this judgment. Defendant 2 died during the pendency of that other Suit No. 15 of 1908 on 23rd March 1909. The present Suit No. 21 of 1909 has been brought by defendant 1 as one of the heirs of the said deceased defendant 2 for her 3/7th share of the properties left by defendant 2 (defendant 2's properties including defendant 2's share of the immovable properties in dispute in O. S. No. 15 of 1908). Defendant 1 also claims from defendant 13 a share of the value of certain jewels alleged to have been left by defendant 2 and of a sum of 14,333 dollars and 33 cents which defendant 1 alleges that her sister (defendant 2 Sultan Mohideen Nachiyal) realized by the sale of her (defendant 2's) properties in Penang and which amount is alleged by defendant 1 to be in the possession of defendant 13 (defendant 2's husband).

The learned Subordinate Judge held (a) that defendant 2 had gifted away all her immovable properties to her husband (defendant 13) by the registered sale deed of gift, Ex. I, dated 23rd April 1906, and hence defendant 1 could not claim any share in those properties as if they had been left by her sister (defendant 2) at the latter's death in 1909; (b) that defendant 2 did not realize 14,333 dollars and

33 cents by the sale of her properties in Penang, that those properties in Penang still exist in Penang as assets left by defendant 2, that a suit for defendant 1's share in those properties can only be brought in the Penang Courts and that defendant 1 is not entitled to recover a share in the value of those properties from defendant 13, as defendant 13 did not receive and is not in possession of the price of those properties as alleged in the defendant 1's plaint in this suit. On these and other subsidiary findings, defendant 1 was given a decree (a) for her share as defendant 2's heir in the house item 13, Sch. A, part 4, in a connected Suit No. 31 of 1909; and (b) for her share in the value of jewels and gold left by defendant 2. As regards the other immovable properties defendant 1 was given her share as her father's heir as well as her share in defendant 2's share of her father's properties by the decree in O. S. 15 of 1908 itself and hence the latter relief was not repeated in the decree in this suit.

The contentions of defendant 1 in this Appeal No. 178 of 1910 may be thus summarized:

(1) the gift deed, Ex. I, executed by defendant 2 to her husband, defendant 13, in 1906 conveyed no title as it was not intended to be operative and was merely colourable;

(2) it is invalid as it was brought about by the influence of the husband over his wife;

(3) the gift was invalid under the doctrine of Mushaa;

(4) it was inoperative under the Mahomedan law as defendant 13 did not get possession from the donor;

(5) the Subordinate Judge ought to have held that the sale price of the Penang properties was held by defendant 13 on behalf of his wife, defendant 2, and that the plaintiff was entitled to claim a share therein as one of the heirs of defendant 2.

The evidence (oral and documentary) was fully discussed before us on both sides. I see no reason to differ from the conclusions of the learned Subordinate Judge on the evidence that the gift deed, Ex. I, was executed by defendant 2 to her husband of her own free will and after having understood the nature of the transaction. The evidence of the respectable witnesses 3 and 4 examined by defendant

13 and the evidence of defendant 13 himself and of his sister's husband clearly support the above conclusion. Though defendant 2 was a gosha woman, she did not observe gosha to these witnesses. The pardah system is not so very strict among the Maracayers of Southern India as among the Mussalmans of the North, and the doctrine of "independent advice" should not be pushed to the same extent here as in Northern India. It is only where the pardah system is so rigorous as to dwarf the intellectual capacity and the worldly knowledge of its observers that stress should be laid on the doctrine of "independent advice" and in other cases, the only question is whether the executant had full knowledge of the contents of the document, that is, appreciated the meaning and effect of the deed and then deliberately executed it: see *Alikian Bibi v. Rambaran Shah* (1). Voluntary deliberate acts of even a pardanashin woman should not be lightly set aside. Of course in cases like those reported, *Kamini Dassee v. Krishna Chandra Mukerjee* (2), where a highly improvident gift is made to a priest by a pardanashin woman, strict proof of the voluntary and deliberate nature of the act would be required. But in the case of a gift by a wife to her husband which is favoured by the Mahomedan law, strictness should not be carried too far.

The evidence in this case further establishes that in the beginning of 1908, (more than a year before defendant 2's death), her husband, defendant 13, took possession of the properties gifted to him by the gift deed, Ex. I, by his wife and has been in possession since then. The doctrine of mushaa is not looked upon with favour by the Privy Council and by the Courts and is therefore brought within as narrow limits as possible. The latest case in Madras seems to be a case reported as *Fakir Nynar Muhamed Rowther v. Kandasawmi Kulathu Vandan* (3). In that case Abdur Rahim, J., says at p. 128: "It is now settled that under the Mahomedan law, as applied in India, a gift of an undivided share in property capable of division is not invalid." There has been some conflict of opinion as to whether, in the case of undivided property, possession by receipt of a share of the

profits by the donee is sufficient and also on the question whether where the donor herself is not in possession, a registered deed of gift by itself will convey title to the donee, but it seems to be now settled that if the donor was herself in possession of the undivided share, and transfers such possession to the donee, the gift is valid, though a mere registered gift deed without transfer of such possession is not valid: see *Vahazulla Sahib v. Boayapati Nagayya* (4), *Kandath Veetil Bama v. Mussaliam Veetil Pakru Kutti* (5), *Alabi Koya v. Mussa Koya* (6), *Mahomed v. Bai Cooverbai* (7), the Privy Council case of *Ibrahim Goolam Ariff v. Saiboo* (8); *Ebrahimhai v. Fulbai* (9), *Jahel-un-nessa Bibi v. Nijib-ul-Islam* (10), *Abdul Aziz v. Fateh Mahomed Haji* (11), *Enayat Khan v. Abdul Rahim* (12) and *Rahimjan Bibi v. Imanian Bibi* (13). In the present case such possession as the donor had was transferred to the donee before her death and the gift is therefore valid.

Coming to the question of the properties in Penang, we agree with the lower Court that Ex. 9 clearly shows that defendant 2's share in the immovable properties in Penang has not been really sold for any price realized by defendant 2 or for any price received by defendant 13 for her, and that the nine sale deeds, which a Penang solicitor made the three husbands of the three sisters (defendants 1, 2, and 3) execute among themselves were not intended as transactions by which the three sisters became individually entitled to or got possession of the value in cash of their respective shares. In the result the appeal is dismissed with the costs of defendant 13 (that is, defendant 1 in the Suit No. 21 of 1909).

Miller, J.—I agree with my learned brother's conclusion and have nothing to add to his judgment.

S.N./R.K.

Appeal dismissed.

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(4) [1907] 30 Mad. 519=17 M.L.J. 562.

(5) [1907] 30 Mad. 305=2 M.L.T. 180.

(6) [1901] 24 Mad. 513=11 M.L.J. 227.

(7) [1904] 6 Bom.L.R. 1043.

(8) [1908] 35 Cal. 1=34 I.A. 167=11 C.W.N. 973 (P.C.).

(9) [1902] 26 Bom. 577=4 Bom.L.R. 180.

(10) [1910] 8 I.C. 38.

(11) [1911] 9 I.C. 635=38 Cal. 518.

(12) [1911] 11 I.C. 979.

(13) [1912] 15 I.C. 698.

(1) [1910] 7 I.C. 166.

(2) [1912] 16 I.C. 110=39 Cal. 933.

(3) [1912] 14 I.C. 993=35 Mad. 120.

A. I. R. 1914 Madras 267**Full Bench**

WHITE, C. J., AND SANKARAN NAIR
AND OLDFIELD, JJ.

on reference from

SADASIVA AIYAR AND TYABJI, JJ.
Kochu Rabia—Plaintiff—Appellant.

v.

Abdur Rahman and others—Defendants
—Respondents.

Second Appeal No. 1414 of 1912, Decided on 10th December 1913, from decree of Dist. Judge, South Malabar, in Appeal Suit No. 1115 of 1910.

Malabar Compensation for Tenants' Improvements Act (1900), Ss. 5, 6 and 19—Contract prior to 1886 regulating rate of compensation for improvements not in accordance with Ss. 5, 6 is not binding on tenant if such contract is less favourable than Ss. 5, 6 and can be repudiated.

A contract, which is made prior to 1st January 1886, and which regulates the rates of compensation claimable by the tenant for improvements or provides for methods of fixing the amount of compensation due to him (such rates or methods not being in accordance with the provisions in Ss. 5 and 6, Malabar Compensation for Tenants' Improvements Act), but which does not expressly refer to the tenant's right to make improvements is not binding on him if such a contract is less favourable to him than Ss. 5 and 6 of the Act, and the tenant is entitled to repudiate the contract and to claim compensation according to the provisions of the Act.

Section 19 of the Act does not deprive him of such a right: 32 *Mad.* 1, *Cons.*

[P 269 C 1]

K. Govinda Marar—for Appellants.

K. P. M. Menon—for Respondents.

Order of Reference.—The question involved in this appeal is whether S. 19, Malabar Compensation for Tenants' Improvements Act (Mad. Act 1 of 1900) affects the validity of an agreement which was entered into prior to 1st January 1886 and by which agreement the parties agreed that compensation for improvements should be paid to the tenant on a certain basis or method of calculation. The District Judge, differing from the Subordinate Judge, held that such an agreement though entered into before 1st January 1886, was not binding on the tenant. The question turns upon the true construction of S. 19 of the Act which provides that "nothing in any contract made after 1st January 1886 shall take away or limit the right of a tenant to make improvements and to claim compensation for them in accordance with the provisions of this Act." The District Judge followed *Koshikot*

Pudiya Kovilagath Sreemanavikraman v. Chundayil Modattul Ananta Patter (1), a decision of Benson, J., and Krishna-swami Aiyar, J. That decision has been followed by Benson, J., and Sundara Aiyar, J., in *Neechooli Parie Amma v. Moothoran* (2).

The reasoning of these two decisions (if we have understood it aright) is that S. 19 contemplates only such agreements as limit the tenant's right to make improvements and to claim compensation therefor: that the section does not deal with a contract merely "regulating the rates of compensation": see *Kozhikot Pudiya Kovilagath Sreemanavikraman v. Chundayil Modattul Ananta Patter* (1) or "limiting the amount of compensation to which the tenant is entitled": see *Neechooli Parie Amma v. Mootharan* (2) in respect of improvements made by him and that the tenant may claim compensation either according to such a contract or under Ss. 5 and 6 of the Act, whichever is more favourable to him: *Koshikot Sreemanavikraman v. Chundayil Modattul Ananta Patter* (1)].

It has been argued before us that these two decisions are inconsistent with the Full Bench decision of *Randupurayil Kunhisore v. Neroth Kunhi Kannan* (3), in which case the question was whether improvements made after 1887 were to be governed by a deed of 1881 as regards the rate of compensation due to the tenant, and the Court held (1) that the validity of contracts made prior to 1st January 1886 is not affected by S. 19, (whether the improvements were made before or after 7th January 1887), and (2) that in the case of contracts made prior to 1st January 1886 the rate of compensation is governed by the terms of the contract.

With the greatest respect to the learned Judges who decided the cases of *Koshikot Pudiya Kovilagath Sreemanavikraman v. Chundayil Modattul Ananta Patter* (1) and *Neechooli Parie Amma v. Moothuran* (2), we have very serious doubt whether the decisions are in accordance with the true construction of S. 19 or with the decision of the Full Bench in *Randupurayil Kunhisore v. Neroth Kunhi Kannan* (3).

(1) [1910] 6 I. C. 887—32 *Mad.* 1.

(2) [1911] 12 I. C. 765—32 *Mad.* 1.

(3) [1909] 1 I. C. 207—32 *Mad.* 1.

Considering in the first place the language of S. 19 itself, it seems somewhat hypercritical to hold that the words "the right of the tenant to make improvements and to claim compensation" do not include the right of the tenant to claim compensation under an agreement which does not expressly refer to his power to make improvements. It seems much more in accordance with the ordinary interpretation of words to construe the section as referring to contracts dealing with the rights of a tenant both to make improvements and to claim compensation, as well as with contracts having direct reference only to the claiming of compensation and being silent as to the right to make improvements, so that three classes of contracts dealt with in the section are contracts to make improvements, contract to claim compensation for improvements made, and contracts to do both; there seems no reason to confine the applicability of the section to contracts which expressly mention both the right to make improvements and to claim compensation for them. It would seem that a right to claim compensation for improvements made implies a right to make the improvements for which compensation is to be claimed. In order that the Court may be justified in interpreting the section as rigidly as is done in the two decisions above referred to, it must be established that there is some very material distinction between contracts of the two kinds, namely (1), a contract which, as regards the rate of compensation to be allowed to the tenant, or as regards the method in which his improvements ought to be valued, is less or more favourable to him than the rates and methods provided for in the Act; and (2) a contract which restricts or enlarges the right of the tenant to make improvements and to claim compensation for such improvements.

But it seems to us that in the majority of cases there would be great difficulty in distinguishing between the two classes of contracts and in determining whether a particular contract would fall under the one head or the other. This difficulty had to be dealt with in *Neechooli Parie Amma v. Moothuran* (2) and can be illustrated by the facts in both the other cases which have been referred to above. If no substantial distinction can be

generally drawn between the two classes of contracts then the facts on which the Full Bench decision in *Randupurayil Kunhisore v. Neroth Kunhi Kannan* (3) was arrived at must also be taken to be indistinguishable from the facts in the two later cases above cited in respect of the applicability of the provisions of S. 19, and it follows that the two later cases are inconsistent with the Full Bench decision.

The facts of the Full Bench case are set out in pp. 1 and 2 of the report: *Randupurayil Kunhisore v. Neroth Kunhi Kannan* (3), and the question referred to the Full Bench was worded quite generally thus: "In the case of a contract made prior to 1st January 1886 is the rate of compensation which a tenant is entitled to receive governed by the terms of the contract or by the provisions of the Malabar Compensation for Tenants' Improvements Act of 1887 and 1900?" The answer to the reference is found in p. 3 of the same:—"Our answer to the question which has been referred to us is that in the case of a contract made prior to 1st January 1886, the rate of compensation is governed by the terms of the contract."

The observations in *Koshikot Pudiya Kovilagath Sreemanavikraman v. Chundayil Mudattul Ananta Pattar* (1) that the tenant is entitled to fall back upon S. 5 of the Act, if that is more favourable to him as also the decision in *Neechooli Parie Amma v. Moothuran* (2) seem to us to be directly in conflict with the answer of the Full Bench cited above. We might add that the observations on the question in dispute in *Koshikot Pudiya Kovilagath Sreemanavikraman v. Chundayil Modatta Ananta Pattar* (1) are obiter, as the case was really decided on the point that an agreement by the tenant "to accept compensation for improvements according to local custom" is not a special contract within the meaning of S. 19.

We feel, however, that as there are two reported decisions in favour of the view which, we find ourselves, as at present advised, unable to accept, it is desirable that the following questions should be referred to a Full Bench of this Court.

1. "Whether a contract, which is made prior to 1st January 1886 and which regulates the rates of compensation claimable by the tenant for improvements

or provides for methods of fixing the amount of compensation due to him (such rates or methods not being in accordance with the provisions in Ss. 5 and 6 of the said Malabar Compensation for Tenants' Improvements Act), but which does not expressly refer to the tenant's right to make improvements, is not binding on him if such a contract is less favourable to him than Ss. 5 and 6 of the Act and whether the tenant is entitled to repudiate the contract and to claim compensation according to the provisions of the Act, and whether S. 19 of the Act affects such contracts."

2. "Whether the cases of *Koshikot Pudiya Korilagath Sreemanvaikraman v. Chundayil Modattul Ananta Pattar* (1) and *Neechooli Parie Amma v. Moothuran* (2) have correctly interpreted the Full Bench decision of *Randupurayil Kunhisore v. Neroth Kunhi Kannan* (3).

(This second appeal coming on for hearing before the Full Bench, upon perusing the grounds of appeal, the judgments and decrees of the lower appellate Court and the Court of first instance and the material papers in the suit and the said order of reference to the Full bench and upon hearing the arguments of Mr. K. Govinda Marar, vakil for the appellant and of Mr. K. P. M. Menon counsel for the respondents 1 to 9, the Court expressed the following :)

Opinion.—We are of opinion that the contract mentioned in the first question which has been referred to us is not binding on the tenant if it is less favourable to him than Ss. 5 and 6 of the Act, and that the tenant is entitled to claim compensation according to the provisions of the Act.

As regards the second question, we are of opinion that having regard to the question which the Court had to consider in *Randupurayil Kunhisore v. Neroth Kunhi Kannan* (3) there is no inconsistency between the judgment in that case and the judgments in *Koshikot Pudiya Korilagath Sreemanvaikraman v. Chundayil Madattul Ananta Pattar* (1) and *Neechooli Parie Amma v. Moothuran* (2). We are not prepared to say that the two last mentioned cases were not rightly decided.

Judgment.—There are nine grounds in the memorandum of second appeal. Ground 9 is given up. The first ground

of the second appeal memorandum is the usual general ground.

The Full Bench having decided that the plaintiff is not entitled to rely on the contract between the parties, grounds Nos. 2, 3 and 4 in the memorandum of second appeal fail.

As regards the Grounds 5 and 6 relating to damages for waste alleged to have been committed by defendant 11 by cutting down 100 living cocoanut trees and using the timber for building his house, the lower appellate Court has disbelieved the evidence of the plaintiff's witnesses on that point, and we cannot interfere with a finding of fact in second appeal. The plaintiff did not claim the value of the timber of the trees which died naturally, that is, she did not put forward in her plaint a right to hold defendant 11 accountable for the value of such timber.

Ground 7 and 8 relate to the order as to costs passed by the lower appellate Court. Seeing that the mortgagee succeeded on the question of damages and on the question of the right basis for valuation of improvements, we are not prepared to interfere with the lower appellant Court's discretion in the exercise of which it ordered the parties to bear their respective costs in the first Court, though it might more properly have ordered proportionate costs, seeing that defendant 11 denied the plaintiff's title to redeem.

The second appeal is dismissed, but as it was necessitated mainly on account of a rather difficult legal question as to the proper basis for the award of compensation for improvements, we make no order as to costs in this second appeal. The time for redemption is extended by three months from this date.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 269

SADASIVA AIYAR, J.

In re *Gunda Ganji Reddi*—Accused—Petitioner.

Criminal Revn. No. 42 of 1914 and Criminal Revn. Petn. No. 38 of 1914, Decided on 22nd January 1914, from judgment of First Class Sub-divisional Magistrate, Jammalamadugu, in Criminal Appeal No. 52 of 1913.

Criminal P. C. (5 of 1898), S. 106—Conviction by Second Class Magistrate—On ap.

peal Court can demand security for keeping peace.

An appellate Court on hearing an appeal from a conviction by a second class Magistrate can also direct the accused to execute a bond giving security to keep the peace: 30 Mad. 48, Diss. from; 1 Cr. L. R. 172, Foll. [P 270 C 1]

K. Subbareddi—for Petitioner.

Order.—I am asked by the petitioner's learned counsel (Mr. Subbareddi) to follow *Paramasiva Pillai v. Emperor* (1) and to set aside so much of the order of the appellate Court as directs the petitioner to execute a bond and to give security for keeping the peace.

I am unable to follow that case as it has been overruled by the Full Bench case reported as *Selai Gounden v. Emperor* (2).

There is no ground for interference with the lower Court's judgment confirming the petitioner's conviction. As however the petitioner has been bound over under S. 106, Criminal P. C., and as no serious injuries have been caused to the complainant, I shall reduce the sentence to four months' rigorous imprisonment and dismiss the petition in other respects.

S.N./R.K. *Petition dismissed.*

(1) [1907] 30 Mad. 48=1 M. L. T. 403=5 Cr. L. J. 88.

(2) 1 Criminal Law Reporter 172.

A. I. R. 1914 Madras 270

SADASIVA AIYAR, J.

Kailasa Aiyar and another — Petitioners.

v.

Arunachala Chettiar and another — Respondents.

Civil Revn. Petns. Nos. 304 and 305 of 1912, Decided on 10th February 1914, from orders of Sub-Judge, Kumbakonam, D/- 23rd November 1911.

(a) Civil P. C. (5 of 1908), O. 22, Rr. 3 and 4—Right to set aside order of arrest abates on death of person against whom order is made.

A right to make an application to set aside an order of arrest abates on the death of the person against whom the order is made, and does not survive to his representatives.

[P 270 C 2]

(b) Civil P. C. (5 of 1908), S. 55 (4)—Liability of surety on bond executed to produce judgment-debtor continues till judgment-debtor appears.

The liability of a surety on bond executed by him to produce a judgment-debtor under Cl. 4, S. 55, continues not only till the judgment-debtor applies to be declared an insolvent but till he appears.

[P 271 C 2]

(c) Civil P. C., O. 47, R. 4 (2) and R. 8—Review petition finally rejected after hear-

ing petition and opposite party—Order of rejection is not passed on rehearing of original case.

Where a review petition was not admitted and was finally rejected after hearing the petitioner and the opposite party, the order of rejection is not passed on the rehearing of the original case.

[P 271 C 1]

(d) Civil P. C., S. 55—Surety appearing without service cannot plead want of notice.

Where a notice is ordered to be served on a surety and he appears without such service, he cannot plead want of notice.

[P 271 C 1]

S. T. Srinivasa Gopalachariar—for Petitioners.

G. S. Ramachandra Aiyar—for Respondents.

Judgment. — Civil Revision Petition No. 305 of 1912 was filed by one Panchu Aiyar against the order of the Subordinate Judge of Kumbakonam refusing to review an order of arrest passed by him in execution proceedings. Panchu Aiyar, against whom the order of arrest was made, died after this Revision Petition No. 305 was filed. I think the nature of the order passed by the Subordinate Judge and the nature of the order sought to be revised make it clear that the Revision Petition No. 305 abated on the death of the petitioner and the right to file the petition did not survive to his legal representative. I therefore dismiss Civil Revision Petition No. 305 of 1912, as it has abated, without costs.

As regards Civil Revision Petition No. 304 of 1912, the petitioner stood as surety for one Senapathy Padayachi who was the judgment-debtor in Small Cause No. 1651 of 1909 on the file of the Kumbakonam Subordinate Judge's Court. The surety bond was executed in the terms of S. 55, Cl. (4), Civil P. C.; that is, the surety agreed that the judgment-debtor Senapathy Padayachi will within one month apply to be declared insolvent and that he "will appear, when called upon in any proceeding upon the insolvency application or upon the decree in execution of which he was arrested," and that if the judgment-debtor fails "so to apply and to appear" the security may be realized. Senapathy Padayachi seems to have put in an imperfect application to be declared insolvent, which application was ordered to be returned to him for amendment, but which he never tried to obtain a return of for such amendment. The application was therefore ultimately dismissed. The decree-holder then put in an Execution

Application No. 1497 of 1911 praying that the sureties might be directed to produce the judgment-debtor and that in default of their so producing the sureties might be arrested. The judgment-debtor was not produced and did not appear and the sureties (of whom petitioner was one) were ordered to be arrested. Then the petitioner put in a review petition against the order directing his arrest. That review petition, as far as I can see from the records, was never admitted and it was finally rejected after hearing the decree-holder and the petitioner (surety). I might here state that parties and even some of the lower Courts do not always keep in view the distinction between an order admitting an application for review under O. 47, R. 4, Cl. (2), and an order passed on re-hearing under O. 47, R. 8. Whether such an order on re-hearing is passed at once after the admission of the review petition under Cl. (2) or on an adjourned date, I am satisfied in this case the Subordinate Judge was right in rejecting the application for review under O. 47, R. 4, Cl. (1), and that his order, which is now sought to be revised, was not an order passed on the re-hearing of the Original Execution Application No. 1497 of 1911. His order rejecting the review is sought to be revised on the contention that there were two good grounds for the admission of the review and that the Subordinate Judge ought to have accepted the review petition on those two grounds. One of the grounds alleged is that the order for arrest was passed without the notice calling upon the surety to produce the judgment-debtor having been duly served upon the surety. This contention does not apply in this case, as whether he was served or not, he seems to have appeared and to have been heard before the order of arrest was passed.

Another contention strongly pressed is that provided some insolvency petition has been filed by the judgment-debtor within the one month granted to him, the surety becomes absolutely discharged from the surety bond. That might have been the law under the old S. 386 which was rather awkwardly worded. While it directed the surety to give security for the judgment-debtor's applying within one month to be declared insolvent and also for his appearance, the latter part of that section says that if the judgment-

debtor "failed so to apply," the Court will direct the security to be realized, ignoring the fact that the security bond was given both "for his appearance and for his filing the petition;" owing to this bad wording of the old S. 336, the Courts held themselves obliged to decide that the surety was discharged as soon as the insolvency petition was put in, whether the judgment-debtor failed to appear or not after so applying to be declared insolvent. The matter, in my opinion, has been set at rest and made clear by the addition of the words "in any proceeding upon the application or upon the decree in execution of which he was arrested" after the words "when called upon" and especially by the addition of the words "and to appear" after the words "so to apply" of the old section. Woodroffe and Ameer Ali in their notes to the present S. 55 state that "under the present section apparently the surety would not be discharged unless the judgment-debtor had appeared also." I also entirely agree (if I may say so with respect) in the decision of Benson, J., and Sundara Aiyar, J., in Letters Patent Appeals Nos. 82 and 83 of 1910, that even under the old S. 336, if one of the two conditions mentioned in the security bond is broken, the surety is liable under his security bond, though that decisions might run counter to the previous decision of the Bombay, Calcutta and Madras High Courts passed on the wording of the old S. 336.

In the result I hold that there are no grounds to revise the order of the Subordinate Judge rejecting the application for review filed in his Court. I accordingly dismiss the revision petition with costs.

S.N./R.K.

Revision dismissed.

A. I. R. 1914 Madras 271

SPENCER, J.

Sambasiva Aiyar and another—Petitioners.

v.

Ganapathy Aiyar and another—Respondents.

Civil Revn. Petn. No. 889 of 1913, Decided on 9th February 1914, from order of Sub-Judge, Kumbakonam, in I. A. No. 800 of 1913, D/- 25th October 1913.

(a) Civil P. C. (1908), S. 115—*Legality of interlocutory order questionable by appeal—It is not a fit case for interference unless question of jurisdiction is involved.*

Where the legality of an interlocutory order can be questioned by way of appeal, it is not a fit case for interference by the High Court under S. 115, unless there has been an improper exercise of jurisdiction by the lower Court or an improper refusal to exercise the jurisdiction vested in it: 31 *Mad.* 62; 12 *I.C.* 719; 4 *I.C.* 509; 17 *I.C.* 65 and *A. I. R.* 1914 *Mad.* 17, *Foll.*

[P 272 C 2]

(b) Civil P. C. (5 of 1908), O. 6, R. 17—Partnership suit—Transactions of partnership must be considered by Courts to avoid multiplicity of proceedings—Necessary amendments for such purpose may be allowed.

In a partnership suit a Court should take into account all the transactions between the partners to avoid multiplication of proceedings and all such amendments should be allowed as may be necessary to determine the real questions in controversy: 13 *I. C.* 268, *Foll.* [P 272 C 1]

C. V. Anantakrishna Aiyar and A. S. Venku Aiyar—for Petitioners.

T. Rangachariar and T. Arumanatham Pillai—for Respondents.

Judgment.—I cannot agree with the Subordinate Judge that the effect of allowing the amendment would have been to settle the affairs of two mills instead of one and that the amendment prayed for was substantially such as to extend the scope of the suit.

Paragraph 17 (e) of the plaint contained a prayer for taking the accounts of the Nammeli Mill as well as the accounts of the Mannargudi Mill and the taking of accounts is a form of relief.

Therefore the words in para. 16 of the plaint saying that no relief was prayed, for in respect of the Nammeli Mill were clearly erroneous and contradictory to what appeared later. Probably the explanation for this statement lies in the fact that as stated elsewhere in the plaint, the Nammeli business had ended in a loss up to the date when the plaintiffs parted with their rights in it to defendant 2. They were however liable for the debts of this business and they claimed a right to outstandings prior to 25th November; and it was right and proper in a partnership suit that a Court should take into account all the transactions between the partners with a view to avoid multiplication of proceedings and to finally determine all the matters regarding which the partners were at issue. It is also just that all such amendments should be made as may be necessary for the purpose of determining the real questions in controversy between the parties: *Sarugan Chetty v. Krishna Aiyangar* (1).

(1) [1912] 13 *I. C.* 268=36 *Mad.* 378.

Recently however this Court has decided not to interfere under S. 115, Civil P. C., in revision with orders however incorrect, refusing to allow amendment of plaints: *Penumarthy Vasantarayadu v. Reddi Subbamma* (2), and although the learned Judge who admitted this petition permitted the party to add S. 15, Charter Act, under which this Court has exercised powers in respect of interlocutory orders passed by Subordinate Courts in many instances, the principle on which interference has been justified in such cases has always been that there has been an improper exercise of jurisdiction by the Subordinate Court or an improper refusal to exercise the jurisdiction vested in it: see *Somasundaram Chettiar v. Manick Vasaka Desika Gnana Sammanda Pandara Sannadi* (3) *Mankolam Vasudevan Nambudri v. Manakolam Sankaran Nambudri* (4), *Sree Krishna Dass v. Chandook Chand* (5) and *Kamal Kutty v. Udayavarma Raja Valiah Rajah of Chirakal* (6). In my opinion no question of jurisdiction arises in this case and the aggrieved party has another remedy by way of appeal against the final decree that may be passed in the suit. I must therefore decline to interfere and I dismiss the petition but under the circumstances without costs.

S.N./R.K.

Petition dismissed.

(2) *A. I. R.* 1914 *Mad.* 17=22 *I. C.* 39.

(3) [1908] 31 *Mad.* 62=3 *M. L. T.* 246.

(4) [1911] 12 *I. C.* 719.

(5) [1909] 4 *I. C.* 509=32 *Mad.* 334.

(6) [1912] 17 *I. C.* 65=86 *Mad.* 275=13 *Cr. L. J.* 753.

A. I. R. 1914 Madras 272

SADASIVA AIYAR AND SPENCER, JJ.

Annamalai Velan and another—Plaintiffs—Appellants.

v.

Murugappa Velan and others—Defendants—Respondants.

Second Appeal No. 1355 of 1909, Decided on 27th January 1914 from decree of Dist. Judge, Tanjore, D/- 21st April 1909, in Appeal Suit No. 226 of 1909.

Madras Rent Recovery Act (8 of 1865). S. 39—Suit to set aside rent sale—Person at whose instance sale was brought about is not necessary party—Decree-holder is necessary party—Civil P. C. (5 of 1908), O. 1, R. 3.

In a suit to set aside a rent sale under S. 39, Madras Rent Recovery Act the person at whose instance the sale was brought about is not a necessary party. A decree-holder is however a necessary party to a sale held in

execution proceedings: 9 Cal. 271, Dist.; 25 Cal. 833, Ref.; 28 Bom 11, Foll. [P 273 C 2; 274 C 1]

T. Natesa Aiyar — for Appellants.

T. R. Venkatarama Sastri — for Respondents.

Judgment. — The plaintiffs are the appellants in this second appeal. The suit was brought for the cancellation of a rent sale held at the instance of a receiver who represented the melvaramdars of certain lands. The receiver as such melvaramadar became the landlord of the plaintiffs and of defendant 1 who are brothers. The rent sale was held on the footing that defendant 1 was the tenant owning the kudivaram right and after notice to him under S. 39, Rent Recovery Act 8 of 1865 (now superseded). The plaintiffs' contention is that defendant 1 did not own the kudiravam right on the date of notice under S. 39, that in a partition effected between the plaintiffs and the defendant about 1890, the plaintiff land and trees fell to the plaintiffs' share; that the proceedings connected with that rent sale cannot bind the plaintiffs as they were not made parties to the said sale proceedings and they were not given notice under S. 39 (Rent Recovery Act) and the notice given to defendant 1 will not bind them, and that "there was no muchilika, attachment or sale proclamation with regard to plaintiff lands and trees." In the suit they joined about 80 persons as defendants, defendants 3 to 80 being the melvaramdars of the village in which the plaintiff lands are situated. One of the defences raised by these melvaramdars was that as a receiver had been appointed in Original Suit No. 8 of 1901 on the file of the Subordinate Judge's Court, Tanjore, to be in possession of the entire melvaram rights of all the melvaramdars till the disposal of that suit and as it was that receiver who gave the notice under S. 39, Rent Recovery Act and brought the plaintiff properties to the sale in auction in which defendant 2 purchased them, the said receiver was a necessary party defendant to the suit and the suit was bad for non-joinder of that necessary party.

The District Munsif overruled this contention on the ground that the receiver had no personal interest in the subject-matter of the present suit and the melvaramdars (defendants 3 to 80) and the purchaser defendant 2, were the persons directly interested. On appeal the Dis-

trict Court of Tanjore held that the receiver was a necessary party. Its reasons are "that a receiver's acts are not necessarily or probably for the benefit of each of the parties to the proceedings, that he is not the representative of any or all of them but of the Court and of the estate the ownership of which is uncertain; that the object of his appointment is to provide a provisional representative of the estate who can do legal acts without the question of title in dispute arising and this object would be frustrated if a plaintiff would go behind him and implead the contesting melvaramdars themselves." The District Court therefore remanded the suit to the District Munsif's Court for retrial after giving the plaintiffs an opportunity to make the receiver a supplemental defendant. When the receiver was accordingly made a supplemental defendant more than one year had elapsed from the date of the rent sale and the District Munsif dismissed the whole suit as barred by limitation as the necessary party the defendant receiver was impleaded only after the period of one year prescribed by Art. 12 (b), Lim. Act. This second decision of the District Munsif's Court dismissing the suit as barred by limitation was confirmed by the District Judge on appeal. In second appeal before us various contentions have been raised, but we think it is necessary to set out only grounds 6 and 8 of the appeal memorandum which are as follows: "6. The receiver being an unnecessary party, the lower appellate Court has erred in directing the plaintiff to add him as a party and then to dismiss the whole suit on the ground of limitation."

"8. The lower appellate Court has erred in remanding the case. It should have disposed of the case on the merits."

We are of opinion that none of the melvaramdars nor the receiver is a necessary party to this suit to set aside a rent sale and that it is only defendant 2, the purchaser at the rent sale, who is a necessary party defendant. A landlord who, under the Rent Recovery Act 8 of 1865, takes steps by the issue of notice under S. 39 and otherwise to bring the tenant's property to sale is not a party to the sale. Nor is such a sale held in execution of any decree to which he is a party. He has only to send a duplicate of the notice under S. 39 to the Collector

with an endorsement stating the date of service of the notice and the mode of service effected and the Collector proceeds to sell the property under Ss. 40, 18, 33 and 35, Rent Recovery Act (S. 40 making the other sections which directly relate to the mode of sale of moveable properties, also apply to the mode of sale of immovable properties). There is no provision in the Act indicating that the landlord who brings about an illegal or irregular sale is a necessary party to a suit brought in this civil Court to have the sale set aside. Under O. 1, R. 3, Civil P. C., the proper persons to be joined as defendants in a suit are those "against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative." When the sale of the kudivaram right in a land takes place under the auspices of the Collector under the Rent Recovery Act and the tenant (the owner of the kudivaram right) brings a suit to set aside that sale, the relief (the granting of which establishes or re-establishes the title of the plaintiff when so granted), will affect only the purchaser at the rent sale and no other person, and hence the right to such relief exists only against the rent auction-purchaser. In the case of a sale under the Civil Procedure Code in execution of a decree, the setting aside of the sale will affect the decree-holder also under O. 21, R. 93; if the sale is set aside, he cannot take or retain the purchase-money towards his decree amount and he will be further delayed in obtaining the fruits of his decree. Hence to the proceedings under O. 21, R. 90, he has been held to be a necessary party. Sales under the Rent Recovery Act however stand on a different footing.

In *Bal Mokoond Lall v. Jirjudhun Roy* (1) the question was considered whether in a suit to set aside even a revenue sale, the Collector was a necessary party under the Bengal Act 11 of 1859. We shall quote the following paragraph of Mitter J's. judgment (which on this point was concurred in fully by Norris, J.): "Then a question was raised to the effect that the plaintiff was bound to make the Secretary of State a party to this suit, and in support of the

appellant's contention upon this point our attention was drawn to the provisions of S. 35, Act 11 of 1859. That section says: "In the event of a sale being annulled by a final decree of a Court of Justice, and the former proprietor being restored to possession, the purchase-money shall be refunded to the purchaser by Government, together with the interest at the highest rate of the current public securities." Comparing this section with the analogous section in Regn. 8 of 1819, viz, S. 14, which is to the effect that "the purchaser shall be made a party in such suits and upon decree passing for reversal of the sale, the Court shall be careful to indemnify him against all loss, at the charge of the zamindar or person at whose suit the sale may have been made," it appears to me that this S. 35 by itself does not afford any ground for the contention that the Secretary of State was a necessary party to the suit.

"It merely provides that in the event of a sale being annulled by a final decree of a Court of Justice and the former proprietor being restored to possession the purchase-money shall be refunded to the purchaser by Government together with interest at the highest rate of the current public securities. But although it appears to me to be clear that S. 35 does not afford any support to the contention raised before us yet it is by no means clear that the Government was not interested in the question raised in the suit because if the sale be set aside the Collector will have to proceed de novo in the matter for the realization of the arrears of revenue. The Government therefore have such interest in the suit as would on their application entitle them to be made a party to it." Thus it was held that the Secretary of State is not a necessary party to the suit even if the Government would have to refund the purchase-money if the sale was set aside. But as the Government was interested in the result of the suit by reason of the provision that the Government should refund the purchase-money in the event of the sale being set aside the Government might on their application be made a party to the suit. This view of the position of a person who brings about and conducts a revenue sale under the Bengal Act applies, it seems to us, a

(1) [1883] 9 Cal. 271=11 C. L. R. 463.

fortiori to the case of the person who brings about and conducts a rent sale under Act 8 of 1865. In *Balkishen Das v. Simpson* (2), their Lordships of the Privy Council had to deal with an objection raised by the respondent that the Secretary of State for India had not been joined as a party to the appeal before them in a case which related to the setting aside of a revenue sale. Their Lordships say that "In their opinion the position of the Indian Secretary in cases like the present is correctly explained by Mitter, J., in *Bal Mokoond Lall v. Jirjudhun Roy* (1)." It is clear to us that but for the provision in S. 315, Civil P. C. (O. 21, R. 93) even the decree-holder will not be a necessary party to an application under O. 21, R. 90, or O. 21, R. 91 to set aside a Court auction sale and because the general rule of caveat emptor was relaxed in favour of a Court auction purchaser in O. 21, R. 91, and O. 21, R. 93, the decree-holder is a necessary party in applications to set aside Court auction sales.

The order of remand therefore by the District Court cannot be supported but it need not be set aside at this stage. Neither the melvaramdars nor the receiver being necessary parties to the present suit the addition of the receiver merely for the purpose of safeguarding their interest (if any) will not make the provisions of S. 22, Lim. Act, applicable: see *Gurvayya v. Dattatraya Anant* (3). And the suit brought within the limitation period (assuming as against the plaintiffs the suit has to be brought within one year after the sale) against the only necessary party defendant (namely the purchaser defendant 2) is not barred by limitation. We therefore set aside the decisions of the lower Courts dismissing the suit as barred and remand the suit to the Court of first instance to decide the case on issues 2 to 6 and any other questions which might arise other than those dealt with by us, that is, other than the question of limitation and the question of the receiver being a necessary party. None of the party defendants need however be struck off the record. The District Munsif will in disposing of the case de novo give findings on the merits of the case also

(unless the suit is dismissed for default or is withdrawn or is compromised) in order to prevent further remands in this suit which is nearly nine years older already. All parties shall be at liberty to adduce evidence. Costs hitherto will abide the result of the fresh decision of the District Munsif.

S.N./R.K.

Case remanded.

A. I. R. 1914 Madras 275

SANKARAN NAIR AND AYLING, JJ.

Subba Reddiar and others — Plaintiff and Defendants 2 and 3 — Appellants.

v.

Visvanatha Reddiar and another — Defendant and Plaintiff — Respondents.

Second Appeals Nos. 701 and 779 of 1912, Decided on 5th February 1914, from decree of Sub-Judge, Mayavaram, in Appeal Suits No. 904 and 953 of 1910.

Specific Relief Act, S. 22—Vendee not presenting sale deed for registration—Registration time expired—Vendee was held not entitled to decree that vendor should execute another document.

Where a vendee did not present the sale deed for registration in view of the vendor's inconveniences and the time for registration expired, it was held that the vendee was not entitled to a decree that the vendor should execute and register another similar document. [P 277 C 1]

R. Kuppusami Aiyer—for Appellants.

S. Muthiah Mudaliar—for Respondents.

Judgment.—This is a suit for specific performance of an agreement to sell certain lands made by defendant 1 in the plaintiff's favour. Defendant 2 is a subsequent purchaser from defendant 1. Defendant 1 executed a sale deed in the plaintiff's favour on 29th June 1907. According to the plaintiff, he asked defendant 1 repeatedly to register the sale deed, but the latter made excuses at first on the ground that it was inconvenient to him to do so immediately in consequence of an attack of small-pox in his house and allowed the time for presenting document for registration to elapse, and that he subsequently promised to execute a fresh sale deed, but was persuaded by others not to do so. The sale deed to defendant 2 was executed on 17th June 1908. The District Munsif found the plaintiff's allegations proved, and gave the plaintiff a decree for specific performance directing defendant 1 to execute a fresh sale deed. On appeal the Subordinate Judge reversed the District

(2) [1898] 25 Cal. 833=25 I. A. 151=2 C. W. N. 513 (P. C.).

(3) [1904] 28 Bom. 11=5 Bo.n. L. R. 618.

Munsif's decree on the ground that defendant 1 having already executed one sale deed, Ex. B, it was the plaintiff's duty to get it registered and, if he could not do so, to institute a suit for its registration. He found that defendant 1 did not agree to execute a fresh sale deed; but he has not recorded a finding on the question whether the non-registration of Ex. B was due to any default on the part of the plaintiff or whether it was due to defendant 1's failure to comply with the plaintiff's request to get it registered, although the District Munsif found that it was owing to defendant 1's neglect to comply with the plaintiff's request to attend the registration office and to admit the execution of Ex. B that it was not registered.

The Subordinate Judge has proceeded on the assumption that even in that case the only remedy of the plaintiff who had Ex. B in his own possession was to take steps to get it registered compulsorily and in case he did not succeed in obtaining registration to institute a suit for the purpose. Before disposing of this question of law, we consider it desirable that the appellate Court should record a finding on the question whether the non-registration of Ex. B was due to defendant 1's default or negligence. The Subordinate Judge is requested to submit a finding on this question on the evidence on record within one month from the date of receipt of this order. Seven days will be allowed for objections.

(In compliance with the order contained in the above judgment the Subordinate Judge of Mayavaram submitted the following:)

Finding.—I am directed to submit a finding on the question "whether the non-registration of Ex. B was due to defendant 1's default or negligence."

The chief consideration in regard to that matter in the circumstances of the case is whether anything remained to be done on the part of the plaintiff to complete the transaction under Ex. B and whether he wanted to avoid it. That again reduces itself into the question whether the plaintiff had passed the promissory note actually to defendant 1 on the date of Ex. B, or whether the Rs. 200 for which it was executed was reserved to be paid on registration of Ex. B and the plaintiff was not able to make it up. I am decidedly for accepting the plaintiff's

version and hold that for the Rs. 200 due (over and above the prior mortgage amount of Ex. A) for the consideration of Ex. A a promissory note was executed and delivered to defendant 1 and that with that, nothing more remained to be done on the plaintiff's part.

In regard to the case of defendant 1, I must state first of all that it has not been uniform. By his written statement he took up the position, that, though the promissory note was executed, it was reserved by the plaintiff himself to be delivered to defendant 1 after the registration of Ex. B. But in the evidence he has tried to make out that he wanted the amount in cash and that was put off to the completion of Ex. B by registration. Ex. B recites specifically that the promissory note was delivered to defendant 1 and Ex. B was admittedly delivered over to the plaintiff. Defendant 1 states in his re-examination that even before the sale deed Ex. B was written, "I wanted that the money should be paid in cash. Plaintiff said, he would pay before the Sub-Registrar." It is not easy then to believe that Ex. B should have been allowed to recite delivery of the promissory note. Assuming that it was not attended to at the time of the writing, it is impossible to believe that, with such recital and after being attested by defendant 1's brothers. I agree with the District Munsif in considering that the attestation by the brothers is proved by his maternal uncle; Ex. B should not have been held by defendant 1 himself till the money should be paid to him as arranged.

Apparently the sale offer proceeded from that of defendant 1 himself. That is made clear by his admission that he made inquiries at Kodangudi (plaintiff's village) whether any would purchase. If then Ex. B was executed for raising moneys for any immediate needs, it is remarkable that defendant 1 should not have made more pressing demands of plaintiff for it. All that he says amounts to this: that the plaintiff agreed to pay the money after taking the attestations of defendant 1's brothers to Ex. B, and at the time of registering Ex. B, that after plaintiff's son's return from defendant 1's village, with such attestations, defendant 1 asked the plaintiff for money, that plaintiff promised to pay in ten days, but that afterwards the plaintiff or his son

did not turn up or press him to get Ex. B registered. It is hard to believe defendant 1, that not even when the plaintiff's son went to his (defendant 1's) place on the occasion of his (plaintiff's son's) father-in-law's death and met defendant 1, had they any talk about the sale.

Whichever version in regard to the Rs. 200 be true, it is too much to ask us to believe that there should have been no talk over the matter then. Defendant 1's statement, that even when he went to sell the second time he had no talk with the plaintiff or his son over the matter, is also incredible and significant. I am disposed to consider the evidence of the plaintiff's first witness much more reliable. It is more likely that the registration was put off on account of the inconveniences in defendant 1's family. That two of the children of defendant 1 were attacked with small-pox and that one of them succumbed to it are admitted by defendant 1. He puts the period at a month or two later than where the plaintiff's son puts it at, but, as I have said, the plaintiff's first witness is more to be relied on. I have not much doubt in concluding that the promissory note was passed on to defendant 1 and there remained nothing more on the plaintiff's part to do to complete the sale. I hold that the registration of Ex. B was put off on account of defendant 1's inconveniences and that it was his neglect or default that is responsible for the non-registration. Doubtless the plaintiff might have presented Ex. B for registration, nevertheless he would appear to have been only accommodating defendant 1 in his difficulties. I find the issue in the affirmative.

(These second appeals coming on for final hearing after the return of the finding of the lower appellate Court upon the issue referred by this Court for trial, the Court delivered the following :)

Judgment.—The finding is that the plaintiff might have presented the transfer deed for registration, but the registration of the deed was put off on account of defendant 1's inconveniences. On this finding the plaintiff is not entitled to a decree that defendant 1 should execute and register a similar document. We accordingly confirm the decrees of the lower appellate Court and dismiss the second appeals with costs.

S.N./B.K.

Appeals dismissed.

A. I. R. 1914 Madras 277

SADASIVA AIYAR, J.

In re K. R. Lewis—Accused 2 — Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 274 of 1913 and Criminal Revn. Potn. No. 227 of 1913, Decided on 12th December 1913, from judgment of First Class Joint Magistrate, Koondupur, in Criminal Appeal No. 51 of 1912.

Penal Code (45 of 1860), S. 79 — Principle of S. 79 is inapplicable to offence under S. 21, Forest Act — Forest Act (Madras), (5 of 1882), S. 21.

The principle of S. 79, Penal Code, does not apply to an offence created by S. 21, Forest Act : 15 I. C. 802, Diss. from. ; 9 I. C. 567, Foll.

[P 277 C 2]

K. Ramanatha Shenai — for Petitioner.

C. Sidney Smith for Public Prosecutor —for the Crown.

Order.—I do not think that the principle of S. 79, I. P. C., should be applied to an offence created by the Forest Act for the protection of the Government revenue and of property belonging to Government. S. 79 itself cannot apply as the definition of offence in S. 40 covers only "a thing made punishable" by the Penal Code except when the word is used in certain sections which do not include S. 79.

I therefore dissent from *Emperor v. Kassim Isab Sab* (1) and hold following *In re Penchul Reddy Kottur* (2) that the belief of the accused that he was justified in his act cannot exculpate him from punishment for any of the offences created by S. 21, Madras Forest Act.

As regards accused 2 having been guilty of only the abetment of the offence charged against him because those who actually cut the forest trees were coolies, accused 2 admitted that he was wholly responsible for the cutting and he did not deny that he was present at the cutting though he did not wield an axe himself (see S. 114, I. P. C.). I am not disposed in revision to allow him for the first time to raise this plea on the allegation that he made a mistake in not raising it before. Even if he is allowed to raise such a technical plea, it would only necessitate a fresh prosecution for abetment and a conviction for that offence.

(1) [1912] 15 I.C. 802=13 Cr. L.J. 530.

(2) [1911] 9 I.C. 567=12 Cr. L.J. 99.

As regards the sentence, the records clearly show that accused 2 (petitioner) had no dishonest intention and he had even parted with a large sum of money to accused 1 to acquire the right of cutting the trees. I therefore think that a nominal sentence is sufficient: my authority is the same case of *In re Panchul Reddy Kottur* (2), already quoted by me and I reduce the sentence on him to a fine of Rs. 5 and order the refund of the balance of whatever amount (if any) has been levied from him.

S.N./R.K.

*Sentence reduced.***A. I. R. 1914 Madras 278**

AYLING AND OLDFIELD, JJ.

Mandavilli Subba Row and another—
Defendants—Appellants.

v.

Gulla Lakshmayya and another—
Plaintiff and Defendant—Respondents.

Second Appeal No. 2053 of 1912, Decided on 26th November 1913, from decree of Dist. Judge, Godavari, in Appeal Suit No. 174 of 1909.

(a) Damages—Suit by owner of drift-wood floating in river against Secretary of State and to others for damages on account of salvage illegally collected—Plaintiff was held entitled to recover.

In a suit by the owner of certain drift-wood floating in the river Godavari against the Secretary of State for India in Council and two other defendants for recovery of damages on account of salvage illegally collected from him under rules framed by Government under G. O. No. 586 Rev., dated 3rd November 1896.

Held: that the plaintiff was entitled to recover the sum from the Secretary of State for India in Council. [P 279 C 2]

(b) Ultra vires—Drift-wood salvage rules contemplate full proprietary rights of Government in drift-wood and are ultra vires—Extent of common law right of Crown to all unclaimed wrecks stated.

The drift-wood salvage rules contemplate full proprietary rights of Government in the drift-wood and as such the rules promulgated by Government under G. O. No. 586, are ultra vires, because the ownership of a river does not necessarily imply the ownership of the drift-wood therein. The common law rights of the Crown under English law to all unclaimed wrecks including flotsam, jetsam, lagan, etc., in territorial or tidal waters are not more extensive in India than in England and do not apply in this respect: 24 Cal. 504 (P.C.), Dist. [P 279 C 1, 2]

*T. Rangachariar and M. Purushotam Naidu—*for Appellants.

*T. Prakasam—*for Respondent 1.

*Govt. Pleader—*for Respondent 2.

Judgment.—The plaintiff in this litigation was the owner of certain drift-

timber which floated down the Godavari and was salvaged at Rajahmundry and taken to the Government depot there. There are certain rules issued by Government for the collection of drift-wood on the Godavari in G. O. No. 586, Rev., dated 3rd November 1896; and under these rules a sum of Rs. 806 is due to the salvors of the timber. This sum was collected from the plaintiffs by the Government official in charge of the depot before the plaintiff was allowed to take possession of his timber; and was paid to defendants 2 and 3 who claim to be the salvors. The plaintiff sued to recover this amount with damages from the Secretary of State for India, defendant 1 and defendants 2 and 3, as having been illegally collected. The District Munsif dismissed the suit; but the District Judge on appeal gave the plaintiff a decree for Rs. 806 with interest against defendants 2 and 3. He held, inter alia, that the Government rules above referred to were ultra vires; and that defendants 2 and 3 were not shown to be the salvors of the timber. Defendants 2 and 3 present this second appeal. Their chief contentions are that the rules are valid and enforceable and the sum of Rs. 806 legally collected; that apart from this they (defendants 2 and 3) were the salvors of the timber and as such entitled to the benefit of S. 70, Contract Act, and that even if the collection was illegal and S. 70 does not apply, they were mere agents of Government and plaintiff's cause of action is only against defendant 1, who levied the amount from him.

The first point for determination is the validity of the drift-wood salvage rules promulgated by Government. Both the lower Courts held them to be invalid. The District Munsif says that in his Court the Government Pleader was not prepared to support the validity of the rules; and the District Judge says that before him they were conceded to be ultra vires. It is now argued on behalf of appellants, with the support of the Government Pleader, that although the rules cannot be supported by any clause of the Forest Act, or any other statute, yet they are valid as being passed under the general powers and proprietary rights of the Crown.

The argument adopted is that not only is the body of water forming the Goda-

vari river the property of Government but also all articles found floating therein without an ostensible owner.

As regards the first proposition reliance is placed on S. 2, Act 3 of 1905, and the proprietary rights of Government in the Godavari river are not seriously disputed. The question is whether the ownership of a river necessarily implies ownership of drift-wood therein. If this be established there seems no reason to hold the rules to be ultra vires, but a reference to their terms will show beyond doubt that they can be supported on no smaller basis than full proprietary right of Government in the drift-wood to which they relate. No authority has been quoted before us for holding that the Crown possesses such a right. It is not a natural incident of proprietary right in the river itself, any more than the right to an article dropped or lost on a plot of land is incidental to the ownership of the land. Some reliance is placed on the Privy Council decision in *Amriteswari Debi v. Secretary of State for India in Council* (1). In that case Government could claim the benefit of certain clauses, Ss. 45 and 51, Forest Act, (which does not apply to the presidency) which specifically authorized the collections of drift-timber, and gave Government what was referred to as presumptive title to the said timber till the true owner made good his claim. But we can find nothing in the judgment of the Privy Council tending, however remotely to suggest that any absolute title in drift-wood appertains to Government.

On the other hand there are passages in the judgment which clearly recognized the right of the original owner of drift-wood to make good his title as against Government and it is stated that the so-called presumptive ownership only exists in those cases where Government collects and holds the timber for the true owner.

Reference was also made to the common law right of the Crown under English Law to all unclaimed wrecks including flostam, jestssam, legan and derelict in territorial or tidal waters: vide 7, Halsbury's Laws of England 210. This right is said to be based partly on prerogative and partly on the Merchants Shipping Act. With the latter, of course, we are not concerned and we see no

reason to suppose that the royal prerogative is more extensive in India than in England or applies in this respect beyond the shores of the sea or tidal waters. It is hardly necessary to remark that the Godavari at Rajahmundry is not tidal.

In our opinion the drift-wood salvage rules referred to cannot be supported on any ground and must be treated as ultra vires. Whether any of the defendants could claim the benefit of S. 70, Contract Act, need not be considered here. The District Judge has found that there is no proof of the circumstances in which the plaint timber was recovered so as to justify a claim under S. 70 and by that finding we are bound. This is equally the case whether defendants 2 and 3 are regarded as independent salvors or as the agents of Government.

The last contention of appellants must however in our opinion be upheld. It is admitted on all sides that the timber after salvage was taken to the Government depot, and notified in the District Gazette, that plaintiff put in a claim to it which was admitted by the Government official in charge; that he was directed by them to pay one-third of the value of the timber which was calculated at Rs. 806; that he did pay this sum to the Government officer in charge of the depot and was then allowed to remove his timber: and that subsequently the money was paid over by Government to defendants 2 and 3. All this was done in pursuance of the procedure laid down by the rules already considered, and in so far as this is a suit to recover money illegally collected it seems clear that plaintiff is entitled to a decree only against defendant 1, whose agents collected the money from him.

The plaintiff's cause of action against defendants 2 and 3 can be based only on the tort alleged in para. 4 and 5 of the plaint. This allegation was found against by the District Munsif on issue 3; and does not appear to have been pressed before the District Judge at all. There is no reference to it in his judgment, and we have not been asked to consider it in this Court. In our opinion the facts found by the District Judge justify a decree, not against defendants 2 and 3, but against defendant 1 only. and we consider the case to be one in

(1) [1897] 24 Cal. 504=24 I. A. 33=1 C. W. N. 249 (P. C.)

which we may fitly exercise our powers under O. 41, R. 33. The fact that plaintiff's cause of action, if he had any, was only against defendant 1, was expressly put forward as one of the grounds of appeal to this Court: vide para. 5 of the appeal memorandum.

We set aside the decree of the District Judge and in its place give plaintiff a decree against defendant 1, for Rs. 806 with interest thereon at 6 per cent per annum from 13th April 1907 to date of payment with proportionate costs throughout. Three months from this date will be allowed for payment under S. 82, Civil P. C. The suit as against defendants 2 and 3 will be dismissed. They will recover their costs from plaintiff in all Courts.

S.N./R.K. Decree set aside.

A. I. R. 1914 Madras 280 (1)

SADASIVA AIYAR, J.

In re *M. A. Vappu Rowther* — Defendant—Petitioner.

Civil Revn. Petn. No 1062 of 1912, Decided on 11th September 1913.

Arbitration—Reference — Party cannot revoke reference to arbitration except on good cause.

A party to a reference to an arbitration cannot revoke it except for good cause, as it stands on the same footing as all other lawful agreements: 12 *M. I. A.* 112, *Rel. on.* [P 280 C 1]

K. Ramachandra Iyer—for Petitioner.

Judgment.—There is no question of jurisdiction or acting illegally to bring this petition within the words of S. 115, Civil P. C., unless the petitioner could establish that the reference to arbitration could be revoked by him at his will and pleasure. (He so revoked it before the award and it has been found by both Courts that he had no good cause for the revocation). Whatever might have been the old English common law, the Privy Council in *Pestonjee Nussurwanjee v. Manekjee & Co.* (1), practically treated that law as obsolete, and have ruled that references to arbitration “stand on the same footing as all other lawful agreements from which the party cannot retire except for good cause.”: see also *Bansidhar v. Sital Prasad* (2) I reject this petition.

S.N./R.K. Petition rejected.

A. I. R. 1914 Madras 280 (2)

SADASIVA AIYAR, J.

In re *Soogoor Basauna Gowd* and others —Accused.

Criminal Revn. No. 863 of 1913 and Criminal Ref. No. 114 of 1913, Decided on 5th February 1914, made by Sess. Judge, Bellary, on 13th November 1913.

Penal Code (45 of 1860), S. 323 — Object to beat complainant — Grievous hurt inflicted by several accused — Proof of common knowledge to cause grievous hurt was held to be essential and imprisonment was obligatory on conviction under S. 325—Penal Code, S. 325.

Where a number of accused intended to beat the complainant but grievous hurt was inflicted.

Held (1): that it must be proved before any one could be convicted of causing grievous hurt that the common object was the intention to cause grievous hurt or the knowledge that any one of them might likely cause grievous hurt in the course of the beating which they intended to give to the complainant: 19 *Mad.* 483, *Foll.* [P 280 C 2]

Held (2): that the imposition of the punishment of imprisonment on a conviction for causing grievous hurt is obligatory. [P 280 C 2]

Public Prosecutor—for the Crown

H. Balakrishna Rao—for Accused.

Order.—Following *Queen-Empress v. Duma Baidya* (1), I hold that accused 1 to 5, 7 and 8 cannot be convicted of the offence of grievous hurt as it is not found that their common object was to cause grievous hurt to the complainant or they knew it to be likely that one of them would cause grievous hurt in the course of the beating which they intended to give to the complainant.

I alter the convictions on these accused to convictions for offences under S. 323 and maintain the sentences.

I add a sentence of rigorous imprisonment for four weeks to the sentence of fine (and imprisonment in default) imposed on accused 6 as the Sub-Magistrate erred in failing to impose a substantive term of imprisonment for the offence under S. 325, I. P. C., of which accused 6 has been found guilty, the imposition of the punishment of imprisonment on a conviction for such offence being obligatory. Accused 6 will be arrested and sent to jail to undergo this additional sentence.

S.N./R.K.

Order accordingly.

(1) [1867-69] 12 *M. I. A.* 112 = 10 *W. R.* 51 = 20 *E. R.* 283.

(2) [1907] 29 *All.* 13 = 3 *A. L. J.* 613 = (1906) *A. W. N.* 258.

(1) [1896] 19 *Mad.* 483 = 1 *Weir* 298.

A. I. R. 1914 Madras 281

WHITE, C. J. AND OLDFIELD, J.

Navajee and another—Plaintiffs—Appellants.

v.

Administrator-General, Madras and others—Defendants—Respondents.

Original Side Appeal No 31 of 1910, Decided on 12th September 1913, from decree of Wallis, J., D/- 23rd March 1910, in Civil Suit No. 163 of 1908.

(a) **Administrator-General's Act (2 of 1874), Ss. 28 and 34 — Administrator-General obtaining letters of administration respecting deceased insolvent's estate — Civil P. C., O. 20, R. 13, is inapplicable — Civil P. C. (5 of 1908), O. 20, R. 13.**

Order 20, R. 13, Civil P. C., which provides for the administration by a Court of the property of a deceased person, does not apply where the Administrator-General has obtained Letters of Administration in respect of the estate of a deceased insolvent. [P 282 C 1]

(b) **Presidency Towns Insolvency Act (3 of 1909), Ss. 108 to 111—Letters of Administration respecting insolvent's property granted to Administrator-General — Insolvency Act does not deal with administration of such property.**

There is no machinery in the law of insolvency under which an insolvent estate, in respect of which Letters of Administration have been granted to the Administrator-General, can be administered under that law. [P 282 C 1]

(c) **Insolvency—Insolvent's estate vested in Administrator-General—Latter has no rights of trustee or Official Assignee.**

Where the estate of an insolvent vests in the Administrator-General under the Succession Act, he can claim no higher title than the deceased himself and the Administrator-General has not the rights of either the trustee or Official Assignee in insolvency. [P 282 C 2]

(d) **Assignment—Agreement to pay money out of cheques coming into possession in future creates valid equitable assignment.**

Where an agreement used the following terms: "I pay you soon after I receive cheques from M. R. Co., for works done and in case I fail to remit your money after I receive from M. R. Co. . . . I am liable."

Held: that these words clearly indicated an intention to pay "out of a specified fund" and not when "funds shall come" and were operative to create a valid equitable assignment of the funds when available and not a mere assignment of an uncertain future chose-in-action: *Collyer v. Isaacs*, 19 Ch. D. 342; *Taibly v. Official Receiver*, 13 A. C. 523; and 10 All. 133, Foll.; *Field v. Megaw*, L.R. 4 C. P. 660, Dist.]

[P 283 C 1, 2; P 284 C 2]

(e) **Transfer of Property Act, S. 100 — Words amounting to creating of charge.**

The words "you should have a lien or charge over cheques or moneys received, for works done with your capital" are sufficiently specific and definite to create a charge on such funds when

they come into existence: *Ex parte Nichols; In re Jones*, 22 Ch. D. 782; *Ex parte Moss; In re Toward*; 14 Q. B. 310 and 9 All. 158, Foll.

[P 284 C 2]

T. Prakasam—for Appellant.

P. Narayanamurthi—for Respondents.

White, C. J.—In this case, one J. S. Peters died intestate and Letters of Administration were granted to the Administrator-General. Thereupon it became his duty under S. 28, Administrator-General's Act (2 of 1874), to distribute the assets. S. 28 directs the Administrator-General to distribute the assets and contains a provision that nothing contained in the section shall prejudice the right of any creditor or other claimant to follow the assets or any part thereof in the hands of the persons who may have received the same respectively. Ss. 34 and 35 contemplate suits by and against the Administrator-General. S. 35 deals with suits by creditors against the Administrator-General. The Administrator-General proceeded to administer the estate and in so doing held that defendants 2 to 6 were entitled to priority of payment by virtue of documents which they held, and which, they contended, amounted to charges given to them by J. S. Peters and entitled them to payment out of certain funds in priority to the general body of creditors. The plaintiff thereupon brought this suit making the Administrator-General defendant 1 and the creditors whose claims to priority had been recognized by the Administrator-General defendants 2 to 6.

It is admitted that Mr. Peters' estate was insolvent. The learned Judge said in his judgment: "This is a suit for the administration of the estate of the late J. B. Peters." The learned Judge's attention was not called to O. 20, R. 13, Civil P. C., which provides that "in the administration by the Court of the property of any deceased person, if such property proves to be insufficient for the payment in full of his debts and liabilities, the same rules shall be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities proveable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being within the local limits of the Court in which the administration suit is pending with respect to the estate of persons

adjudged or declared insolvent." I thought at one time in the course of the argument that a difficulty might arise in connexion with the judgment of the learned Judge by reason of the fact that his attention had not been called to this rule and he had not considered the question whether the rule was applicable to this suit. I was at one time disposed to think that O. 20, R. 13, Civil P. C., did apply, but after hearing a full argument on the point I have come to the conclusion that it does not.

The policy of the law in connexion with insolvent estates of deceased persons is indicated by Ss. 107 to 111, Presidency Towns Insolvency Act, 1909. S. 108 enables a creditor of the deceased debtor whose debt would have been sufficient to support an insolvency petition against the debtor, had he been alive, to present to the Court a petition asking for an order for the administration of the estate in insolvency. There is a further provision that a petition for administration under this section shall not be presented to the Court after proceedings have been commenced in any Court of justice; but that, in that case, the Court may on its own motion transfer the proceedings to the insolvency Court. S. 111 provides that Ss. 108, 109 and 110 shall not apply to a case in which Probate or Letters of Administration have been granted to an Administrator-General. The result seems to be that when probate has been granted to the Administrator-General there is no machinery for the administration of an insolvent estate under the law of insolvency. We consulted the Administrator-General with regard to the practice and he has ascertained that the practice in Bombay and Calcutta is same as here. I confess I do not quite understand the principle of the thing, but this appears to be the law.

The words of O. 20, R. 13, Civil P. C., are almost, word for word, the same as S. 10, Judicature Act of 1875. Before that Act the rule in bankruptcy was that a secured creditor must realize his security and prove for the balance. The rule in Chancery was that he could prove for his whole debt, but if, on the realization of the security there was a surplus, he must refund the surplus. The effect of the rule is not to apply all the principles of bankruptcy to insolvent estates, but only to establish a uniformity of adminis-

tration in respect of the four heads specifically mentioned in the section.

As regards the vesting of the estate about which we had a good deal of argument the rule says nothing with regard to vesting, but merely deals with the heads specifically mentioned therein.

Mr. Prakasam, who appeared for the appellants, laid stress on the fact that under the Succession Act, as contended, this estate became vested in the Administrator-General.

The nature of that vesting as it seems to me, is, different from the vesting in a trustee or in the Official Assignee by virtue of the operation of the law of insolvency. It gives the Administrator-General no higher title than the deceased here.

Is there anything to indicate that this suit is a suit for administration by the Court of the property of the deceased person to which the rule would apply except the fact that the learned Judge in general language describes it as "a suit for the administration of the estate of the late J. S. Peters?" Mr. Prakasam has pointed out that the plaint follows more or less closely the form of plaint which we find in the schedule to the Code as the form for an administration suit by a creditor. There is this difference. In the present suit there is the statement that Letters of Administration were granted to the Administrator-General. No doubt one of the prayers is that the estate and effects of the deceased may be administered under the direction of this Court. But the decree is not in the form of a decree which is made in an administration suit. The learned Judge only purported to deal with the specific question as to whether defendants 2 to 6 were entitled to priority of payment and did not deal generally with the question of administration.

If O. 20, R. 13, Civil P. C., does not apply, the question whether we should, in dealing with this appeal, the principles of law upon which the decision of *Ex parte Nichols*; *In re Jones* (1) and *Ex parte Moss*, *In re Toward* (2) are based, does not arise.

It remains for us to decide whether we agree with the learned Judge as to the construction of the documents which are

(1) [1883] 22 Ch. D. 782=52 L. J. Ch. 635=48 L. T. 492=31 W. R. 661.

(2) [1885] 14 Q. B. D. 310.

relied upon by defendants 2 to 6 as giving them rights in priority in the administration of the estate. I think in construing the instruments, we are entitled to take into consideration the course of business between the parties.

The plaintiff at one time—I am stating the facts quite generally—financed the late Mr. Peters for the purpose of enabling him to carry out his contracts with the Madras Railway Company. After a time they ceased to do business with Mr. Peters and closed their accounts. They were paid a small sum on account. The defendants undertook to finance the deceased and the course of business was—again I am stating the facts generally—they did the work and provided materials.

Mr. Peters charged the company for the work done and for the goods supplied according to his contracts with the Railway Company, paying the defendants according to his agreements with them and retaining the difference between what he paid them, and what the company paid him as a commission for himself. The learned Judge finds, and we see no reason to differ from him, that defendants 2 to 6 did the work in respect of which they claimed a charge on payment received by Mr. Peters from the Railway Company.

The instrument about which there was most discussion is Ex. 11. That is a document which is, no doubt, inartistically drawn. It is in these terms: "Agreement written 3rd September 1906 by J. S. Peters, Government Pensioner, and 4th District 10th section contractor, of M. R. Co., now residing in Kovour, Krishna District, to Errah Govindan Garu son of Errah Jogiah Subrayudu, Sudra and Inamdar of Rajahmundry, under the following conditions:

(1) I pay you soon after I receive cheques from M. R. Co., for works done by you investing money under me as task work, deducting my commissions as noted below for the following works:

(2) My late bankers or other debtors have no claims on your invested capital for the works you are now doing and about to do as per my orders except to the commissions I have to receive from the cheques of your works under me. It is agreed that you should have a lien or charge over cheques or moneys received for works done with your capital.

(3) In case if I fail to remit your moneys soon after I receive from M. R. Co., for works done by you as per my orders either verbal or written, I am liable for breach of contract liabilities." The learned Judge read this document with Ex. 10 which is a letter dated 2nd July 1906, some two months earlier, written by Mr. Peters to the defendant 2 asking him to supply certain materials and carry out certain works and promising to pay him as soon as he gets a cheque from the Railway Company after deducting his commission. Then, going back to Ex. 11, we have this paragraph: "It is agreed that you (defendant 2) should have a lien or charge over cheques or moneys received for works done with your capital." It was, I think, conceded that the work in question was done after the date of Ex. 11 and it was not disputed that payment was not made by the Railway Company until after the death of Mr. Peters and the grant of Letters of Administration to the Administrator-General. But it seems to me clear from the judgments in *Ex-parte Nichols*, *In re Jones* (1) and *Ex-parte Moss*, *In re Toward* (2) that the instrument might operate as a charge on cheques or moneys payable for work done after Ex. 11 was given by Mr. Peters to defendant 2. The fact that payment was not made by the Railway Company until after Letters of Administration had been granted to the Administrator-General might be material if the principle of the decisions in the two cases to which I have referred were applicable in this case. But, for the reasons I have stated, it seems to me that this fact is immaterial.

Mr. Prakasam contended that as the cheques did not come into existence until after the giving of the document that could not be the subject of an assignment. He relied on the decision of *Collyer v. Isaacs* (3). We find in that case the answer to Mr. Prakasam's contention. The Master of Rolls says: "A man cannot in equity, any more than at law, assign what has no existence. A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that pro-

(3) [1882] 19 Ch. D. 342=51 L. J. Ch. 14=45 L. T. 567=30 W. R. 70.

perty, and the contract to assign thus becomes a complete assignment." The question came before the House of Lords in *Tailby v. Official Receiver* (4), where the question was whether a man could assign future book debts. It was held that the assignment of future book debts was good if the subject-matter of the assignment could be identified.

Mr. Narayana Murthi, who appeared for some of the defendants, has called our attention to certain Indian cases. I will only refer to *Bansidhar v. Sant Lal* (5). This was a case of hypothecation of indigo produce when it should come into existence. It was held that the hypothecation was good.

A further objection which was taken by Mr. Prakasam was that the words of the instrument were not sufficiently specific to constitute a charge. Some authorities have been cited in reference to the question. There is a case in *Ramsidh Pande v. Balgobind* (6) in which the words of the instrument were of a general character—"whatever property etc., belonging to me." It was held that the bond created a charge on the properties in the circumstances of the case. This decision was doubted in a later Allahabad case and I do not express any opinion about it. It seems to that the words of the instrument in the present case are of a much more precise and specific character. We have a reference to specific funds out of which the claims of the creditor are to be satisfied. They are to be satisfied out of cheques or moneys received for work done by the defendants which was paid for in the first instance by the defendants. The rule is thus stated in *Fisher on Mortgages*, Edn. 6, p. 126, para. 230: "If however there is a sufficient indication that the supposed assignee is to have the benefit of the fund or chose in action in question, in addition to relying on the credit of the assignor, or, as it is sometimes put, is to be paid 'out of the fund' as distinguished from 'when the assignor gets the fund,' a valid equitable assignment is created, provided that the transaction is for value. The intention must be that the property shall pass." Applying that test here, is it "when" or

"out of?" It seems to me that Ex. 11 may be fairly construed as being an instrument where a man gives a charge to be met out of a specific fund.

Mr. Prakasam referred us to a passage in *White and Tudor's Leading Cases*, Edn. 8, Vol. I, at p. 117: "A promise to pay money when the debtor receives a debt due to him from a third person does not constitute an equitable assignment, so as to charge the debt in the hands of such third person." In the notes the case of *Field v. Megaw* (7) is cited. The promise in that case was a promise to pay "when," not a promise to pay "out of."

Then as to the other documents which were relied on as creating a charge, Ex. 14 is in these terms: "I promise to pay the amounts you paid to my agent, N. Subba Row Garu, for interest up to to 14th October 1906, amounting to Rs. 118-8-10 and Rs. 15 of to-day's total, one hundred and thirty three from the commissions due to me on your works from coming cheques." That seems to me not a promise to pay "when I get cheques," but a promise to pay "from the commissions I should be entitled to retain out of the cheques I receive." I also think, a charge was created by Exs. 5 and 6. Then we have Ex. 21. This particular letter, no doubt, gives rise to a certain amount of difficulty. The words are "I will pay the amount for works you perform for timber, etc., soon after cheques for the same are received, deducting the usual commission as paid by others." The course of business was, as I have said, that Mr. Peters should deduct a certain percentage for himself and pay the balance to the men who did the works, i. e., the defendants. I think we are warranted in construing this as a promise by Mr. Peters to pay from a specific fund after he had deducted the commission to which he was entitled as arranged between him and the defendants.

We see no reason to differ from the learned Judge's findings of fact in this case, nor from his finding with regard to the suggestion of fraud on the part of the late Mr. Peter's agent.

There only remains the question of costs. The case is not free from difficulty and our order is, the parties may take their costs, taxed as between party and

(7) [1869] L. R. 4 C. P. 660.

(4) [1888] 13 A. C. 523=58 L. J. Q. B. 75=60 L. T. 162=37 W. R. 513.

(5) [1888] 10 All. 133=(1888) A. W. N. 35.

(6) [1887] 9 All. 158=(1887) A. W. N. 15.

party, out of the estate of Mr. Peters both here and before the learned Judge.

Oldfield, J.—I agree.

S.N./R.K.

Appeal rejected.

A. I. R 1914 Madras 285

SESHAGIRI IYER, J.

Goginannei Venkatanarasimharayudu and another—Petitioners.

v.

Rajah Venkatarangayya Appa Row Bahadur Zamindar of Nuzwid—Respondent.

Civil Revn. Petn. No. 150 of 1913, Decided on 12th February 1914, from decree of Dist. Munsif, Bezwada, in Small Cause Suit No. 1912 of 1912.

Madras Settlement Regulations (25 of 1802), Ss. 4 and 12—"Gatti toomoolu" is voluntary payment by ryot to zamindar for keeping tank in repair—Cess legally payable before enfranchisement does not change rights of parties—Cess is not within Ss. 4 and 12.

"Gatti toomoolu" is a voluntary payment made by a ryot to the zamindar for keeping a tank in repair.

Where such a cess was legally payable before the date of enfranchisement by the inamdar to the zamindar the mere fact of enfranchisement does not change the rights of parties. Nor is such a cess "revenue" within the meaning of Ss. 4 and 12 so as to make the levy by zamindar illegal under those sections. It is a mere voluntary payment made to a zamindar under a contract and is recoverable by him.

[P 285 C 2]

V. Ramadoss—for Petitioners.

V. Ramesam—for Respondent.

Judgment.—The facts of this case are not in dispute. Prior to the year 1909 the defendant in this case was paying to the zamindar a certain sum of money by way of gatti toomulu. It is agreed by the learned vakils appearing on both sides that this was a cess payable for repairing the tank from which the defendant was entitled to his supply of water for his fields. In the year 1909 the lands were enfranchised and in the application he made to the Inam Deputy Collector for favourable quit-rent, the defendant mentioned the fact that he had to pay gatti toomulu to the zamindar and that consequently there should be a reduction in his favour to the extent of that payment. The Inam Deputy Collector was of opinion that this was not a cess which could be levied by the zamindar and has held that no reduction should be made in favour of the defendant.

The zamindar has brought the present suit to recover the amount of gatti toomulu due to him since the enfranchisement; he is met by the plea that the enfranchisement has changed the rights of the parties and that the zamindar is no longer entitled to a levy of the cess. It need hardly be pointed out that if this was a cess legally recoverable by the zamindar from the defendant till the enfranchisement, nothing that has been done by the Inam Deputy Collector or said by him in his order would take away that right. Act 8 of 1869 makes it clear that pre-existing rights are not to be disturbed by the enfranchisement.

Mr. Ramadoss very properly gave up that contention. His argument was that under Regulation 25 of 1802, this was a revenue which the Government had reserved to itself, and that it would not be open to the zamindar to claim the amount of gatti toomulu because the right of levying it has been taken away from him by the combined operation of Ss. 4 and 12 of the Regulation, and he referred me to the form of the sanad printed in the Board's Stading Orders to show that any revenue whose levy had been prohibited by the Permanent Settlement could not be recovered by the zamindar from his under-tenure-holder. If I am satisfied that this is the revenue due from lakhiraj lands I would accede to the contention of Mr. Ramadoss and would hold that the zamindar is not entitled to recover the cess. I do not think this cess is revenue in any sense of the term. The payment probably originated in a contract, the contract on the part of the zamindar being that he should keep the tank, from which water was to be supplied to the defendant, in good repair and the consideration on the part of the defendant being that he should pay a certain sum of money to enable the zamindar to effect this purpose. That being the relationship between the parties and it not being suggested that the zamindar has failed in his duty or that the defendant has in any way suffered, it follows that the zamindar is entitled to recover the amount unless the contention is acceded to that it was a revenue which was abolished under Ss 4 and 12, Regulation 25 of 1802. As I have already stated, I do not think that this can be said to be a "revenue" payable to the zamindar by the inamdar. I

therefore hold that the zamindar is entitled to recover this cess.

I am supported in this conclusion by the decision in Second Appeals Nos. 541 to 550 of 1891, Civil Revision Petition No. 286 of 1909 and in Second Appeals Nos. 616 to 619 of 1908. In all these cases the question was whether gatti toomulu could be regarded as a voluntary payment and whether it would be illegal on the part of the zamindar to levy the cess. In all these cases the High Court, accepting the findings of the Courts below, was of opinion that this cess was not a voluntary payment, but a payment due under a subsisting contract and that there was nothing illegal in claiming it. Following these decisions, I dismiss the petition with costs.

S.N./R.K. *Petition dismissed.*

A. I. R. 1914 Madras 286 (1)

OLDFIELD, J.

In re *Annamalai Odayar and others*—Accused—Petitioners.

Criminal Revn. No. 419 of 1913 and Criminal Revn. Petn. No. 337 of 1913, Decided on 5th December 1913, from judgment of 1st Class. Sub-divl. Mag., Kumbakonam, in Criminal Appeals Nos. 118 to 121 of 1913.

Penal Code (45 of 1860), S. 379—Removal of crops by tenant in his possession and control does not amount to theft unless there was actual delivery to landlord.

The removal by a tenant of the heaps of grain in his possession and control does not amount to theft, unless there was actual delivery to the landlord of his share of the grain, although the landlord may have put a seal on the heaps: 26 Mad. 481, *Foll.* [P 286 C 2]

J. C. Adam—for Petitioner.

Public Prosecutor—for the Crown.

Order.—The findings of both Courts are that the paddy, which the accused have been convicted of stealing was in the joint possession of the landlord, the complainant and the tenant, accused 1, and that the accused 1 and others removed it. It is argued that the possession should have been held to be accused 1's and that the removal was therefore not theft.

The only material facts found are that on the one hand the landlord's seal had been put on the heaps of grain and that on the other accused 1 acknowledged possession of the grain in Ex. A and that it was in his backyard. The lower Courts have not attached importance to the two last mentioned facts and have in my

opinion erred in law in their conclusion from the first and the other circumstance *Subudhi Rancho v. Balarama Pudi* (1) decided generally that until the delivery by the tenant to the landlord the latter's share of the crop was with the tenant and there is no reason for not applying this to the present case. The possession should therefore have been held to be the tenant's and the convictions for theft are therefore unsustainable.

The learned Public Prosecutor does not suggest that a conviction of any other offence is possible in this case. The conviction and sentences are set aside: the fines if levied must be refunded.

S.N./R.K. *Sentences set aside.*

(1) [1903] 26 Mad 481=13 M. L. J. 123=1 Weir 425.

A. I. R. 1914 Madras 286 (2)

WALLIS, J.

In the matter of *Mani Bai*—Petitioner. Original Civil Petn. No. 17 of 1911, Decided on 16th December 1913.

Minor—Marriage—Court will not interfere usually with right of mother to select bridegroom for her daughter.

A mother has a right to select a bridegroom for her daughter and her right should not be interfered with by the Court except in very exceptional circumstances: 11 I. C. 570, *Foll.* [P 286 C 2]

Venkatasubba Rao and Radhakrishnayya—for Petitioner.

D. Devadoss—for Lord Govind Doss.

Order.—The minor's mother applies for permission to marry the minor who is a ward of Court to one Mani Lal and her brother for an injunction to restrain the mother from giving her in marriage. According to law as laid down in the most recent case of *Acha Ranganaimmal v. Acha Ramanuja Aiyangar* (1) the right of selection is in the mother and should not, in my opinion, be interfered with by the Court except in very exceptional circumstances. Then the brother is reputedly a man of great wealth and although his relations with the mother, who was his father's second wife, have been exceedingly bad, it seemed to me that he might be in a position to bring forward a candidate so far superior to any the mother could find, that it would be necessary in the interests of the minor to interpose. He has not however succeeded in doing so. Of the three candidates put forward by him the last is an account clerk in a District Court on a

(1) [1911] 11 I. C. 570=35 Mad. 728.

salary of Rs. 40 who is said also to have private means. Another is an employee in a mill. The third Modhu Lal has not yet adopted any profession and is said on the other side to be too nearly related to the minor. None of these is so superior to the mother's candidate who carries on business in piecegoods at Baroda where the family comes from, as to justify the interference of the Court. Accordingly I grant the mother the permission asked for and sanction an expenditure of Rs. 7,500 for the marriage of which Rs. 5,000 is to be spent on the purchase of jewels. The application for an injunction is dismissed with costs.

Payment to petitioner or agent.

S.N./R.K. Order accordingly.

A. I. R. 1914 Madras 287

Full Bench

WHITE, C. J., AND SANKARAN NAIR
AND OLDFIELD, JJ.

Madurai Pillai — Defendant — Petitioner.

v.

T. Muthu Chetty — Plaintiff — Respondent.

Civil Revn. Petn. No. 952 of 1912, Decided on 6th January 1914, from order of Small Cause Court Judge, Madras, in Full Bench Appln. No. 96 of 1912.

(a) **Presidency Small Cause Courts Act (1882), Ss. 9 and 38 — Order under R. 2, Madras High Court Rules, is ultra vires although it can be made out of terms imposed under S. 38 when making order for new trial.**

Order 41, R. 2, is ultra vires of the High Court although the Small Cause Court, if it thinks fit, can make it one of the terms, which it is entitled to impose under S. 38, Presidency Small Cause Courts Act, when making an order for a new trial, that the condition similar to that imposed by O. 41, R. 2, should be satisfied before it grants the application. [P 289 C 2 ; P 290 C 1]

(b) **Interpretation of Statute—If power to make regulations is given by statute, regulations cannot abridge right conferred by statute—If rule making power is given by statute, rule may abridge rights given by statute.**

The general rule is that where a power to make regulations is given by a statute, no regulations made under the statute can abridge a right conferred by the statute itself. But if by statutory enactment a power is given to a rule-making authority to make rules, the rules, if they are within the power given, would be good even if they purport to abridge the rights given by the statute. [P 289 C 1]

(c) **Presidency Small Cause Courts Act, S. 9 — High Court is empowered to make rules respecting practice and procedure and not substantive rights.**

Section 9 only empowers the High Court to

make rules with reference to matters of practice or procedure. The terms of the section are not wide enough to give the High Court power to make rules with regard to matters of substantive right or matters which are not practice or procedure. [P 289 C 1]

(d) **Presidency Small Cause Courts Act, S. 38 — Right to apply for new trial is like right of appeal, matter of substantive right.**

Section 38 gives a right to a party to apply for a new trial and as this right cannot be distinguished from a right of appeal, it is not a matter of practice or procedure but, like the right of appeal, a matter of substantive right.

[P 289 C 2]

C. Krishnamachariar for *K. Bhashyam Aiyangar*—for Appellant.

P. M. Sivagnana Mudaliar—for Respondent.

Order of Reference

Sankaran Nair, J. — A decree was passed against the petitioner by a single Judge of the Madras Court of Small Causes. He made an application to the Small Cause Court to order a new trial and to set aside the decree, under S. 38, Presidency Small Cause Courts Act, 1882. That application was rejected by the Full Bench on the ground that the full amount under the decree was not paid at the time of presenting the application, as required by O. 41, R. 2, Presidency Small Cause Court rules. The petitioner now applies to this Court to set aside the order of the Small Cause Court, on the ground that the rule above referred to is ultra vires, as it contravenes S. 38, Presidency Small Cause Courts Act, and that therefore they were wrong in rejecting his application.

Section 38 runs in these terms : "Where a suit has been contested, the Small Cause Court may, on the application of either party order a new trial to be held, or alter, set aside, etc." O. 41, R. 2, runs in these terms : "No application shall be entertained, unless the applicant shall, at the time of presenting his application, either deposit in Court the amount due from him under the decree or order, or give security to the satisfaction of the Court or the Registrar, for the performance of the decree or order in respect of which the application is made." The general rule is that, where a power to make regulations is given by a statute, no regulations made under it can abridge a right conferred by the statute itself : see *Reg v. London*

Justices (Bird); *Ex-parte Needes* (1). Now, in this case, the section confers no right upon the petitioner himself. He cannot therefore complain that any right of his has been taken away by the regulations.

The next question is, whether the right which is vested in the Small Cause Court under S. 38 has been taken away by the regulations. The section states that the Small Cause Court may order a new trial; it is not imperative. I am of opinion that it was open to the Small Cause Court to lay down certain conditions under which alone it would exercise the jurisdiction conferred by that section. If therefore the Small Cause Court had framed the rule under which this application of the petitioner was rejected, it would apparently be a valid rule. But the rule was made not by the Small Cause Court, but by the High Court, and the question is, whether it is open to the High Court to cut down the jurisdiction of the Small Cause Court. The rule is said to have been framed by the High Court "by virtue of the powers conferred by the Presidency Small Cause Courts Act 1882, and the Acts amending the said Act and of all other powers hereunto enabling." If it is this Act itself that gives power to the High Court to frame rules, then, apparently, the High Court has no power to cut down the jurisdiction. The section in the Small Cause Courts Act under which these rules are framed, is apparently S. 9 of the Act. That section places the Small Cause Court under the jurisdiction of the High Court, for the exercise of the powers which are conferred upon it by the Letters Patent, by the Civil Procedure Code, the Legal Practitioners Act and 24 and 25 Victoria Ch. 104, S. 105. Now, if that is the only section under which the High Court can frame these rules, then, as I have said before, I am disposed to think that the High Court had no jurisdiction to frame this rule.

But apart from the Small Cause Courts Act, the High Court has certain powers over the civil Courts in the Presidency, under the enactments and Letters Patent above referred to, and the rules are also said to have been framed under all other powers enabling the High Court to make

the rules. Therefore the question arises whether, apart from S. 9, Small Cause Courts Act, the High Court had not the power under the other provisions of law to make the rule in question. This question has not been argued before us. Such power, if vested in the High Court under the above provisions of law, cannot be taken away by implication. If the Legislative Council is entitled to cut down the power of the High Court then it must be done by express enactment and not by implication. I have also considered the question whether the Small Cause Court, having acted under these rules or rules similar to these, framed under the same powers, from 1882 up to this date, may not have impliedly accepted the rules as their own. But I am not able to accept this suggestion. The mind of the Small Cause Court was never directed to that question, and they never considered whether they had the right to accept or discard these rules. The question is one of great importance and affects the procedure of the Court and might affect the validity of numerous decisions. I therefore refer to a Full Bench the question, whether O. 41, R. 2, Presidency Small Cause Court rules, is *ultra vires*.

Ayling, J.—I agree to the reference proposed by my learned brother.

(This petition coming on for hearing before the Full Bench on Monday, 5th January 1914 and this day upon perusing the petition, the order of the lower Court and the record in the case and the order of reference to a Full Bench and upon hearing the arguments of the counsel the Court expressed the following :)

Opinion

White, C. J.—The question which has been referred to us in this case is, "Whether O. 41, R. 2, Presidency Small Cause Courts Rules is *ultra vires*." The rule provides that no application (for a new trial shall be entertained unless the applicant at the time of presenting the application either deposits in Court the amount due from him under the decree or order or gives security to the satisfaction of the Court or the Registrar for the performance of the decree or order in respect of which the application is made. The power to grant a new trial in a suit in the Presidency Small Cause Court is regulated by S. 38 which provides :

(1) [1898] 2 Q.B. 340=67 L.J. Q.B. 618=79 L.T. 156=46 W.R. 528=62 J.P. 422=14 T.L.R. 284.

"Where a suit is contested, the Small Cause Court may on the application of either, party made within eight days from the date of the decree or order in the suit order a new trial to be held or alter set aside or reverse the decree or order upon such terms as it thinks reasonable." The rules of the Presidency Small Cause Court are made under the powers conferred by S. 9, Presidency Small Cause Courts Act of 1882. Under the Act, as it originally stood there was a power in the Small Cause Court itself with the previous sanction of the High Court to make rules. In 1895 that section was repealed and the power to make rules was given to the High Court. The terms of the section which empower the High Court to make rules in reference to the Small Cause Court are very wide. The general rule is no doubt that stated in the case referred in the order of reference, *Queen v. Bird, Ex parte Needes* (1), that is, "where a power to make regulations is given by a statute no regulations made under the statute can abridge a right conferred by the statute itself." That is the general rule. But if by statutory enactment a power is given to a rule making authority to make rules, the rules as it seems to me if they were within the power given would be good even if they purported to abridge the rights given by the statute.

I think the only question we have to decide is, is this rule within the powers conferred upon the High Court by the section which was introduced into the Act in 1895? Now whatever may be the true construction of this section one thing seems clear and that is, it only empowers the High Court to make rules with reference to matters of practice or procedure. It cannot, as it seems to me, be suggested that the terms of the section are wide enough to give this Court power to make rules with regard to matters of substantive right or matters which are not practice or procedure. Then the question is, can it be said that the right to apply for a new trial is a matter of practice or procedure; S. 38 which regulates this question of new trials is perhaps somewhat curiously worded. It does not say in so many words that a party has the right to apply for a new trial. It says that "the Small Cause Court may on the application of the party order a new trial."

But I think on the true construction of the section it gives a right to a party to apply for a new trial.

As regards the right of appeal, the right of appeal being a creature of that statute, I think it is well settled that a right of appeal is not a matter of practice or procedure. I may refer to certain observations made by Lord Westbury in a case to which our attention has been called, *Attorney General v. Herman James Sillem* (2). The Lord Chancellor thus describes the right of he says: "An appeal is the right of appeal entering a superior Court and invoking its aid and interposition to redress the error of the Court below. It seems absurd to denominate this paramount right part of the practice of the inferior tribunal." Our attention has also been called to a decision of the House of Lords *Colonial Sugar Refining Company v. Irving* (3) in which there is an observation by Lord Macnaughten: "To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure." Now can we draw any distinction between a right of appeal conferred by statute and the right to apply for new trial? I think we cannot. Our attention has not been called to any case in which any such suggested distinction has been drawn nor to any case in which it has been held that the right to apply for a new trial is a matter of practice or procedure. Of course there is no objection to the Small Cause Courts, if they think fit, making it one of the terms which they are entitled to impose when they make an order for a new trial, that the condition imposed by O. 41, R. 2, should be satisfied before they grant the application. But to say that the Small Cause Court has the power to do that is a very different thing from saying that the rule in question is a rule of practice or procedure and within the powers conferred by S. 9. The preamble to the rules states that they are made "by virtue of the powers conferred by the Presidency Small Cause Courts Act of 1882 . . . and of all other powers hereunto enabling the High Court." Our

(2) 11 E. R. 1200 = 10 Jur. (n. s.) 446 = 10 L. T. 434 = 33 L. J. Ex. 209 = 4 N. R. 29.
(3) [1905] A. C. 369 = 74 L. J. (P.C.) 77 = 92 L. T. 738 = 21 T. L. R. 513.

attention has not been called to any power in the High Court in this connexion outside the powers conferred by S. 9, Presidency Small Cause Courts Act.

One word with regard to the case of *Morgan v. Bowles* (4) which was cited in argument in support of the contention that the rule is bad. I do not think that either this case or the case of *In re West Devon Great Consols Mine* (5) affords us any assistance with reference to the question as to whether the rule in question here is ultra vires or not. *Morgan v. Bowles* (4) had reference to a provision of an Act which imposed an obligation on a party appealing to give security for costs. Then certain rules were passed which did not reproduce this provision, and it was held that the obligation to give security for costs under the Act continued. That case was decided upon the question of construction on the ground that the words of the rule did not abrogate the provision of the Act with reference to security for costs.

In *In re West Devon Great Consols Mine* (5) Lord Bowen said with regard to this matter: "The rule 'generalia specialibus non decogant' applies" and he decided the question purely as one of construction. And Lord Justice Cotton in his judgment says: "Assuming without deciding that the Rules Committee had power to take it away, they have not purported to do so, for general rules would not do away with this special direction to which they do not expressly refer."

It seems to me for the reasons I have stated the answer to the question referred to us is that the rule is ultra vires.

Sankaran Nair, J.—I agree that the rule is ultra vires.

Oldfield, J.—I concur.

S.N./R.K.

Reference answered.

A. I. R. 1914 Madras 290

AYLING AND SPENCER, JJ.

Meloth Kannan Nair and others — Appellants.

v.

Kodath Kammaran Nair and others — Respondents.

First Appeals Nos. 90 and 91 of 1909, Decided on 17th December 1913, from decree of Dist. Judge, South Kanara, in Original Suit No. 27 of 1907.

(a) **Transfer of Property Act, S. 61—Two mortgages on same property in favour of same mortgagee—One cannot be redeemed before another.**

Where there are two mortgages on the same property in favour of the same mortgagee, the mortgagor cannot redeem the one without redeeming the other; 11 I. C. 629, *Ref.* [P 291 C 1]

(b) **Court-fees Act (7 of 1870), S. 7 (9)—Finding of Court that one of mortgages is not genuine — Subject-matter for court-fee on appeal against decree directing redemption is value of mortgage admitted by mortgagor.**

Where there is a finding by the Court of first instance in favour of the mortgagor that one of the two mortgages is not genuine the subject matter for the purpose of determining the court-fee payable on any appeal by the mortgagor against the decree directing redemption is the value of the mortgage admitted by him and not of the one found to be not genuine by the Court of first instance. [P 291 C 2]

(c) **Court-fees Act (7 of 1870), S. 7 (9)—Appellant should not be compelled to base valuation of appeal on possibility of finding in his favour being reversed.**

An appellant should not be compelled to base his valuation of the subject matter of an appeal on the possibility of an appellate Court reversing the finding in his favour. 5 *Mad.* 201; *Foll.* [P 291 C 2]

(d) **Transfer of Property Act, S. 63 — Darkhast for accretion adjoining mortgaged property and for accretion of adjoining mortgagee's land granted—Accretion is held to be in trust for mortgagor's benefit.**

Where a mortgagee in possession, taking advantage of his position as such presents a single darkhast both for the accretion adjoining the mortgaged land and for the accretion adjoining his own land and the darkhast is granted, he must be held to have received the accretion to the mortgaged property in trust for the mortgagor's benefit. [P 293 C 2]

(e) **Hindu Law — Alienation — Manager — Proof of prudent act.**

Where an anandravan attests a mortgage by the karnavan it is prima facie evidence that the mortgage is not an imprudent act of the karnavan. [P 293 C 1]

T. V. Seshagiri Aiyar and B. Sitaram Rao—for Appellants.

J. C. Rosario and V. Ryrur Nambiar—for Respondents.

White, C. J.—In this case Mr. Rosario has raised the preliminary objection that the court-fee paid by the appellant

(4) [1894] 1 Q. B. 236=63 L. J. Q. B. 84=10 R. 62=42 W. R. 269.

(5) 38 Ch. D. 51=57 L. J. Ch. 850=58 L. T. 61=36 W. R. 342.

on filing his appeal is insufficient. The facts which are material for the purpose of this question are these. The plaintiff sued to redeem a mortgage for Rs. 5,000. The defendants say, I may state the facts quite broadly — The defendants say, "there is a second mortgage on the same property for Rs. 800. You are not entitled to redeem the mortgage for Rs. 5,000 without at the same time redeeming the mortgage for Rs. 800." The plaintiff's case is that the mortgage for Rs. 800 is a spurious document. The Court of first instance has held that the plaintiff is the party who is entitled to sue for the redemption of the Rs. 5,000 mortgage and it has also held that the mortgage for Rs. 800 is not genuine.

The question of the computation of the court-fee, it is practically agreed, must be decided with reference to the value of the subject matter in dispute in the appeal. It is accepted for the purpose of the point under consideration by Mr. Rosario that if there are different mortgages in favour of one and the same person in respect of the same property the mortgagor cannot seek to redeem one mortgage without redeeming the others.

That is the principle laid down in the case of *Balasubramania Nadar v. Sivaguru Aszri* (1). In the case of *Sekharan Nair v. Kongot Eacharan Nair* (2) a question arose as to the value of the subject-matter of an appeal for the purpose of computing the court-fee payable by the appellant and it was there held that in suits for redemption and in appeals from those suits the subject matter in dispute for the purpose of Art. 1, Sch. 1 to the Court-fees Act is the existence of the right to redeem, any question as to the amount payable as a condition of redemption being merely incidental to that right. Mr. Rosario has distinguished this case from the case before us on the facts and he points out that there the transaction was one, there was only one mortgage and the further sum which was payable by the mortgagor as a condition of his redeeming the property was a sum which was payable as compensation for improvements. I do not see that this case can be distinguished in principle from the present case. No doubt there the money was

payable by way of compensation for improvements, here it is payable on a second mortgage. If the question before us is, as I take it to be, a question as to the terms on which the plaintiff is entitled to redeem the mortgage, the fact that one of those terms may involve a payment by the plaintiff of a sum in addition to the sum which he offers to pay for the purpose of redeeming the mortgage, it does not seem to me that that state of things makes the value of the subject-matter of the appeal the principal money expressly secured by the instrument of mortgage plus the amount which the mortgagor has to pay as a condition of being allowed to redeem. As it is put in 24 *Madras Law Journal's* case, that is incidental to the right to redeem and ought to be excluded from consideration in computing the value of the subject matter of the appeal. If the defendants are able to establish that the mortgage for Rs. 800 is a good mortgage, then the plaintiff cannot without at any rate amending his plaint and making up the deficiency in his court-fee obtain a decree in this suit. Mr. Rosario accepted that and he has contended that a state of things may arise in which he will be in a position to say, "I accept the finding that the mortgage for Rs. 800 is a good mortgage and accepting the finding I now ask for leave to amend my plaint and to make up the deficiency in my court-fee for the purpose of obtaining a decree for redemption in the suit." Such a state of things may arise hereafter but I do not think it follows from that that the value of the subject-matter in dispute in the appeal now as it stands is the principal money expressed to be secured by the mortgage plus the amount which will have to be payable by Mr. Rosario in the event of the Court of appeal setting aside the finding of the Court of first instance and holding that the mortgage for Rs. 800 is a good mortgage. I do not think the point is altogether free from difficulty but that is the conclusion at which I have arrived and I think the objection ought to be disallowed.

Syabji J.—I entirely agree with what has just fallen from the learned Chief Justice. As he has explained the question is the value of the subject matter of the appeal and in order to understand

(1) [1911] 11 I. C. 629.

(2) [1909] 8 I. C. 459.

that I think we must see what is the subject-matter of the suit and what can be the order that the Court can pass under the present proceedings. That order as the learned Chief Justice has pointed out and as is admitted by the applicant can in the absence of leave being obtained by the plaintiff to amend his plaint, only be either that he should be permitted to redeem the mortgage of 1855 for Rs. 5,000 or that he should not be permitted to redeem that mortgage. Incidental questions may no doubt arise in order that the Court may be able to decide whether or not the plaintiff should be allowed to redeem the mortgage mentioned in his plaint. The decision of those incidental questions cannot affect, it seems to me, the subject-matter of the suit or the relief that the Court of appeal can grant under the present proceedings. I refer to that question whether the alleged further charge for Rs. 800 exists and is valid as an incidental question because the defendant does not require any relief to flow from its determination; he relies upon it merely in order to contend that the plaintiff cannot succeed in the suit as framed and, as I have already stated, it was admitted before us for the purposes of the present proceedings that on the pleadings as they stand the decree cannot be to the effect that the mortgage for Rs. 800 should be redeemed; neither party desires such a decree. The plaintiff does not admit the validity of the mortgage and the defendant does not wish it to be redeemed and refers to it merely to say that the Rs. 5,000 mortgage cannot be redeemed by itself. The question does not arise before us (and I express no opinion on it) whether our decision would be different where on the pleadings the defendant specifically raises the alternative plea (which may or may not be in the form of a counter-claim) that the plaintiff should be required to redeem not only the mortgage sought to be redeemed in the plaint but also another mortgage which is alleged to exist by the defendant and of which either the existence or the validity is denied by the plaintiff.

In such a case, the decree of the Court would have the same effect on each of the mortgages and the Court would decree in the case of each of them equally that it should be redeemed or

not redeemed. Here on the pleadings, as represented to us, the plaintiff has not offered to redeem the second mortgage, and the defendant does not desire it to be redeemed, and the order of the Court will, in no case, be such as to affect the alleged further charge for Rs. 800.

For those reasons I agree that this preliminary objection should be dismissed.

(These appeals and the memorandum of objections put in by respondent 1 in Appeal No. 90 of 1909 coming on for hearing on Thursday and Friday, the 11th and 12th days of December 1913, on the merits and having stood over for consideration till this day, the Court delivered the following:)

Judgment.— The learned vakil for the appellant has devoted his arguments primarily to showing that Ex. B is not binding on those members of the tarwad who are not parties to it, (a) because it is not supported by consideration to the extent of Rs. 1,000. (b) because it was not such a bargain as a prudent manager would enter into for the benefit of the tarwad.

As regards the first point, we see no reason on the evidence to differ from the finding of the lower Court that consideration passed as set forth in the document.

The second point appears to have been treated as of minor importance by the parties in the lower Court. It may be intended to be raised in the additional issue, and, if so it must be presumed to have been in the minds of the parties although it is difficult to find anything in any of the defendant's written statements which raises such a plea. At any rate in the lower Court, the suit as far as it relates to the effect of Ex. B was fought out primarily on the question of whether defendant 2 was or was not the karnavan of the tarwad, and secondly, on the question of consideration already referred to. It is now admitted that defendant 2 was the karnavan as alleged by the plaintiff.

The arguments of the appellant's vakil really amount to this: that the tarwad manager ought to have made a better bargain than is contained in Ex. B. It is pointed out that although the money value of the produce of the land had probably doubled since 1855 when Ex. 3 was executed, Ex. B which is for a term of 30

years only secures the tarwad a sum of Rs. 1,000 more than the amount under Ex. 3 and that as Ex. B was executed five years before the term of Ex. 3 expired, there would seem to have been no urgency about the matter.

We have given full weight to these considerations but we do not think that on the evidence before us we should be justified in pronouncing the transaction one which is not binding on all the tarwad members. Mr. Rosario points out that the introduction of the new settlement rates may have largely neutralized the rise in prices. The evidence on record shows very little of the circumstances under which Ex. B came into existence. What we do know is that it was executed by the karnavan together with the two senior anandravans (defendants 3 and 4) — a fact which by itself is usually taken as sufficient evidence of the assent of the family: vide *Elayachanidathil Kombi Achen v. Kenatumkora Lakshmi Amma* (3). There is evidence that defendants 6, 10 and 11 were also present at the time and as the family is governed by Marmukkatayam and not Aliasantana law the omission to join defendant 6 has no significance. In addition to this, it is clear that the arrangement made by defendants 6 to 11 under Ex. 1 was very little better — the term was twenty-five years instead of thirty, but the amount (Rs. 6,000) was precisely the same. The difference in term is certainly insufficient ground for stamping the first bargain as imprudent. It is, in fact, only these defendants 6 to 11, who should be allowed to raise this objection for defendant 1 is an outsider who has no ground of complaints on this score.

We find no reason for holding Ex. B not binding on all the members of the tarwad.

The next point argued for the appellants relates to the genuineness of Ex. 4. The evidence in support of this document is most meagre: and, in our opinion, the District Judge has given convincing reasons for not accepting it as genuine.

Lastly, it is urged that inasmuch as plaintiff item No. 4 was granted to defendant 1 on darkhast, it should be taken to be his own acquisition, and not an accession to the mortgaged property. Here also we agree with the District Judge. Admittedly preference is given in gran-

ting newly formed accretions on darkhast to the holder of the adjoining land. Defendant 1 took advantage of his mortgage to present a single darkhast both for accretion adjoining the mortgaged lands and for the accretion adjoining his own land, and his application was granted. In our opinion he must be held to have received the accretion to the mortgaged property in trust for the mortgagor's benefit.

The appeals are dismissed with costs.

Only two points have been argued by Mr. Rosario on the memorandum of cross-objections presented by him. The first relating to the deduction in the mortgage amount on account of land acquisition, depends on fresh evidence which we have declined to admit. The second relates to the Judge's disallowment of mesne profits from the date of plaint. We do not consider that the plaintiff's offer to pay Rs. 300 in addition to the sum of Rupees 5,000 deposited can be taken as a valid tender of the amount due to the mortgagee, (the actual value of improvements being found to be Rs. 1,231). The District Judge's order as to mesne profits is correct.

The memorandum of cross-objections is dismissed with costs.

S.N./R.K.

Appeals dismissed.

A. I. R. 1914 Madras 293

AYLING AND OLDFIELD, JJ.

Golla Chinna Venkadu — Accused — Appellant.

v.

Emperor — Opposite Party.

Criminal Reference No. 41 of 1913, Decided on 10th November 1913, made by Sess. Judge, Kistna, in Criminal Case No. 25 of 1913.

(a) Evidence Act (1 of 1872) S. 118 — Child's evidence is admissible though no oath is administered — S. 13, Oaths Act, governs case — Oaths Act, Ss. 5 and 13.

A child's evidence is not inadmissible because no oath was administered to it. Although S. 5, Oaths Act, is imperative, still S. 13 of the Act governs cases of this sort: 16 *Mal.* 105, *Foll.*; 10 *All.* 207, *Diss. from.* [P 294 C 1]

(b) Penal Code, S. 84 — Evidence of insanity — Evidence relating to plea of insanity of accused must refer to time when offence was committed.

Where an accused pleads insanity, the evidence relating to it must refer to the time when he committed the offence and not to the state of his mind long afterwards. [P 294 C 2]

A. Nilakantam—for Accused.

Public Prosecutor—for the Crown.

Judgment.—The appellant has been convicted of the murder of his wife on the night of 25th July. The direct evidence against him is that of two of his children, P. Ws. Nos. 4 and 6, who say they awoke in the middle of the night and saw the appellant cutting his wife's throat.

These witnesses, who are aged eight and six years, were not affirmed or sworn by the Sessions Judge; and it is argued by the appellant's vakil that their evidence is on this account inadmissible and should be excluded from consideration. In reply to this the Public Prosecutor relies on S. 13, Oaths Act.

The authorities on the subject are not uniform; but it appears to be the view of both the Bombay and Calcutta High Courts that the failure by a Court to administer oath or affirmation to a witness does not render the evidence of that witness inadmissible. The same view was taken by Parker, J., in the only reported case of this Court, *Empress v. Viraperumal* (1), bearing on the point, although Collins, C. J., was of a different opinion. In an unreported case, *Empress v. Perumal* referred to therein, Wilkinson and Muthusawmi Iyer, JJ., took the same view as Parker, J.

It is only in the Allahabad High Court that the opposite view has prevailed: vide *Queen-Empress v. Maru* (2). Both on a construction of S. 13 and in view of the authorities above referred to, we are inclined to hold that S. 13 applies to a case of this kind, and that the evidence is admissible.

We are at the same time constrained to point out that S. 5, Oaths Act, is imperative; and if a Court holds that a witness "may lawfully be examined or give or be required to give evidence" (in other words, is competent to testify), it is the duty of the Court to administer oath or affirmation to that person before recording his evidence. We see no reason for not acting on the evidence of the children.

Even if that evidence were left out of account, there remains sufficient circumstantial evidence to warrant the inference that the appellant murdered his wife.

The only other point argued relates to the sanity of the appellant, whether the case falls under S. 84, I. P. C. No such plea was set up either in the committal inquiry or in the Sessions Court, in both of which the behaviour of the appellant appears to have been that of a sane man. His appeal petition to this Court, which we have carefully considered, contains no suggestion of insanity. It appears, however, that, when notice of the date of hearing of this appeal was sent to him, his behaviour was such as to suggest to the Medical Officer in charge of the Jail in which he was confined that he might be insane, and after some further observations, this officer has submitted a report in which he states his opinion that the appellant is now insane, though he suggested the desirability of further investigation.

Apart from this report, which is not evidence, it is, in our opinion, impossible to accept the defence of insanity. The appellant's vakil has invited our attentions to the apparent absence of motive for the crime, and to the appellant's behaviour, immediately afterwards as supporting his plea; but while giving full weight to these points, we do not consider that, viewing them in connexion with the whole record, a Court would be justified in inferring legal insanity at the time of the crime.

The report of the Medical Officer is, of course, a very different matter, but it does not follow that because the appellant is insane now (if he be insane) that he was insane in July. He may have lost his reason since his trial and condemnation to death.

On the record before us we must confirm the conviction, while reducing the sentence to transportation for life.

It will be matter for the consideration of Government, after further observations of the appellant, whether he should undergo this sentence in the usual way; or should be treated as a criminal lunatic.

S.N./R.K.

Sentence reduced.

(1) [1893] 16 Mad. 105=1 Weir 823.

(2) [1898] 10 All. 207.

A. I. R. 1914 Madras 295

SADASIVA AIYAR AND SPENCER, JJ.

Gottipati China Kondiah—Plaintiff — Appellant.

v.

Gottipati Narasappa Naidu and others —Defendants —Respondents.

Second Appeal No. 1539 of 1910, Decided on 21st January 1914, from decree of Dist. Judge, Nellore, in Appeal Suit No. 89 of 1909.

Partnership—Suit for settlement of accounts of dissolved partnership found barred—Prayer for recovery of share of collections collected after dissolution of partnership—Plaintiff was held entitled to prove what sums will be received by defendants within three years before suit.

In a suit for the settlement of accounts of a dissolved partnership, the plaintiff partner also prayed for the recovery of his share of the collections which were alleged to have been received by defendants (partners) after the dissolution of the partnership.

Held: that even if the claim for the settlement of partnership accounts was barred by limitation, the plaintiff was entitled to prove that sums had been received by the defendants within the three years before the suit, leaving however an opportunity to the defendants to show that if a general account of the partnership is taken, the plaintiff would not be found entitled to the share claimed by him of the sums received by them within three years before suit: 28 *Mad.* 344 and 3 *I.C.* 486, *Rel. on.*

[P 295 C 2; 296 C 1]

T. V. Seshagiri Aiyar and *T. V. Muthukrishna Aiyar*—for Appellant.

G. K. Narayan—for Respondents.

Sadasiva Aiyar, J.—The plaintiff is the appellant before us. His suit, as I understand it (especially from para. 10 of the plaint), is based on the allegations that the partnership between himself and the defendants was dissolved by consent in October 1903 and that between October 1903 and May 1904 the plaintiff's and defendant 3's men collected the debts due to the partnership and paid the moneys so collected to defendants 1 and 2. The reliefs prayed for in the plaint are that "all the accounts relating to the partnership trade may be sent for to the Court and the accounts settled and that a decree may be passed directing recovery from defendants 1 and 2 and from their family property, of the amount of Rs. 846-4-0 which, the plaintiff believes, should be due to him for his share of the amount collected and paid to defendants 1 and 2 or of any larger amount which will be found upon settlement of accounts.

In para. 16 of the plaint the cause of

action is stated to have arisen from November 1903, and I take this to mean that the cause of action arose on the several dates between November 1903 and May 1904 referred to in para. 10 of the plaint as the period during which the collections were made by plaintiff's and defendant 3's men. The lower Courts dismissed the suit on the ground that the dissolution really took place in May 1903 and not in October 1903 as alleged in the plaint and as the suit was brought in July 1906 more than three years from the date of the dissolution of the partnership and as the suit was one for a settlement of accounts on the dissolution of a partnership, it was barred. I think the plaint is not worded as clearly as it might have been. A reading of paras. 10 and 16 of the plaint with the relief portion in para. 17 and the schedule thereto shows, in my opinion, that the plaintiff wanted to get his share of the sums which he alleges were collected by the plaintiff's and defendant 3's men and were received by defendants 1 and 2 between November 1903 and May 1904. If then besides the general prayer for the settlement of accounts of a dissolved partnership there is also a prayer for the recovery of the plaintiff's share of the sums received by two of the partners within three years before the suit, the following decisions namely *Sokkanadha Vannimundar v. Sokkanadha Vannimundar* (1), *Sadhu Narayana Aiyangar v. Ramaswami Aiyangar* (2) and *Thiruvengadamudaliar v. Sadagopa Mudaliar* (3) seem to apply to such a prayer and the plaintiff would be entitled to prove what sums have been received by defendants 1 and 2 within the three years before the suit leaving however an opportunity to defendants 1 and 2 to show that, if a general account of the partnership transactions is taken, the plaintiff would be found not to be entitled to the share he claims of the accounts received within the three years before suit by defendants 1 and 2. It must be admitted that this aspect of the case was not pointedly put forward by the plaintiff before the Munsif and no issue was raised on this question in the Munsif's Court. But the point seems to have been taken in the grounds of appeal to the lower appellate Court—ground

(1) [1905] 28 *Mad.* 344.(2) [1909] 3 *I. C.* 486=32 *Mad.* 203.(3) [1910] 7 *I. C.* 811=34 *Mad.* 112.

6—and though there is no definite statement that evidence was shut out by the District Munsif on the question as to what amounts had been received by defendants 1 and 2 between November 1903 and May 1904, it is contended in the appeal memorandum that “the District Munsif should have tried that question and ought to have given a finding on it.” Having in mind the difficult nature of the question of law involved and seeing that it is not unreasonable to suppose that the plaintiff and his legal advisers had only vague ideas of their legal rights in a case of dissolved partnership and of collects made and amount received by some of the partners after dissolution, I think that it is not improper to allow the plaintiff an opportunity to adduce evidence on that question giving, of course, a like opportunity to defendants 1 and 2 not only to meet the evidence which may be adduced by the plaintiff in regard to these alleged collections but also to prove that the plaintiff's share of these collections cannot be recovered by him, having regard to the state and result of the general accounts of the partnership. We therefore set aside the decrees of the lower Courts and remand the suit to the Court of first instance for a decision de novo not only on the questions arising in the case including the question relating to the amounts received by defendants 1 and 2 as alleged in para. 10 of the plaint and in the schedule thereto but also on the question of the general state of the accounts if it is necessary to go into that question also.

The court-fees paid by the appellant on the memorandum of appeal will be refunded to him. Costs incurred in all the Courts will be provided for by the District Munsif in the fresh decision.

Spencer, J.—I concur and I have nothing to add.

S.N./R.K.

Case remanded.

A. I. R. 1914 Madras 296

ABDUR RAHIM AND SPENCER, JJ.

Bhogavalli Venkayya and another—
Defendants—Appellants.

v.

Kudapa Settya and another—Plaintiff-
Defendant 1—Respondents.

Second Appeal No. 308 of 1910. Decided on 31st October 1911, from decree of Sub-Judge, Kistna, in Appeal Suit No. 42 of 1909.

Transfer of Property Act (4 of 1882), S. 116—Expiry of lease does not imply determination of right to possession—Lessee under expired lease can maintain ejectment suit against trespasser.

An expiry of a lease does not necessarily imply a determination of the right of possession. A lessee holding under a time-expired lease can therefore maintain a suit in ejectment against a mere trespasser: *Gibbins v. Buckland*, 32 L. J. Ex. 156, Ref. [P 296 C 2]

P. Narayanamurthi—for Appellants.

S. Gopalasami Aiyangar and S. V. Padmanabha Aiyangar—for Respondents.

Judgment.—The District Munsif has found on issue 3 that the appellants (defendants 2 and 3) had no occupancy rights and, although the Subordinate Judge has not recorded any express finding on this point, it is clear from his judgment that he regarded the relations in which the parties stood as precluding any independent right of occupancy existing in these appellants. We think that Exs. C and II show that the District Munsif's conclusion on this issue was correct. It was contended for the appellants that (respondent 1's) plaintiff's title having been determined before suit by expiry of his lease deed he was not entitled to obtain a decree of ejectment against the appellants, but we think that the expiration of his lease deed does not necessarily imply the expiration of his right of possession and as against parties who are in no better position than trespassers he is entitled to a decree: vide *Gibbins v. Buckland* (1) and *Knight v. Clarke* (2). We may add that the landlord, who is defendant 1, acquiesces in the plaintiff getting a decree and it has been shown that the appellants are not in a position to resist the landlord's right.

The second appeal is dismissed with costs (one set).

S.N./R.K.

Appeal dismissed.

(1) [1863] 32 L. J. Ex. 156=1 H. & C. 736=9 Jur. (n. s.) 207=8 L. T. 87=11 W. R. 380.
(2) [1880] 15 Q. B. D. 294=54 L. J. Q. B. 509 50 J. P. 84.

A. I. R. 1914 Madras 297 (1)

SADASIVA AIYAR AND TYABJI, JJ.

A. R. A. R. Somasundaram Chettyar and another—Petitioners.

v.

Thirumala Gondama Gondala Nagaya Rama Krishna Kadir Velasami Naicker and others—Respondents.

Civil Misc. Petn. No. 1056 of 1910, Decided on 5th January 1914, from order in Appeal Suit No. 166 of 1901.

Civil P. C. (14 of 1882), S. 206—Court can amend errors in decree without amending pleadings where errors first appeared—Civil P. C. (5 of 1908), S. 152.A Court has power to amend clerical errors, which had crept into decree by following similar errors in the plaint without as a preliminary requisite of such amendment, causing the pleadings in which the errors first appeared to be amended: 16 *Mad.* 424, *Foll.* [P 297 C 2]*A. Krishnaswami Aiyar, King and Partridge*—for Petitioners.*T. Rangachariar, C.V. Ananthakrishna Aiyar, N. Rajagopalachariar, V. Parthasarathy Aiyangar and C. A. Seshagiri Sastri*—for Respondents.**Judgment.**—There are palpable clerical errors in the decree as it stands. Those errors consist in the misdescription of the boundaries of the properties in Sch. A. The names of the seven villages and the sub-district, the taluq and the district in which they are situated are all correctly given but instead of describing each village as bounded on the north by such and such a property (say property A), bounded on the east by such and such a property (say property B) and so on, they were described as to the north of A, to the south of B and so on, thus making the description by boundaries palpably erroneous.In connexion with very similar errors which had crept into a decree, this Court held in *Narayanasami v. Natesa* (1), that such errors could and ought to be corrected by an application under S. 206, (old Civil P. C.) corresponding to S. 152, new Civil P. C., even though the errors had crept into the decree by its having followed the similar errors made in the plaint. There is no dispute in this case as to what the lands intended to be affected by the litigation and the decree are. Following the ruling of *Narayanasami v. Natesa* (1) we hold that the time when the clerical errors (provided they are as in this case palpable clerical(1) [1899] 16 *Mad.* 424.

errors) were first introduced in the transactions or proceedings between the parties is immaterial and that the Court has got power to amend such clerical errors if they are found in the decree without the necessity of having the prior pleadings in which the same errors had formerly appeared themselves amended as a preliminary requisite to the amendment of the decree.

We therefore grant this petition for amendment as prayed for. The respondents will pay the petitioner's costs of this application as they ought not to have opposed it.

S.N./R.K.

*Petition granted.***A. I. R. 1914 Madras 297 (2)**

SANKARAN NAIR AND AYLING, JJ.

Samandan Karkal Edathil Rayarappan Nambiar—Petitioner—Appellant.

v.

Malikandi Aketh Mayan—Petitioner—Respondent.

Appeal No. 7 of 1913, Decided on 29th January 1914, from order of Dist. Judge, North Malabar, in Civil Misc. Petn. No. 13 of 1912.

Civil P. C. (1908), O. 21, R 90—Decree-holder with knowledge of judgment-debtor's death purchased property in execution—Legal representatives not brought on record—Sale was held to be nullity and that Art. 166, Lim. Act, was inapplicable—Limitation Act (1908), Art. 166.

Where a decree-holder, who had notice of the death of the judgment-debtor, purchased his property sold in execution of the decree, without bringing the representatives of the judgment-debtor on the record:

Held: that the omission to bring the representatives of the deceased judgment-debtor on record was not a mere irregularity and that consequently the sale was a nullity as against them.**Held also:** that as the sale was nullity, Art. 166, Lim. Act, did not apply: 6 *Mad.* 180; 22 *Mad.* 119 and 32 *Cal.* 296, *Foll.*; 25 *Bom.* 337, *Dist.* [P 298 C 1]*K. Govinda Marar*—for Appellant.*V. Ryru Nambiar*—for Respondent.**Judgment.**—The plaintiff in Original Suit No. 590 of 1903 obtained a decree on his hypothecation deed for the sale of the properties mortgaged against the mortgagor and the appellant's predecessor-in-title who was a puisne mortgagee. The puisne mortgagee purchased the mortgagor's interest in a judicial sale in execution of a decree obtained by him to which the plaintiff was a party. The mortgagee-judgment-debtor, in Original Suit No. 590 of 1903 died and without

bringing his representatives on record the plaintiff got the properties sold in execution of his decree. The appellant now applies in effect to be made a party and to set aside the sale on payment to the plaintiff of the amount due to him under the decree. He also alleged fraud. The lower Courts hold that the application is barred by limitation. If the sale is a nullity so far as he is concerned, then the application is clearly not barred. According to the decisions of this Court, *Ramasami Ayyangar v. Bagirathi Ammal* (1), *Krishnayya v. Unnissa Begam* (2) and *Groves v. Administrator-General of Madras* (3), the omission to bring the representatives on record is not a mere irregularity. It renders the sale a nullity against the representatives of the judgment-debtor. But it is contended that these decisions have been overruled by the Privy Council: see *Malkarjun v. Narhari* (4). In that case however there was an order passed by the Court executing the decree directing a person to be brought on record as the representative of the deceased judgment-debtor. The fact that the decision was afterwards found to be erroneous and the true representatives were not brought on record was held not to be sufficient to set aside the sale against a bona fide purchaser: see *Khierajmal v. Daimi* (5). In this case it may also be pointed out that the decree-holder was the purchaser and he had notice of the death of his judgment-debtor. We are therefore unable to hold that the Madras cases are no longer of any authority.

The appellant therefore will be placed on record as the representative of his karnavan and on payment of the amount due to the decree-holder, the sale will be set aside. The appellant is entitled to the costs in this and the lower appellate Court. The costs in the first Court will be provided for in the final order.

S.N./R.K.

Appeal allowed.

A. I. R. 1914 Madras 298

SADASIVA AIYAR, J.

Kajira Beeviammal and another—
Plaintiffs—Petitioners.

v.

Fathma Biviammal and others—
Defendants—Respondents.

Civil Revn. Petn. No. 353 of 1913, Decided on 17th January 1914, from order of Dist. Munsif, Tiruturaipundi, in I. A. No. 298 of 1913, in Original Suit No. 239 of 1912.

Civil P. C. (1908), S. 115—Erroneous order refusing to allow amendment—No revision lies.

The High Court will not interfere in revision under S. 115 with an erroneous order refusing to allow the petition for amendment of plaint, there being no error in the exercise of jurisdiction or material irregularity. [P 298 C 1]

*T. V. Gopalaswami Mudaliar—*for
Petitioners.

G. S. Venkatarama Aiyar for *G. S. Ramachandra Iyer—*for Respondents.

Facts.—Plaintiff instituted the suit for the recovery of possession of certain immovable properties from defendants 1 to 3 alleging that the plaintiff's father was solely entitled to and had been enjoying the same till his death and that thereafter his brother, defendant 3, in collusion with defendants 1 and 2, was enjoying them. Defendants 1 to 3 contended that the suit properties were the self-acquired properties of defendant 3 and that defendants 1 and 2 had purchased the same from him and had been enjoying the same. Long after the issues had been settled the plaintiff sought to amend the plaint by inserting a prayer that in case the Court should hold that the suit properties belonged to the plaintiff's father and defendant 3 jointly, she might be awarded her father's share after partition and division by metes and bounds. The District Munsif rejected the petition. Plaintiff then preferred this revision petition to the High Court.

Judgment.—The Munsif's refusal to allow the petition for amendment of plaint seems to me to be clearly erroneous. Giving more weight (as I ought) to the very recent decision of this Court in *Penumarli Vasantarayadu v. Reddi Subbamma* (1) than to the decisions of the Calcutta High Court in *Charu Chundra Dutt v. Sarat Chandra Singh* (2), etc., quoted by the learned vakil for the peti-

(1) [1883] 6 Mad. 180.

(2) [1888] 15 Mad. 399.

(3) [1889] 22 Mad. 119=8 M.L.J. 288.

(4) [1901] 25 Bom. 337=5 C.W.N. 10=10 M.L.J. 368=2 Bom. L.R. 927=27 I.A. 216 (P.C.).

(5) [1905] 32 Cal. 296=1 C.L.J. 584=2 A.L.J. 71=9 C.W.N. 201=7 Bom. L.R. 1=32 I.A. 23 (P.C.).

(1) [1914] 22 I.O. 39.

(2) [1910] 8 I.O. 87.

tioner, I refuse to interfere in revision under S. 115, Civil P. C. There will be no order as to the costs in this petition.
S.N./R.K. *Petition dismissed.*

A. I. R. 1914 Madras 299

TYABJI, J.

Vazhakuttia Kutti Uduman Haji and others—Plaintiffs—Petitioners.

v.

A. Mammi Kutti and others—Defendants—Respondents.

Civil Revn. Petn. No. 997 of 1912, Decided on 26th March 1914, from order of Sub-Judge, Palghat, D/- 3rd February 1912, in Misc. Petn. No. 3612 of 1911.

Civil P. C. (1908), S. 115—Revision petition against an order, presented more than eight months from date of order—Delay was not excusable—Limitation Act (1908), S. 4.

Where an order was sought to be revised, under S. 115 by a petition presented more than eight months from the date of the order and after five months of inexcusable delay, there is no sufficient reason to excuse delay in prosecuting the petition: 24 *Mad.* 646, *Dist.*

[P 299 C 2]

T. R. Ramachandra Aiyer and T. R. Krishnasami Aiyer—for Petitioners.

C. Madhavan Nair—for Respondents.

Judgment.—This is a petition against an order amending a decree. It was presented 168 days after the order complained of. Following the decision in *Visvanathan Chetti v. Ramanathan Chetti* (1) I must take it that the petitioner should have appealed against the amended order and not petitioned under S. 115, Civil P. C. That case is sought to be distinguished before me in two ways. First it is argued that in that case if the proper proceeding was to be an appeal, then the appeal would have lain to another Court and that the High Court could not therefore have proceeded on the basis that the petition was an appeal. I accede to that distinction to a certain extent. If that were the only objection to the proceedings, it might have been proper for me to consider whether the present petition should not be treated as an appeal and whether it should not proceed on that basis. But that would not meet the second objection which is the delay, and curiously enough the second point on which the decision is sought to be distinguished by the petitioner's pleader is the fact that in the present case the decree was amended several years after the original decree

had been passed, the original decree having been passed in 1903 and amended in 1911. I do not think that will make any distinction.

The point decided in *Visvanathan Chetti v. Ramanathan Chetti* (1) was that S. 4, Lim. Act, provided a means by which the delay in appealing could be excused. But I will assume that the circumstances of this case are sufficient for the petitioner to have considered that it would be more proper for him to come by way of a revision petition than by way of an appeal, and that the fact that in this case the decree was amended several years after it was originally passed, whereas in *Visvanathan Chetti v. Ramanathan Chetti* (1) it was amended soon after it was passed, distinguishes the present case from the reported decision. Making all allowance for this, I do not see my way to excuse the long delay in presenting this petition. The order was made on 3rd February 1912. The first time that the petitioner came to the High Court was on 16th July 1912. He then came with an application in a wrong form. The present petition in the proper form was not presented till 12th September 1912. But I am asked in the first place to consider the present petition as having been presented on 16th July 1912, and in the second place in regard to the making of the first application (which was admittedly in wrong form) to excuse all time during which the Courts were closed for the vacation. The vacation commenced, I presume, about the beginning of May 1912. The delay between February and May is in itself so great that, taking into consideration the fact that the actual petition with which I have to deal was not presented till 12th September 1912, I think I am justified in saying that the petitioner has been dilatory and that he has made out no case for obtaining the indulgence of the Court on the various points on which he has failed to observe that strict form of the law. It seems to me that this is a case in which it would not be proper to excuse this delay and hear the petition now. The petition will be dismissed with costs.

S.N./R.K.

Petition dismissed.

(1) [1901] 24 *Mad.* 646.

A. I. R. 1914 Madras 300 (1)

SADASIVA AIYAR AND SPENCER, JJ.

Meethale Vittil Raman—Plaintiff—Appellant.

v.

Puthulath Ambu and others—Defendants—Respondents.

Letters Patent Appeal No. 2 of 1913, Decided on 13th November 1913, from order of Sankaran Nair, J., in Second Appeal No. 1026 of 1912.

(a) **Adverse Possession—Acquisition of title by prescription depends on nature of animus possidendi.**

Acquisition of title by prescription depends upon the nature of the animus possidendi, whether that animus is based on a real or false or pretended title does not matter except that the title acquired by prescription cannot be higher than what could be acquired if the pretence or falsehood proved true. [P 300 C 1]

(b) **Adverse Possession—Lessees within 12 years cannot acquire title by prescription.**

Where the defendants were lessees within twelve years, there could be no acquisition of title by prescription. [P 300 C 1]

J. L. Rozario—for Appellant.

V. Ryru Nambiar—for Respondents.

Judgment.—The plaintiff's case was that the defendants' possession was not adverse in 1900 (the suit was brought in 1910) because the defendants became lessees in 1900 under the tarwad of which the plaintiff is the karnavan.

The defendants said that as members of the same tarwad they have been in possession up to date of suit of the plaintiff house. On the case of both parties no question of adverse possession for more than 12 years before suit in the defendants as against the tarwad (on behalf of which the plaintiff sues) arises at all in this case.

The nature of the possession for the purposes of acquiring a title by prescription and the character and extent of the title acquired by possession depend on the nature of the animus possidendi, and whether that animus is based on a real or false or pretended title does not matter except that the title acquired by prescription cannot be higher than what could be acquired if the pretence or falsehood was true. Here even if the pretence of the defendants was true they could not acquire any title by prescription against the tarwad as the possession supposing the pretence was true cannot be adverse against the tarwad.

The learned District Judge seems to be in error in holding that the plaintiff's claim to eject was based only on

the alleged letting of 1900. It was also based on the title of the tarwad.

We must set aside the order of the learned Judge of this Court and the decrees of the lower Courts and give judgment for the plaintiff for possession of the house sued for.

As the plaintiff set up a false case of letting, and in view of the fact that defendants have been in possession though not adversely for several years, we direct the parties to bear their respective costs in all Courts.

S.N./R.K.

*Appeal decreed.***A. I. R. 1914 Madras 300 (2)**

SADASIVA AIYAR AND SESHAGIRI AIYAR, JJ.

Parama Taragan—Plaintiff 2—Appellant.

v.

Thirumandhankunnu Devasmom Uralers Cheriachan Veetil Govindachan and others—Plaintiffs 3 to 5 and—Defendants 1 to 22—Respondents.

Second Appeal No. 2502 of 1912, Decided on 13th March 1914, from decree of Sub-Judge, Palghat, in Appeal Suits No. 606 and 612 of 1911.

Malabar Law—Authority executed in name of all Uralers of devaswom but signed by some is not sufficient.

A document executed in the name of all six uralers of a devaswom but signed by only five of them, is not sufficient authority to invest a particular uraler with power to create a melcharth on behalf of a devaswom : 26 M. L. J. 257, Ref. [P 300 C 2]

K. P. Gorinda Menon—for Appellant.

C. V. Anantha Krishna Iyer—for Respondents.

Judgment.—The appellant before us (plaintiff 2) has obtained a melcharth from plaintiff 1 and seeks to redeem a kanom given by the uralers of a devaswom.

The appellant cannot succeed unless the plaintiff 1 had a legal right to give the melcharth to the appellant.

Plaintiff 1 can have had no such right unless he had been invested with proper authority from the uralers to grant a melcharth. The authority relied upon is a deed (Ex. C) which begins by reciting that it is executed by all the six uralers of the devaswom, but is really signed by only five of them. It is therefore an incomplete document and plaintiff 1 cannot be legally invested with any authority on the strength of that

document: see *Amritham Pillai v. Nanjah Gounden* (1). Plaintiff 2's (appellant's) claim to redeem was therefore rightly rejected and this second appeal is therefore dismissed.

This would of course not prevent the uralers as trustees from bringing a suit to redeem the mortgage on behalf of the devaswom, and it is only plaintiff 2's, claim to redeem and the particular relief prayed for in the present suit, (namely that the properties should be placed in possession of plaintiff 2 on his redeeming the mortgage) that are disallowed in this suit and decided in this second appeal.

There will be no order as to the costs of this second appeal.

S.N./R.K. *Appeal dismissed.*

(1) [1914] 23 I. C. 464.

A. I. R. 1914 Madras 301

SESHAGIRI AIYAR, J.

P. Ramasami Naidu — Defendant—Petitioner.

v.

Venkataramanjulu Naidu and another —Plaintiffs—Respondents.

Civil Revn. Petn. No. 354 of 1913, Decided on 24th February 1914, From decree of Presy. Small Cause Court Judge, Madras, in Ejectment Suit No. 91 of 1913.

(a) Civil P. C. (1908), S. 115—High Court can revise proceedings under S. 41, Presidency Court of Small Causes Act—Presidency Small Causes Court Act (1872), S. 41.

High Court has power under S. 115 to revise the proceedings under S. 41, Presidency Court of Small Causes Act: 31 Bom. 138; 30 Cal. 588; 30 Cal. 986 and 6 I. C. 473, *Foll.*

[P 302 C 2]

(b) Landlord and Tenant—Lease for fixed term—Tenancy terminable on notice—Notice cannot be given until lease term expires.

Where a lease is for a fixed term and then the tenancy is determinable on notice, notice cannot be given until after the expiration of the fixed term. [P 303 C 1]

(c) Landlord and Tenant—One notice given before and other after lease expiry—First notice was held to be premature and second insufficient.

Where in a case one notice was given before and another after the expiry of the fixed period of a lease:

Held: that the first notice was premature and the second insufficient inasmuch as it did not give six months' time as provided in the agreement: *Thompson v. Maberly*, 2 Camp. 578, *Dist.*: *Brown v. Symons* 8 C. B. (n.s.) 208, *Foll.* [P 303 C 1]

(d) Civil P. C. (1908), S. 115—When petitioner has other remedies, lower Court's

discretion will not be interfered with by High Court—But in no case can High Court condone illegal exercise of jurisdiction.

Where discretion is to be exercised by Subordinate Courts, a High Court, will ordinarily refuse to interfere if petitioner has other remedies but where want of jurisdiction of the Subordinate Court has been established no question of the exercise of discretion arises and a High Court cannot condone this. [P303C2]

(e) Presidency Small Cause Courts Act (1882), S. 41—Court has jurisdiction to deliver possession when tenancy has terminated—Court's order to deliver possession before termination of tenancy is wrong and is revisable—Civil P. C. (1908), S. 115.

Under S. 41, Presidency Small Cause Courts Act the Court has jurisdiction to deliver possession only when the tenancy has determined and therefore where the Court has delivered possession before the determination of the tenancy, its order is wrong and open to revision: 11 Bom. 488, *Foll.*

The provision as to how trials contained in Chap. 6, Presidency Small Cause Courts Act does not apply to proceedings under S. 41 of the Act: 31 Bom. 259, *Foll.* [P 303 C 2]

M. O. Parthasarathi Aiyangar and *K. V. Krishnaswami Aiyar*—for Petitioner.
N. Chandra Sekhara Aiyar for *C. P. Ramaswamy Aiyar*—for Respondents.

Judgment.—This was a proceeding in ejectment under S. 41, Presidency Small Cause Courts Act. Defendant executed a rental agreement on 14th June 1897 agreeing to occupy the site for 15 years by building a house on it. The agreement provides: "In case you require the aforesaid land if you give me six months' previous notice after the aforesaid 15 years I shall accordingly vacate the land remove the superstructure I had built thereon and put you in possession of it." Plaintiff gave two notices one in October 1911 and another on 13th December 1912 claiming possession on 31st of that month. Plaintiff's case is that the tenancy came to an end by efflux of time on 14th June 1912 and that as he gave notice in October 1911 defendant was bound to vacate the premises. Defendant contended that the first notice was bad as it was before the 15 years were over, that the second notice did not terminate the tenancy as it did not allow six months' time to vacate and that the Small Cause Court had no jurisdiction to entertain the application under S. 41. The learned third Judge of the Small Cause Court overruled these objections and gave possession to the plaintiff directing that "the defendant should remove the superstructure at his cost and deliver the site on 1st May

1913." Defendant moves the High Court to revise this order. A preliminary objection is taken to the jurisdiction of the High Court to entertain the revision petition. Mr. Chandra Sekhara Aiyar, who appeared for the plaintiff has argued this point very fully and clearly before me. His contention is that under S. 8 of Act 5 of 1908 only certain sections of the Code of Civil Procedure were made applicable to suits or proceedings of Small Cause Courts and that S. 115 is not one of those sections. He also contended that as S. 23 of Act 15 of 1882 which related to the provisions of the Code of Civil Procedure applicable to Presidency Small Cause Courts was repealed by Act 1 of 1895, and as the said section referred to the schedule which made S. 622 of the old Code corresponding to S. 115 of the present Code applicable to Small Cause Courts by implication the power of the High Court to interfere in revision under S. 115 was taken away, and he quoted *Ismailji Ibrahimji Nagree v. N. C. Macleod* (1) in support of this position. S. 8, Civil P. C., enumerates the sections which are made applicable "to any suit or proceeding in any Court of Small Causes."

The petition before me is not a suit or proceeding in a Small Cause Court. Nor does the repeal of S. 23 affect the question. It was due to the fact that the Civil Procedure Code contained provisions relating to the revisional powers of the High Court and it was thought unnecessary to provide for it in the Small Cause Courts Act. As regards *Ismailji Ibrahimji Nagree v. N. C. Macleod* (1) it is true that Beaman J., expressed a doubt whether S. 622 of the old Code was applicable to applications to revise suits or proceedings for Small Cause Courts. But the learned Judge gives no reason for his conclusion. There can be no doubt that the language of S. 115 is in terms applicable to cases coming from Presidency Small Cause Courts. They are subordinate to the High Court : vide S. 3 of Act 5 of 1908 and S. 6, Act 14 of 1882. Therefore unless by any express provision the power of the High Court is taken away, it will have jurisdiction to revise the proceedings of Small Cause Courts. The practice in this Presidency has been to

entertain these applications. I am fortified in this view by the decision of the Calcutta High Court in *Haladhar Maiti v. Choytonna Maiti* (2). In *Ram Dhin Bania v. Sewbaksh Singh* (3) and in *Sarat Chandra Singh v. Broto Lal Mukerji* (4) the learned Judges of the Calcutta High Court came to the conclusion that the High Court was competent to exercise revisional jurisdiction but directed that the petitions should be disposed of by the Judge sitting in the Original Side of the High Court. That is not the practice which has been adopted by the Madras High Court. I must overrule the preliminary objection and hold that the High Court has power to revise the proceeding under S. 115, Civil P. C.

On the merits the question turns upon the construction to be placed on the rental agreement. Mr. Parthasarathy Aiyangar, for the petitioner contends that the language of the rental agreement imports that the defendant was not to be disturbed under any circumstance within the 15 years of his lease and that on the expiry of that period the plaintiff can recover possession only after giving six months' notice. It is contended on the other side that the term as to six months' notice was inserted in order that the defendant may know at the end of the 15th year that the landlords intend to eject him and that the notice of October 1911 is sufficient compliance with this condition. I am unable to accept this construction. The language is plain and unambiguous; and the parties apparently contemplated the continuance of the tenancy on the original terms after the fixed period was over, leaving to the landlord the right to claim possession after giving six months' notice. I cannot accept the conclusion of the learned Judge that the six months' notice was to be anterior to the 15 years and not subsequent. There are no Indian authorities on the construction to be placed on similar clauses in rent agreements. Nor are English authorities uniform. In *Thompson v. Maberly* (5) it was held that where a tenancy was "for 12 months certain and six months' notice to quit afterwards," notice given to terminate the tenancy at the end of the

(2) [1903] 30 Cal. 538=7 C. W. N. 547.

(3) [1910] 6 I. C. 473=37 Cal. 714.

(4) [1903] 32 Cal. 986.

(1) [1907] 31 Bom. 138=8 Bom. L. R. 989.

first year was good. In *Gardner v. Ingram* (6) Lord Coleridge says this with reference to *Thompson v. Maberly* (5): "Mr. Cross relied on the case of *Thompson v. Maberly* (5) (*ubi sup.*) where Lord Ellenborough, C. J., stated that if premises are taken for 12 months certain and six months' notice to quit afterwards, "the tenancy may be determined by a six months' notice to quit expiring at the end of the first year." That case is not however quite satisfactory, as it appears to have been decided on the meaning of the word certain, and as Lord Campbell points out in a note the decision was for the plaintiff on another point, so that Lord Ellenborough's observation was obiter. It is true that, in the case of *Brown v. Symons* (7) in the Common Pleas, which was an apprenticeship case and turned upon the words "for 12 months certain," *Thompson v. Maberly* (5) (*ubi sup.*) was cited in the argument and was not disapproved of. But I think that in a case of a similar agreement where the word "certain" does not occur, it would be very doubtful whether *Thompson v. Maberly* (5) (*ubi sup.*) should be treated as an authority." The same view was held by the Court of appeal in *Cannon Brewery Co. v. Nash* (8). The case, *Brown v. Symons* (7), related to the contract of service and does not affect the decision in the above cases. In Halsbury's Laws of England, Vol. 18, p. 444, the proposition is thus stated in the notes: "In general where there is a fixed term and then the tenancy is determinable on notice, the notice cannot, it seems, be given until after the expiration of the fixed term." This view is in consonance with reason and justice. I, therefore, hold that the tenancy was not terminated by the notice of October 1911 and that the notice of 13th December 1912 was not sufficient.

The further question now arises, whether the Presidency Small Cause Court had jurisdiction to direct possession to be given under S. 41 of the Act. Para. 2 of that section makes the determination of the tenancy a condition precedent to the exercise of jurisdiction. It must be remembered that the power to pass

orders relating to immovable property is an exceptional authority conferred on the Presidency Small Cause Courts. The conditions under which this power can be exercised must therefore be strictly complied with. If the conditions fail the jurisdiction does not exist. It was argued before me that the defendant has other remedies and that he is not entitled to invoke the aid of the High Court's revisional powers. A number of cases were quoted before me. I take the principle of these decisions to be that where there is discretion to be exercised, the High Court will ordinarily refuse to interfere, if the petitioner has other remedies, generally speaking, only cases which are sought to be brought under Cl. (c), S. 115, will be affected by this rule. I am of opinion that where want of jurisdiction has been established, no question of the exercise of discretion arises and that the High Court cannot condone absolute want of jurisdiction. The decision of West, J., in *Amritav Krishna Deshpande v. Balkrishna Ganesh Amrapurkar* (9) is not against this position. In the view that I have taken of the right of revision, it is not necessary to consider whether the remedy by way of retrial is open to a party against whom an order under S. 41 has been passed. I need only mention that it has been decided in *Ramkrishna Sitaram v. Hai Dawood Ismail* (10) that such proceedings should not be dealt with under Chap. 6, Presidency Small Cause Courts Act.

The decision of the learned Judge must be set aside and the application under S. 41 must be dismissed with costs throughout.

S.N./R K.

Order set aside.

(8) [1898] 77 L. T. 648=14 T. L. R. 158.

(9) [1897] 11 Bom. 488.

(10) [1907] 31 Bom. 259=9 Bom. L. R. 208.

A. I. R. 1914 Madras 303

WALLIS AND SADASIVA AIYAR, JJ.
Subramania Chetty—Defendant—Appellant.

v.

Somasundaram Chetty and others—Plaintiffs—Respondents.

Civil Appeal No. 188 of 1909, Decided on 26th March 1914, against decree of Sub-Judge, Madura, in Original Suit No. 194 of 1908.

Hindu Law—Son liable for father's debts succeeds as partner in place of his father—

(5) 2 Camp. 573.

(6) [1890] 61 L. T. 729=54 J. P. 311.

(7) [1860] 8 C. B. (n.s.) 203=2 L. J. C. P. 251=6 Jur. (n.s.) 1079=8 W. R. 480=2 L. T. 322=141 E. R. 145=129 P. R. 627.

Intention to make himself liable for previous debts of firm is presumed.

When a Hindu son, already liable for his father's debts under Hindu law, succeeds as a partner in a partnership business in place of his father, a presumption arises that he intended to make himself liable for the previous debts of the firm. [P 304 C 1]

P. Narayanamurthi—for Appellant.

Judgment—We see no reason to doubt the conclusion that the Subordinate Judge has come to that defendant 2 was a partner. Ex. D in 1906 is a letter in which defendant 2 himself is expressly stated to be one of the firm. S. P. Subramaniam Chetty was his father's name and S. P. Subramaniam Chetty mentioned in Ex. D is defendant 2 himself. This man is said in the body of the letter to be one of the proprietors whose signatures are to be taken and admittedly the signature of defendant 2 was taken. When signed by defendant 2 and the other two, Ex. D became a letter of guarantee by the firm. This letter goes to show that defendant 2 was a partner then and also that the oral evidence that defendant 2's father had died at the beginning of 1906 was correct. There is evidence that defendant 2 was a partner even during his father's lifetime. Even if he only became a partner on his father's death, very little evidence is required to show that an incoming partner accepts liability for the past debts of the firm, as pointed out by Lindley on Partnership (8th Edition) p. 252, and we think that, when a Hindu son, who is already liable for his father's debts under the Hindu law, succeeds as partner in place of his father, a presumption arises that he intended to make himself liable for the previous debts of the firm. We agree, therefore, with the Subordinate Judge and dismiss the appeal with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Madras 304

TYABJI, J.

Godavarthi Peria—Petitioner.

v.

Godavarthi Lakshmi Devamma and others—Respondents.

Civil Revn. Petn. No. 348 of 1913, Decided on 20th March 1914, from order of Dist. Court, Guntur, in Original Petn. No. 196 of 1910, D/- 12th November 1912.

(a) Civil P. C. (1908), S. 35—"Costs would abide the result"—Meaning of.

The words "costs would abide the result" do not mean costs will follow the result. [P 304 C2]

(b) Civil P. C., (1908), S. 35—Discretion of Subordinate Court as to costs is not curtailed by words "costs would abide the result" in appellate order.

The discretion ordinarily vested in a subordinate Court to decide how the costs shall be borne is not curtailed by the mere use of the phrase "costs would abide the result" in an order of the appellate Court : 4 C.W.N. 343, Diss. from. [P 304 C 2]

(c) Civil P. C. (1908), S. 35 — Litigation caused by language of will—Costs should be borne by testator's estate.

Where a litigation is caused by the language of a will, its costs should be borne by the estate of the testator and not by the trustees. [P304C2]

T. Rama Chandra Rao—for Petitioner.

V. Ramadoss, P. Doraiswami Aiyangar and A. N. Sitarama Sastri — for Respondents.

Judgment.—The question is whether the order of the High Court of 9th August 1912 which is in the following words "the costs will abide the result" left the District Judge any discretion in awarding costs. *Fani Bhusan Roy Chowdhury v. Bama Sundari Debi* (1) is cited to show that no discretion was left.

The words "costs would abide the result" do not mean, in my opinion, the costs will follow the result. The order of the High Court of 9th August 1912 did not, in my opinion, deprive the lower Court of the discretion ordinarily vested in any Court to decide how the costs shall be borne.

The lower Court therefore had in its discretion to award costs as it seemed most proper. I do not see any ground to interfere with the exercise of the discretion which, so far as I can judge, was not wrongly exercised. It may well have appeared to the learned Judge (1) that the respondents having been appointed trustees had not done anything to be mulcted in costs ; (2) that the testator by the form of his will had caused the litigation and that the proper order was that the costs should be borne by the estate of the testator.

The petition is dismissed with costs.

S.N./R.K. *Petition dismissed.*

(1) [1900] 4 C. W. N. 343.

A. I. R. 1914 Madras 305

SADASIVA AIYAR AND TYABJI, JJ.

R. M. P. S. Muthiah Chettiar and others—Petitioners.

v.

Authinamulagi and others — Respondents.

Civil Revn. Petns. Nos. 744 to 746 and 748 to 819 of 1910, Decided on 10th December 1913, from orders of Sub-Judge, Ramnad, in Small Cause Suits Nos. 612 to 614, 616 to 624 and 626 to 688 of 1910.

Provincial Small Cause Courts Act (9 of 1887), S. 23—Plaintiff sued to recover rent as trustee — Defendant denied that he was trustee and asserted kudivaram right—Small Cause Court was held to have no right to determine plaintiff's title.

The plaintiff, alleging himself to be the trustee of a temple, sued for the recovery of rent of a certain land. The defendant denied that the plaintiff was a trustee and also asserted kudivaram right to the land.

Held: that as the Small Cause Court has no jurisdiction to determine the plaintiff's title as a trustee and as the jurisdiction in this case depends on title to land disputed between the parties, the Small Cause Court was justified to return the plaint for presentation to a revenue Court. [P 305 C 2]

P. R. Srinivasa Aiyangar and A. Krishnaswami Aiyar—for Petitioners.

T. Rangachariar—for Respondents.

Facts.—The plaintiff is the trustee of a temple. He sued to recover rent from the tenants. They asserted kudivaram right in the land, and contended that the Small Cause Court, as a civil Court, has no jurisdiction to try the suit and that what was granted to the temple was only land revenue. The inam lands constitute an "estate" within the meaning of S. 3 (2) and that revenue Courts alone have jurisdiction. The Sub-Judge, without deciding that question, returned the plaint to be presented to the proper Court. Hence this revision petition against the order.

Judgment.—The Subordinate Judge as a Small Cause Court has returned the plaints under S. 23, Provincial Small Cause Courts Act, because the "relief claimed" by the plaintiffs cannot be granted by the Small Cause Court without determining the question whether plaintiffs have the kudivaram right in the plaint lands. The determination of that question is necessary owing to the defendants questioning the jurisdiction of the Small Cause Court (which is a civil

Court), defendants contending that the revenue Courts alone have jurisdiction.

Ultimately therefore as the "relief claimed" by the plaintiffs cannot be granted by the Small Cause Court without deciding the question of plaintiff's title to the kudivaram it is not inappropriate to say that the decision as to the grant of that relief "depends upon the proof or disproof of a title to immovable property" within the words of S. 23, Act 9 of 1887. Mr. Varadachariar for the petitioners in revision contends that the relief itself for recovery of rent does not depend upon the proof or disproof of plaintiff's kudivaram title but it is only the jurisdiction of that particular Court as a civil Court to grant such relief that so depends upon the proof or disproof of the kudivaram title and hence S. 23 does not apply. We hold (though not without hesitation) that this contention cannot be accepted. The reason for the rule enacted in S. 23 seems to be that, where it is considered advisable by a Small Cause Court that a final decision on a question of title, which decision would if given by an original Court ordinarily be subject to appeal and even to second appeal and which decision would ordinarily be res judicata between the parties, should be given in the particular case before the Small Cause Court by an original Court, the Small Cause Court, though competent to decide incidentally the question of title in that particular case, might exercise with discretion the power of returning the plaint to be presented to the original Court which would have jurisdiction to so decide on that title finally. That reason applies also to cases where a question as to jurisdiction between revenue and civil Courts depends upon the title to immovable property disputed between the parties. We therefore hold that the Subordinate Judge's order under S. 23 was not illegal or passed without jurisdiction.

Even if we are wrong in the above view the defendants (or at least some of them) in their written statements have denied plaintiffs' title as trustees of the temple to sue for the rent and such title as trustees is again a title which a Small Cause Court cannot finally determine, and on that ground also the return of the plaints (or at least those plaints against which that contention was raised) can be justified.

We therefore dismiss these revision petitions.

Costs will abide. In one of the petitions (Civil Revision Petition No. 768 of 1910), in which the respondent died and which has abated, there will be no order as to costs.

S.N./R.K.

Petitions dismissed.

A. I. R. 1914 Madras 306

AYLING AND OLDFIELD, JJ.

Dakkata Thotapalli and others—Defendants—Appellants.

v.

Sasanapuri Dalisethi and others—Plaintiffs—Respondents.

Second Appeal No. 2101 of 1912, Decided on 21st November 1913, from decree of Dist. Judge, Ganjam, in Appeal Suit No. 82 of 1912.

(a) Transfer of Property Act (4 of 1882), S. 58—Mortgage—Construction of document—Meaning of "Tanakha" explained.

The phrase "tanakha" commonly used in the Ganjam District, always means a mortgage and in that district it is used in no other sense.

So where that term has twice been used in the operative portion of a document, a mortgage is intended to be created by the parties: 19 I. C. 221, *Diss. from*. [P 206 C 2]

(b) Transfer of Property Act (4 of 1882), S. 58—Description was held to be sufficiently specific.

Where a mortgagor stated in a document: "My jiroiyati and inam lands which I own in the village of my residence described at the beginning of the document as Brama Tarla of Tarla Taluq" and where no difficulty was experienced in identifying the lands on the date of enforcement:

Held: that the property was sufficiently "specific" within the meaning of S. 58, T. P. Act, to create a mortgage interest in it: *Tyson v. Kelcey*, (1899) 2 Ch. 530, *Foll.* [P 307 C 1]

P. Nagabhushanam—for Appellants.

V. Ramesam—for Respondents.

Ayling, J.—This appeal turns entirely on the question whether the document Ex. A operates to create a valid simple mortgage of the lands referred to therein. The vakil for the appellants has argued at great length that it creates, not a mortgage, but merely a charge: in which case the suit would admittedly be time-barred.

That Ex. A was intended by the parties to create a simple mortgage, I feel no doubt whatever. The word "tanakha" which is twice used in the operative portion of the document is to my mind conclusive. The learned District Judge says: "The word 'tanakha' is always used to denote a mortgage." This

opinion of the meaning locally attached to a phrase, formed by the District Judge after hearing the point discussed in Court and with every opportunity of coming to a correct conclusion, appears to me entitled to the greatest weight. In Browne's Telugu Dictionary the only meanings given to the word "tanakha" are (1) a mortgage, (2) an assignment of land revenue, the latter meaning being obviously inapplicable in the present case. My own experience of the Ganjam District leads me to precisely the same conclusion as the District Judge. "Tanakha" is a phrase commonly used and perfectly well understood by the people of the Ganjam District as meaning a mortgage and in no other sense.

Unless there is something in the document incompatible with such a meaning, there is to my mind, no room for argument. I see nothing of the sort. It is pointed out that the document recites a mortgage of the executant's jiroiyati and inam lands in his village "and all my property moveable and immovable." These last words I take to be nothing more than a sounding phrase loosely used, and thrown in by the drafter of the document to give it a legal air. This sort of thing is by no means uncommon where documents are prepared among simple country people; and it seems to me it would be a great mistake to draw from the phrase an inference neutralizing the perfectly definite word already referred to.

Our attention was invited to the case of *Kamayya v. Yerakola* alias *Penta Kristnayya* (1) in which somewhat a similar document containing the same word "tanakha" was held insufficient to create either a charge or a mortgage.

With great respect to the learned Judge who disposed of that case, I consider that a much more definite and precise meaning should be given to the word "tanakha" than they were prepared to ascribe to it; and in the matter of construction of a particular document which must, in every case, be decided on its merits, I do not think their expression of opinion binds us in the present case.

It is next argued that, although the parties may have meant the document to create a mortgage, it will not be effective to that end, as the lands are not specified so as to satisfy the requirements of S. 58,

(1) [1913] 19 I. C. 221,

T. P. Act. This objection also seems to me untenable. Numerous cases can be quoted in which particular documents have been held to be inoperative in consequence of ambiguity, or operative in spite of lack of exact specification. It is not very easy or very safe to argue from one case to another. The lands to which a document applies may be indicated in different ways, but so long as the indication is sufficiently precise to enable them to be determined, even though after a lapse of time the process may be one of some difficulty, it seems to me the requirements of the section should be held to be satisfied. I shall only quote the words of Kekewich, J., in *Tyson v. Kelcey* (2): "If it is possible to discover its meaning by construction, and to ascertain when the time for enforcement comes to what property the charge attaches, it cannot be said that it ought not to be enforced because it is too vague, or even because there might have been a difficulty in ascertaining the property at the time of the creation of the charge."

These words, though pronounced in an English Court, appear to me to be equally applicable in construing S. 58, T. P. Act, and to furnish the best practicable test for dealing with a document like Ex. A.

Here the mortgagor mortgages: "My jiroiyati and inam lands which I own at the village of my residence" (described at the beginning of the document as Brama Tarla of Tarla Taluq.) Why should it be assumed in the absence of evidence that these lands cannot be determined? No attempt has been made to show that any difficulty is actually experienced in locating the lands referred to; and, for anything that appears to the contrary, it may be done with ease and certainty. In my opinion it would be construing S. 58, T. P. Act, much too narrowly to hold Ex. A to be inoperative on this ground.

I would dismiss the appeal with costs.

Oldfield, J.—I refer first to the contention that Ex. A is not a mortgage, because it does not, as S. 58, T. P. Act, requires, deal with specific property. Reference to authorities affords little guidance, because the majority proceed on no stated principle and the words

under construction in them are not identical with those of Ex. A. Some, in which the description both of the property dealt with and the method of dealing with it was very general, such as *Kamayya v. Yerakola* (1) and *Tyson v. Kelcey* (2) cited in it, were decided on the ground that only such a general obligation, as that by which every bond binds the debtor's property, was provided for. But in the present case the method of dealing provided for is, I shall agree with my learned colleague, of a more special character. As to the description of property, there seems to be no more involved in the requirement that it shall be specific than that it shall be ascertainable or shall be bound only so far as it is ascertainable when the time comes for the enforcement of the mortgage. There is English authority for that view; and it is, I think, involved in the enforcement of mortgages of a share of family property to be ascertained by partition, which is common in this Presidency and of which *Chinnu Pillai v. Kalimuthu Chetti* (3) is a recent instance. With these observations I agree with the decision of my learned colleague on this point.

As regards the defendant's second contention that the language of Ex. A creates only a charge, not a mortgage, I concur in attaching importance to the interpretation of the expression "tanakha" by the learned District Judge and to the probability that the intention was to create a mortgage and not the ill-defined and unusual relation constituted by a charge. It is, moreover, important (1) that Ex. A contains an undertaking not to alienate, which there is no reason for treating as not intended to be effective as regards the immovable property, and (2) that this undertaking runs "I shall not effect 'tanakha' or sale." The implication being that every sort of alienation was in question, and there being no reason for supposing that, whilst the power to charge and sell was forgone, the power to alienate intermediate rights was retained, this use of the word "tanakha" affords strong support to the view that here and therefore elsewhere in the document it should be interpreted as meaning "mortgage."

In these circumstances I concur in dismissing the appeal with costs.

(2) [1899] 2 Ch. 530 = 68 L. J. Ch. 742 = 81 L. T. 354 = 48 W. R. 59.

(3) [1911] 9 I. O. 596 = 35 Mad. 47.

By the Court.—The appeal is dismissed with costs.

The memorandum of objections as regards the award of subsequent interest at contract rate to date fixed for payment (which we fix at three months from this date) and 6 per cent. thereafter is allowed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Madras 308

SADASIVA AIYAR AND SESHAGIRI
AIYAR, JJ.

Subramaniam Chettiar — Plaintiff —
Appellant.

v.

Periasami Thevar and another—Defendants — Respondents.

Second Appeal No. 425 of 1912, Decided on 18th March 1914, from decree of Dist. Court of Ramnad, in Appeal Suit No. 598 of 1910.

Madras Estates Land Act (1865), S. 151—Co-owner, transferee from tenant made party to ejectment suit against tenant by other co-owner—Revenue Court held to have no jurisdiction.

Where a co-owner sued to eject a tenant in a revenue Court making the other co-owner, to whom the tenant had transferred his rights, a party to the suit.

Held: that the revenue Court had no jurisdiction to entertain the suit as the remedy of the plaintiff was to sue in a civil Court for joint possession or partition: *S. A. No. 1600 of 1911*; 21 *I. C.* 621; 29 *Mad.* 29; 8 *I. C.* 842; 2 *I. C.* 306 and 21 *I. C.* 334, *Ref.*; 35 *Cal.* 807, *Diss. from.*

[P 309 C 2]

S. Srinivasa Aiyangar — for Appellant.
C. V. Ananthakrishna Aiyar — for Respondents.

Sadasiva Aiyar, J. — Plaintiff and defendant 2 are cosharers of the melvaram right in the plaint land according to the plaint allegations. As the suit has been dismissed on a preliminary point, we have to accept only the plaint allegations with any facts admitted on both sides in order to see whether the dismissal is legally sustainable. Defendant 1 was the occupancy tenant of the plaint land. It is not denied that he had sold the land to defendant 2 a few days before the suit was instituted in the Court of the Special Deputy Collector of Ramnad. Thus on the date of the suit, defendant 2 owned a half-share in the melvaram right and the whole of the kudivaram right. The question is whether the plaintiff who owns the other half share in the melvaram right, can maintain this suit in the revenue Court for ejectment and

obtain a decree for possession of the land on behalf of himself and defendant 2.

The suit as framed was, no doubt, for the ejectment of defendant 1, ignoring the sale to defendant 2 by defendant 1 and the transfer of possession by defendant 1 to defendant 2. We may take it that the sale was unknown to the plaintiff when he brought the suit, but yet as the sale and delivery had, as admitted before the Deputy Collector at the time of hearing, taken place before the suit was instituted, the rights of the parties have to be decided upon as those rights stood on the date of the plaint and in the light of the facts which had taken place before the date of the plaint.

The ground on which the lower Courts have dismissed the suit is that as the plaintiff's cosharer (defendant 2) did not join the plaintiff in bringing this suit, the plaintiff alone cannot maintain this suit to eject defendant 1 (the tenant), and reliance is placed on *Gopal Ram Mohuri v. Dhakeshwar Pershad Narain Singh* (1) in support of the above view by the lower appellate Court. I have dissented from some of the observations in *Gopal Ram Mohuri v. Dhakeshwar Pershad Narain Singh* (1) in the decision referred to by my learned brother in his judgment. I have dissented from those observations in that case which support the view that one of several joint lessors cannot put an end to the demise even in respect of his own share of the land held in common. Further, this is not a case of a landlord putting an end to the tenancy, but it is a case of a landlord suing on a statutory right given by S. 151, Madras Estates Land Act, to eject a tenant on account of the latter's having constructed a house upon the land held by him as a tenant for agricultural purposes and thereby having made it unfit for agricultural purposes. I do not think that cases relating to the forfeiture of tenancy under the ordinary law can throw much light on this question. The Madras Estates Land Act does not say that the tenancy is forfeited or that the tenant ceases to be a tenant when he commits the acts mentioned in S. 151. Under the Madras Estates Land Act even the denial of the landlord's title is no ground for ejectment, and Ss. 151, 152 and 153 show that a tenant who has incurred liability to be ejected is still called a tenant till a decree

(1) [1908] 35 *Cal.* 807=7 *O. L. J.* 483.

is passed for ejectment in the suit brought by the landlord. Though I am however unable to support the dismissal of the suit on the ground on which the lower Courts have based such dismissal, I think the dismissal of the suit can be justified for the reasons which I shall now proceed to state. As it is admitted that there had been a sale to defendant 2 before the suit was brought and as defendant 1 had ceased to have possession of the plaint plot on the date of the suit, there was really no cause of action vested in the plaintiff to sue defendant 1 in ejectment on the date of the suit. No doubt the plaint can be allowed to be amended by converting the prayer for the ejectment of defendant 1 into a prayer for the ejectment of defendant 2. But the questions to be considered before allowing such an amendment are: (1) "Is the plaintiff entitled to eject defendant 2, who is a cosharer in the melvaram right along with the plaintiff and who is now the owner of the whole kudivaram right?" (2) "Is such a suit maintainable in a revenue Court?"

Section 8, Cl. 3, Madras Estates Land Act, begins with the words: "The merger of the occupancy right under sub-Ss. 1 and 2." This implies that merger of the occupancy right takes place when the circumstances mentioned in sub-Ss. 1 and 2 occur. Sub-S. 1 relates to the entire interests of the landholder and the occupancy right becoming united by transfer, succession or otherwise in the same person. In such a case there can be no doubt that there is a merger of the occupancy right. Sub-S. 2 relates to a case where the occupancy right has been transferred to a person jointly interested in the land as landholder. In such a case the whole occupancy right cannot be merged as the person to whom the whole occupancy right was transferred, was only a landholder in part; but under the general law a fraction of the occupancy right corresponding to the fraction of the landholders' right (vested in the purchaser) must become merged in the latter. In the present case therefore when defendant 2 purchased defendant 1's kudivaram right in the whole plot, the occupancy right in a half-share became merged in the half-share of melvaram right belonging to defendant 2 and the other half of the occupancy right remained without merger in defendant 2.

Supposing that this suit for ejectment of defendant 1 from the whole of the land is converted by amendment into a suit for ejecting defendant 2 from the whole of the land even then this suit must fail because defendant 2 has become entitled to both the melvaram and the kudivaram in half the land and is entitled to remain in possession of at least that half-share. It may be argued that the suit might be amended as a suit for the joint possession of the land with defendant 2. Then, apart from the question raised in certain Calcutta decisions whether the proper course for a cosharer is not to sue for partition and separate possession under such circumstances, there arises the preliminary difficulty whether the revenue Court can entertain such a suit for joint possession. I do not think a suit for joint possession as contemplated is within the jurisdiction of the revenue Court under S. 151, Madras Estates Land Act, as that section contemplates a suit for khas possession ejecting a tenant as such; nor can the suit be amended as for partition and possession of half-share as such a suit cannot also be maintained in a revenue Court.

The right of one cosharer against another cosharer seems to have been recently considered by Sankaran Nair and Ayling, JJ., in *Muthiah Chetty v. Subramania Chetty* (2) and though reasons are not given for the decision the lower appellate Court's decision was confirmed and it is clear from the printed papers that it was held by the lower appellate Court that even a trespasser building upon a land belonging to two cosharers cannot be enjoined by a mandatory injunction at the suit of only one of the cosharers if the trespasser had, before the suit acquired the right of the other cosharer and if the extent of the land built upon by him was less than what would fall to him on a partition. In *Basanta Kumari Dasya v. Mohesh Chandra Shaha* (3) it has been decided that a decree for joint possession can be given to a cosharer only in exceptional cases. On the whole therefore I think that the suit brought in the revenue Court and framed as a suit to eject defendant 1 who was not in possession on the date of suit was rightly dismissed and I would

(2) S. A. No. 1600 of 1911.

(3) [1913] 21 I. C. 621.

dismiss this second appeal but without costs.

Seshagiri Aiyar, J.—The plaintiff and defendant 2 are the proprietors of the village of Thavasikudi. Defendant 1 is the ryot of the village. The plaintiff's case is that defendant 1 built a house on a portion of the holding which is cultivable land on 29th May 1910 and has thus rendered himself liable to be evicted. Defendant 1's plea is that he had put defendant 2 in possession of the property under an agreement to sell, that he himself did not erect any building and that there is no cause of action against him. Defendant 2 states that he erected the building complained of.

As on the first hearing we had no information regarding the date on which defendant 2 became the purchaser we asked the learned vakils appearing in the case to ascertain that fact. We are informed that the sale was on 15th June 1910. This suit was brought on 17th June. It is thus clear that when the suit was instituted defendant 2 had purchased the kudivaram right in the plaintiff property.

The Courts below dismissed the plaintiff's suit on the sole ground that one cosharer landholder was not entitled to maintain a suit to eject the tenant of the holding and they relied upon *Gopal Ram Mohuri v. Dhakeshwar Pershad Narain Singh* (1) for this position. I am clearly of opinion that this view is incorrect. In this High Court there has been a course of decisions to the effect that one trustee can maintain a suit as against a stranger making the other co-trustees party defendants. In the case of cosharers also there are decisions to the same effect. If the plaintiff's case is true defendant 1 forfeited his right to the property by committing waste and he became a trespasser liable to be evicted at the instance of the persons entitled to the property.

The decision in *Gopal Ram Mohuri v. Dhakeshwar Pershad Narain Singh* (1) is opposed to the view taken in *Sri Raja Simhadri Appa Rao v. Prattipati Ramayya* (4) and in *Korapalu v. Narayana* (5). The case of *Jatindra Nath Chowdhri v. Prasanna Kumar Banerjee* (6) related to the enhancement of the

rent. That does not affect the decision in this case. For it is a well-recognized principle of law that one cosharer alone cannot maintain an action to increase the burden upon the tenant. The tenant entered into a contract with all the landholders as a body and the contract rests upon the consent of every cosharer, and so long as there is no severance of the interests of the cosharers either by partition or by some other arrangement the tenant is entitled to say that the concurrence of all the parties should be obtained for increasing the rent payable by him. These considerations do not apply to cases where one of the cosharers sues to eject a trespasser; he will then be acting on behalf of his cosharers. This view is supported by the decision of *Ram Bakhsh v. Chanda* (7). In *Mangalasami Thevar v. Sathayappa Povandan* (8) one of the cosharers was allowed to sue for his share of the rent upon a joint contract. These decisions show that in Madras and in Allahabad the view taken in *Gopal Ram Mohuri v. Dhakeshwar Narain Singh* (1) does not find any support. I have stated already that on principle there is no justification for the theory that one cosharer alone cannot maintain a suit to recover property from a trespasser. The ground therefore upon which the Courts below dismissed the suit cannot be sustained.

Mr. Ananthakrishna Aiyar for the respondent has drawn our attention to a decision of Benson and Sundara Aiyar, JJ. in *Chellasami Tevar v. Alayan* (9) which holds that when a cosharer purchases the tenant's interest, the suit brought by the other cosharer should be dismissed. The question whether joint possession can be given to the plaintiff cosharer with the defendant cosharer was not considered in that case. S. 8, Cl. 2, Estates Land Act, provides that when a landlord obtains by transfer the occupancy right in the land he shall be entitled to hold the land subject to the payment to his co-landholders the share of the rent which may from time to time be payable to them. The principle of this section, as contended for by Mr. Srinivasa Aiyangar for the appellant is to keep alive the liability to pay rent as tenant even after the purchase; in other

(4) [1903] 29 Mad. 29.

(5) [1913] 20 I. C. 930=28 Mad. 445.

(6) [1910] 8 I. C. 842=38 Cal. 270 (F. C.).

(7) [1909] 2 I. C. 306.

(8) [1913] 21 I. C. 334.

(9) S. A. No. 1957 of 1911.

words, the purchase does not work out a fusion of the interest of the landlord and the tenant. When we compare Cl. 1, S. 8, which provides for the merger of the interests of landlord and tenant it is clear that the legislature intended that only in cases where the entire interests of the landlord and the tenant do coalesce that the distinct capacities of the tenant and landlord should cease to exist. The language of S. 111, Cl. (d), T. P. Act, is to the same effect. Reference may also be made to S. 60, T. P. Act, which enables a co-mortgagor to redeem his share only under certain conditions. I therefore hold that defendant 2 has not ceased to be a tenant by purchasing the interests of defendant 1 in a portion of the holding. Even in this view I am not prepared to agree with Mr. Srinivasa Aiyangar's contention that defendant 2 can be evicted from the property. The plaintiff is only entitled to joint possession with him. Neither the plaintiff nor defendant 2 can predicate that they have got rights in any specific portion of the property. Their right is for joint possession until by partition specific portions are allotted to their share. I would have been prepared to give a decree for joint possession to the plaintiff along with defendant 2 if such a decree can be passed in this suit. But the proceedings commenced in a revenue Court; and Mr. Sreenivasa Aiyangar has shown us no provision of law nor any authority that the Special Deputy Collector is competent to pass a decree for joint possession. I dismiss the second appeal on this ground. But under the circumstances of the case I make no order as to costs.

S.N./R K. *Appeal dismissed.*

A. I. R. 1914 Madras 311

AYLING, J.

Gogi Padmarajappa and another—
Plaintiffs—Petitioners.

v.

*Madduru Venkatasubbiah—*Defendant
—Respondent.

Civil Revn. Petn. No. 374 of 1913,
Decided on 12th May 1914, from order of
Dist. Munsif, Bellary, D/-11th March
1913, in Second Civil Suit No. 16 of 1913.

Contract Act (1872), Ss. 91 and 93—Cause
of action for suit by seller for balance of ac-
counts accrues where goods are consigned to
Railway—Civil P. C. (1908), S. 20 (c).

Where a buyer and seller reside in different
places, the cause of action for a suit by the

seller for balance of account due from the buyer
arises where the goods are consigned to the
Railway: 1 M. H. C. R. 200, Dist. [P 311 C 2]

S. Ranganatha Aiyar—for Petitioners.

S. Natesa Sastri—for Respondent.

Judgment.—The only question is,
whether the District Munsif was right in
holding that the suit was not cognizable
by his Court under S. 20 (c) Civil P. C.

The suit is for recovery of balance due
on account. The defendant living in
Guntur is said to have purchased gram
from the plaintiffs doing business in
Bellary. It appears that 25 bags of
gram were despatched by the plaintiffs
at Bellary to the defendant at Guntur
by railway on the defendant's order.
It is not alleged that the gram did not
reach the defendant; in fact it is clear
from the defendant's written statement
that it did reach him. For nine bags
the railway receipt was issued in the de-
fendant's own name; for 16 bags it was
issued in the plaintiff's name, but
endorsed in the defendant's name so as to
enable him to take delivery. The goods
were not insured.

It appears to me on these facts that
S. 91, Contract Act, applies; and that
delivery to the railway company as a
carrier has the same effect as delivery to
the buyer, and passes title in the goods.
If this is so, even as regards a portion of
the goods, the cause of action arose in
part at Bellary, and the suit was in-
stituted in the proper Court. There was
nothing to indicate a reservation by the
plaintiffs of the *jus disponendi* in the
case of the nine bags; and even in the
case of the 16 bags for which he took
the railway receipt in his own name,
this intention might be held to be nega-
tived by his endorsement of the receipt
in the name of the defendant: vide
Remfry on Sale of Goods at pp. 205-206.
The failure to insure the goods to which
the District Munsif attaches so much
importance is immaterial seeing that
they safely reached their destination.
It is only where the goods do not reach
the consignee that the special provision
of law embodied in the latter part of
S. 93, Contract Act, applies.

The only case quoted by the respon-
dent's vakil is that reported in *Winter v.*
Way (1) and may be distinguished on the
simple ground that it was disposed of

prior to the enactment of the Contract Act.

The Munsif's order must be set aside. He will restore the suit to his file and dispose of it according to law.

The costs of this petition will be costs in the cause.

S.N./R.K.

Order set aside.

A. I. R. 1914 Madras 312 (1)

SADASIVA AIYAR AND SPENCER, JJ.

Baruddin Shaib — Judgment-debtor — Appellant.

v.

Arunachalla Mudali — Decree-holder — Respondent.

Appeal No. 43 of 1912, Decided on 16th December 1913, from order of Dist. Judge, North Arcot, in Appeal Suit No. 294 of 1911, D/- 22nd December 1911.

Civil P. C. (5 of 1908), O. 21, R. 57 — Application of rule only to attachment in "execution of decree."

Order 21, R. 57, applies only to attachment in "execution of a decree." Where therefore a plaintiff attaches property of the judgment-debtor before judgment, and, after obtaining the decree, applies for his arrest, but allows the application to be dismissed for default, the attachment is not thereby dissolved but continues effective.

Where a decree-holder applies in another execution petition to be allowed to share rateably in the proceeds of the sale of the property attached by him before judgment, but which is proposed to be brought to sale by another decree-holder who had also attached it in execution of his decree, it cannot be said that the decree-holder has converted the attachment before judgment into an attachment in execution: 14 I. C. 345, *Ref.* [P 312 C 1, 2]

G. S. Venkatachariar — for Appellant.

P. R. Ganapathi Aiyar — for Respondent.

Judgment.—We agree with the lower Court that the attachment before judgment did not cease to exist because the decree-holder (among his numerous execution petitions) applied once for arrest of the judgment-debtor and that application was dismissed for default.

We think that O. 21, R. 57, Civil P.C., makes an attachment cease on the dismissal of an execution application only if that attachment had been made "in execution of" the decree and not when it had been made before judgment in view to a possible execution of a decree which might probably be passed thereafter.

The other contention of the appellant, namely, that by the petitioners having applied in another execution petition to be allowed to share rateably in the pro-

ceeds of the sale of these properties, if they were brought to sale by another decree-holder, who had also attached them in execution of his decree, the present decree-holder converted the attachment before judgment into an attachment in execution, is also not sustainable. Such conversion can take place only if the decree-holder applies for sale of the properties in execution of his own decree. Whether such conversion will take place even in such a case may be questioned on the authority of *Ganesh Chandra Adak v. Banwari Lal Roy* (1), but it is unnecessary to decide that question for the purpose of this case.

The third contention that by the decree-holder's conduct he must be deemed to have abandoned all rights under the attachment before the judgment is, again, not supported by anything on the record.

The view of the lower Court, therefore that no fresh attachment is necessary to entitle the decree-holder to bring the properties to sale in execution is correct, and we dismiss the appeal with costs.

S.N./R.K.

Appeal dismissed.

(1) [1912] 14 I. C. 345.

A. I. R. 1914 Madras 312 (2)

SADASIVA AIYAR AND SPENCER, JJ.

Subbaraya Rowther Minda Nainar — Appellant.

v.

Muthammal and others — Respondents.

Appeals Nos. 219 and 242 of 1911, Decided on 23rd December 1913, from order of Sub-Judge, Mayavaram, D/- 4th September 1911, in Execution Appeal No. 211 of 1911.

(a) Civil P. C., O. 21, R. 66—Settlement of terms of sale proclamation regarding property to be sold in execution — Failure of judgment-debtor to appear and object though served — Properties sold — Sale proclamation cannot be objected to on ground of misdescription after sale is enforced.

Where, on the date fixed for the settlement of the terms of a sale proclamation of several items of immovable property ordered to be sold in execution of a decree, the judgment-debtors did not appear and object, though notice was served upon them, but allowed the properties to be sold, it is not open to them to subsequently raise objections to the sale proclamation on the ground of misdescription after the sale has been confirmed and concluded: 12 *Mad.* 19 (P. C.) and 21 I. C. 389, *Foll.* [P 371 C 1]

(b) Civil P. C., O. 21, R. 90—Objection to sale proclamation on ground of misdescription trivial — No substantial injury to judgment-debtors—Properties sold at fair price

—There was held to be no reason for setting aside sale.

Where some of the objections raised to the sale proclamation on the ground of misdescription were impossible of compliance, and others trivial in themselves, but no substantial injury was caused thereby to the judgment-debtors but, on the other hand, the properties were sold at a fairly good price

Held: that there was no reason for setting aside the sale on the ground of a misdescription in the sale proclamation. [P 315 C 2 ; P 317 C 2]

(c) **Civil P. C., S. 11 — Judgment-debtor not appearing on date for settlement of sale proclamation—Subsequent appearance—Objection by review petition dismissed — Order is res judicata in subsequent proceedings.**

Where, without appearing on the date fixed for the settlement of the sale proclamation, the judgment-debtors appeared subsequently and objected by a review petition, which was dismissed.

Held: that the order operated as res judicata in subsequent proceedings and was not appealable: 27 *Mad.* 259, *Foll.*; 23 *Mad.* 568 and 30 *Cal.* 617, *Diss. from.* [P 317 C 1]

S. Sreenivasay Ayangar, C. V. Anantha Krishna Iyer and K. Bhashyam Aiyangar --for Appellant.

Theru Narayanachariar, G. S. Ramchandra Aiyer, N. R. K. Thathachariar, S. Mathial Mudaliar and M. B. Doraisami Ayangar—for Respondents.

Sadasiva Aiyar, J.—These two appeals are directed against an order of the Subordinate Judge of Mayavaram who dismissed the two separate petitions of the appellants to set aside the sales in Court auction of certain properties, the auction sales having been held in execution of the decree in Original Suit No. 26 of 1899 on the file of the Court of the Subordinate Judge of Kumbakonam. That decree was passed in 1900 and is now nearly 14 years old.

The judgment-debtors in that decree might be called shortly the "Nainars" and the principal judgment-debtor (defendant 1) "Nainar." The decree-holders in that decree might be called the "Nadars" and the principal person "Nadar." That decree of 1900 was attached by a creditor of the Nadars in execution of the decree obtained by the said creditor against the Nadars in Original Suit No. 2 of 1904 on the file of the Court of the Subordinate Judge of Kumbakonam. This attaching creditor in Original Suit No. 2 of 1904 (Muthammal by name), was entitled to execute the attached decree in Original Suit No. 26 of 1899 and filed the execution application in that suit in pursuance

of which the properties were sold in Court auction. She will be called "the decree-holder."

The decree-holder brought several lands of the Nainars to sale in execution. She wanted to have the properties proclaimed for sale and applied to the Court to settle the terms of the sale proclamation, submitting a draft of her own in which the numerous items of lands to be sold were divided into 24 lots, each lot containing several items. Notice was given to the Nainar defendants to appear on 9th February 1911 to put forward their objections to the draft sale proclamation. The Nainar defendant appeared on 9th February 1911 and at his instance the matter was adjourned to 20th February 1911 in order that he might formulate his objections. On 20th February 1911, the matter was again adjourned peremptorily at his instance to 28th February 1911. On 28th February also, he put forward no objections and the draft sale proclamation put in by the decree-holder was approved, and the sale was fixed for 20th April 1911. Meanwhile, on 5th April 1911, the Nainars applied for a review of an order dated 28th February 1911 which settled the terms of the sale proclamation according to the decree-holder's draft. This review petition was numbered as Execution Appeal No. 159 of 1911. This petition for review, dated 5th April 1911, was supported by an affidavit (by the Nainar) of the same date. The objections to the settled sale-proclamation are mentioned in this affidavit.

I will set out those objections shortly, using the words of the affidavits as far as possible: (a) In the settled proclamation there are many mistakes: see para. 4 of the affidavit. (b) The division of the lots for sale by auction is not one to secure a proper price. (c) The kist in the proclamation is given roughly and the kist given is stated to be less than the actual kist which is greater: see para. 5 of the affidavit. (d) For each of the lots in the division into lots, the seed-bed is not given and "only if properly the seed-bed be given, and the property be divided into lots of one veli each, the property can be sold at auction at a proper price:" see para. 6 of the affidavit. (e) The encumbrances stated in the proclamation are said to be benami and to have been discharged and if the auction be held without examining the charge-holders on the

encumbrances and without obtaining their statements it will not fetch a proper price: see para. 7 of the affidavit. Of these five objections (a) to (e), objection (a) is very vague and general and was properly ignored by all parties. Objection (e) was also evidently not pressed. The Subordinate Judge had thus got three objections (b), (c) and (d) to consider in passing orders on this review petition of the Nainar dated 5th April 1911.

As regards the first of these three objections (b) to (d), which objection is also expanded in the latter part of the objection (d), namely, the objection that the decree-holder's division of the lands into 24 lots for the purpose of sale is not equitable and that the properties and the lands should have been divided into a larger number of lots so that each lot may be of the extent of only one veli, the Subordinate Judge seems to have asked or permitted the Nainar to file a statement of his own showing what in the Nainar's opinion was the proper mode of division of the lands into plots. On 21st April 1911, the Nainar accordingly filed a statement distributing the 200 odd items of land (which had been distributed into 24 lots by the decree-holder) into 43 lots of his own. This statement does not indicate in any of these 43 lots which of the items in the said lot is the seed-bed land. It further does not indicate how and to what extent the kist mentioned for the lands in this list of 21st April 1911 differs from the amounts of kists mentioned in the decree-holder's draft proclamation. In fact, the contention as to the kist seems not to have been pressed afterwards.

This review petition Execution Appeal No. 159 of 1911 came on for hearing on 4th July 1911 and was dismissed by the learned Subordinate Judge in a considered order. Paras. 5 and 6 of that order are as follows: "(5) And furthermore, the allegations contained in these petitions do not disclose material objections to the draft proclamations. A vague objection is taken as regards the amount of assessment, but no particulars are given as regards the correct assessment. It is not possible to allow a seed-bed for every plot. The division of plots in the draft proclamation seems to be fair and reasonable. Further, sub-division of these plots is not calculated to

bring with it any compensating advantage.

"(6) I am of opinion that there is no ground for reviewing the previous order of this Court. Nor are the objections such as can be upheld upon their merits."

As I said before, the sale itself was first fixed for 20th April 1911. It was afterwards adjourned to 6th July 1911. The learned Subordinate Judge being of opinion on 6th July that the Nainars and the Nadars were acting together to defeat the decree-holder (Muthammal) and that they were using every device of chicanery to delay the properties being brought to sale in execution, considered it best to hold the auction sale of the 24 lots in his immediate presence and in the presence of the vakils of the several parties and also not to conclude the sale of any lot until, in his opinion, a fair price was obtained for it. On 6th July 1911, he passed order that the auction sale would be continued day by day until 12th July 1911, in order evidently to give full opportunity to all bidders to make bids and for the Nainar and Nadar defendants to bring up to the highest likely bidders. Between 6th and 12th July the Nainar defendants filed a petition on 10th July 1911 praying for adjournment of the sale of all properties and for the issue of a fresh proclamation. In this petition Execution Appeal No. 183 of 1911 the Nainar put forward "new ground of objection which he did not even hint at in the previous proceedings. That ground was that some of the items in lots 1, 11, 12, 14 and 15 had been sold away in revenue sale long ago (the Tamil word used is * * * *) and that the inclusion of those revenue sale lands in the lots was a material irregularity which ought to be corrected before the sales were held.

The carelessness of the Nainar is shown even in this belated petition, for admittedly none of the items in lots 1 and 11 had been sold away in revenue sale as alleged in this petition. This petition seems to have come on for hearing before the Subordinate Judge on 12th July, the date fixed for concluding the auction sales and was summarily dismissed as having been put in too late. On that same date (12th July) lots 4, 5, 7, 8, 9 and 12 to 16 (that is, 10 out of the 24 lots) were knocked down to the several bidders, who made the highest

bids, by the Subordinate Judge himself in the presence of the vakils. After these 10 lots had been so knocked down, the Nadar seems to have put in a petition for adjournment of the sale on the ground that some properties sold away in revenue sales were included among the lands brought to sale and the Subordinate Judge adjourned the sales of the other 14 plots accordingly to the issue of fresh proclamation omitting these lands from the 14 plots.

The present petitions Execution Appeal No. 211 of 1911 and Execution Appeal No. 225 of 1911 were filed on 25th July 1911 and 31st July 1911 by the Nadar and the Nainar respectively for setting aside the sales of the above 10 lots and it is from the orders dismissing these petitions, Nos. 211 of 1911 and 225 of 1911, that the present Appeals Against Order No. 242 of 1911 and 219 of 1911 have been presented to this Court.

The appeal memoranda practically repeat the objections mentioned in the Nainar's petition of April 1911 (omitting the kist). They repeat the further objection mentioned in the petitions of 10th and 12th July 1911 as to some of the items which have been sold in revenue sales being included in the 10 lots brought to sales on 12th July 1911, and they also contend that by reason of these four irregularities the properties fetched a much lower price and that the Nainars and the Nadars have sustained substantial injury. It was further contended that besides the affidavits filed in support of these objections in the lower Court, petitioners were ready with the evidence of persons deposing to the affidavits and the lower Court acted improperly in refusing to examine them.

I shall shortly deal with those of the above contentions which are unimportant. There is nothing on the record to support the allegation that the learned Subordinate Judge refused to examine any witnesses and I have little doubt that the petitions were disposed of on the affidavits filed on both sides with the acquiescence of the parties and the vakils. The objection as to each plot not having been given a seed-bed adjoining it was properly rejected by the Subordinate Judge as it was not possible to do so and it has not been shown before us that it could be done or that the division into 43 plots made in the statement of 21st

April 1911 by the Nainar allows a seed-bed to each of these 43 lots. The objection as to the inaccuracy of the kists amounts, though faintly referred to in the arguments, was not even taken in the seventeen grounds of appeal mentioned in appeal against Order No. 219 of 1911 or in the thirteen grounds in appeal against Order No. 242 of 1911.

The only contentions remaining to be disposed of are: (1) that the two hundred and odd lands should have been divided into 43 lots as contended for by the defendants and not into 24 lots; (2) some of the items in each of the lots 7, 12, 14 and 15 out of the ten lots in dispute had been sold away in revenue sales and the inclusion of those lands was a material irregularity in the proclamation of sale and in the conduct of the sales of those four lots; (3) this material irregularity also affected the sales of the other six lots 4, 5, 8, 9, 13 and 16 as intending bidders, knowing that some of the ten lots contained items sold away in revenue auction, were scared away from bidding for even the six lots which did not contain revenue sale lands; (4) the above irregularity caused the ten lots to be knocked down for substantially lower prices than they would have otherwise fetched and hence substantial injury has been caused to the Nainars and the Nadars.

Coming to the first objection as to the division of the lands into 43 lots instead of 24 lots, nothing was urged before us to show that the division accepted by the Subordinate Judge was less fair than the division mentioned by the Nainar defendants in their statement of 21st April 1911. As regards the second objection it must be admitted that the inclusion in each of these lots 7, 12, 14 and 15 of certain items which had been sold away long ago in revenue sale was an irregularity. I am, however rather doubtful whether it was a material irregularity. Neither side was able to tell us when exactly the revenue sales had taken place. The Nadar defendants, when they themselves tried to execute their mortgage decrees of 1900 in the years 1903, 1904, 1906, 1908 and 1909, did not seem to have excluded these lands sold away in revenue auction: see Ex. A. As we have seen, even the Nainars, when they put in their list on 21st April 1911, dividing the 200 and odd lands into 43 lots, did not exclude any of the items sold

away in revenue sale. And it was only in the belated petition of 10th July 1911 that this fact was brought to the notice of the Court. The items in each of these four lots 7, 12, 14 and 15, sold away in revenue sale, seem in extent to be rather small fractions of the total extent of the respective lots. For instance, lot 7 contains lands of the total area of about 12 acres, while the items sold away in revenue sales in that lot are only to the extent of 27 cents. Similarly in lot 12, the total acreage is more than 16 acres and the lots sold away in revenue auction are less than five acres in extent. In item 14 the total extent is about 17 acres and the extent of lots sold away in revenue auction is less than 3 acres. In item 15 the total extent is about 2 acres and the extent of lands sold away in revenue auction is about 30 cents. From the bidders' list we see that there was keen competition and the purchasers at the bidding were strangers and not the decree-holder.

Under these circumstances I am not sure that the inclusion of these properties sold away in revenue sale was a material irregularity. Their inclusion might rather be expected to have the effect of having made the bidders (if they were not aware of the error) bid more than the value of the lands really belonging to the judgment-debtor in the respective lots than the opposite effect of making the lots fetch reduced prices by scaring away bidders. Of course the Court sales, of the lots, so far as they related to items already sold away in revenue sales will not pass any title to the Court auction purchasers in those items. Even taking it that the irregularity in the inclusion of these lots was a material one, can the judgment-debtor be allowed, under the circumstances of this particular case, to rely upon such irregularities as vitiating the sale? In *Arunachellam v. Arunachellam* (1) their Lordships of the Privy Council said: "The judgment-debtors knowing, as they must have known, what the description was in the proclamation, allow the whole matter to proceed until the sale is completed, and then ask to have it set aside on account of this, as they say, misdescription. It appears to come within what was laid down by this Board in the case of *Olpherts and Macnaghten v. Mahabir*

Pershad Singh (2), that if there was really a ground of complaint, and if the judgment-debtors would have been injured by these proceedings in attaching and selling the whole of the property whilst the interest was such as it was, they ought to have come and complained. It would be very difficult, indeed, to conduct proceedings in execution of decrees by attachment and sale of property if the judgment-debtor could lie by and afterwards take advantage of any misdescription of the property attached and about to be sold, which he knew well, but of which the execution-creditor or decree-holder might be perfectly ignorant, that they should take no notice of that, allow the sale to proceed, and then come forward and say the whole proceedings were vitiated.

"That, in their Lordships' opinion, cannot be allowed, and on that ground the High Court ought not to have given effect to this objection." No doubt, in this case the objection was taken two days before the final bids were accepted on 12th July, but, as we have seen, the objection petitions contained patent mistakes and the putting forward of this particular objection was delayed from January 1911 till 10th July 1911. Whence therefore, as pointed out in *Raja of Kalahasti v. Maharaja of Venkatagiri* (3), a judgment-debtor's rights to have a sale set aside on the ground of material irregularity would be much weaker if his objections are made after the conclusion of the sale or after the confirmation of the concluded sale than if he had made it before the confirmation of the sale, still the principle that a judgment-debtor ought to come in with his objections within a reasonable time after he becomes aware of the existence of the errors in the sale proclamation on which he relies and that if he does not do so he ought not to be allowed to put forward those objections, is a wholesome principle and it was not intended to be departed from in the above case of *Raja of Kalahasti v. Maharaja of Venkatagiri* (3). In that case, again, it was found, as a fact, that the judgment-debtor was unaware of the statements in the sale proclamation to which he was bound to object, "and the ignorance was one for

(2) [1883-66] 9 Cal. 656=10 I. A. 25=11 C. L. R. 494 (P.C.).

(3) [1913] 21 I. C. 389=38 Mad. 387.

(1) [1889] 12 Mad. 19=15 I. A. 171 (P.C.).

which he was not in the circumstances to blame having been in part induced by the conduct of the decree-holder " in that case. In the present case, the Nainar defendants must have known of the revenue sales, and, far from the decree-holder having misled them, they misled the decree-holder even by their statement of 21st April 1911 into thinking that the properties sold away in revenue sales still remained the Nainar's properties. On this ground I am of opinion that the Subordinate Judge was justified in dismissing the objection of the Nainar defendants made on 10th July 1911 as coming too late while the Nadars never raised this objection in respect of the revenue sales till after the ten lots in dispute had been sold away. It must however be remarked that the Subordinate Judge was in error in thinking that as no appeal was preferred against the order approving the draft proclamation or against the order dismissing the application for review, the matter was concluded between the parties as *res judicata*. The case of *Sivagamri Achi v. Subrahmania Ayyar* (4) shows that such orders are not appealable as decrees, the Full Bench ruling in the said case *Sivagamri Achi v. Subrahmania Ayyar* (4) having dissented from *Sivasami Naicker v. Ratnasami Naicker* (5) and *Ganga Prosad v. Raj Coomar Singh* (6).

Lastly, even holding that the Nainar and the Nadar defendants are not precluded by their conduct from raising this objection, there is the important question whether the irregularity complained of has resulted in a substantial injury to them. As their Lordships of the Privy Council say in the case of *Arunachellam v. Arunachellam* (1), the words of S. 311 of the old Civil P. C., corresponding to O. 21, R. 90, clearly state that no sale should be set aside on the ground of irregularity unless the appellant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity. The Subordinate Judge has considered the affidavits on both sides and has come to the conclusion that the Nainars and the Nadars have not proved that substantial injury has been caused to them by reason of of this irregularity. I have considered

the affidavits on both sides and I agree with the opinion of the learned Subordinate Judge. The four affidavits on the side of the defendants contained internal evidence that they were made by persons who made no serious inquiries as to even what properties had been sold away in revenue sales as is shown by the mistakes made by them as to the lots which contained the items which were sold away in the revenue auction. The verified petition by one of the auction-purchasers shows that the affidavits on the side of the Nainars and Nadars were made by the close friends of the Nainars and the Nadars and that the deponents are not persons capable of buying at the sale. The affidavits on the side of the auction-purchasers show that the properties fetched fair prices; while in one of the objection petitions of the Nainars and the Nadar defendants a *veli* is said to be worth about Rs. 2,000 it was afterwards contended that they were worth even Rs. 3,000.

In short I am clearly of opinion that the appellants have failed to prove that they sustained any substantial injury by reason of the irregularity in the inclusion of some items in lots 7, 12, 14 and 15 which had been sold away in revenue sales, or that intending bidders were scared away by the inclusion of those lands. In the result I would dismiss these appeals with costs; one set in each of the two appeals is awarded to Muthammal (respondent 1) and one set among the auction-purchasers.

Spencer, J.—I agree.

S.N./R.K.

Appeals dismissed.

A. I. R. 1914 Madras 317

WALLIS AND SADASIVA AIYAR, JJ.

Chundam Veettil Pazhayottayil Kaderkutti—Plaintiff—Appellant.

v.

C. P. M. Muhamad and others—Defendants—Respondents.

Civil Appeal No. 166 of 1911, Decided on 2nd April 1914, against decree of Sub-Judge, South Malabar, in O. S. No. 38 of 1910.

Transfer of Property Act (1882), Ss. 67 and 98—Construction of *kanom* mortgage.

Where a *kanom* deed provides that the *kanomdar* should enjoy the mortgaged properties and pay out of the usufruct Rs. 10 every year to the *jenmi* and gives also the *jenmi* an option to pay the mortgage money at any time after the lapse of one year, the *kanomdar* has no

(4) [1904] 27 Mad. 259=14 M. L. J. 57.

(5) [1900] 23 Mad. 568=10 M. L. J. 314.

(6) [1908] 80 Cal. 617.

right to bring the mortgage properties to sale. Though a kanom is an anomalous mortgage within the meaning of S. 98 the provision as to repayment does not amount to "covenant to pay" within the meaning of S. 67 : 22 *Mad.* 350, *Ref.* [P 318 C1, 2]

T. R. Ramachandra Aiyar—for Appellant.

K. P. M. Menon—for Respondents.

Wallis, J.—It appears to be well settled in this Court that, looked at as a mortgage, a kanom is an anomalous mortgage within the meaning of S. 98, T. P. Act. The present document appears also to come within the category of anomalous mortgages as owing to the reservation of a purapad or payment of Rs. 10 to the mortgagor it does not satisfy the definition of a usufructuary mortgage in S. 58, T. P. Act. If it is an anomalous mortgage the rights and liabilities of the parties under S. 98 are to be determined by the contract as evidenced in the mortgage deed and, so far as such contract does not extend, by local usage. It is unnecessary to resort to local usage in this case though there is little doubt it would support the view I am taking.

Section 67, T. P. Act only gives a right to bring to sale in the absence of a contract to the contrary, and assuming that S. 67 applies to anomalous mortgages coming within S. 98, I think there is here an implied contract to the contrary. The present mortgage is a usufructuary mortgage apart from the reservation of the purapad, and it is well understood in Malabar and elsewhere that usufructuary mortgages do not confer a right to bring to sale. As observed by the Subordinate Judge all that the present instrument does is to give the mortgagors a liberty or option to pay the mortgage money to the mortgagee at any time they liked after one year from the date of the mortgage bond. It would, I think, be altogether opposed to the intention of the parties as gathered from the instrument, to allow the mortgagee to bring the property to sale.

This appeal is dismissed with costs.

Sadasiva Aiyar, J.—I do not wish to go into the question whether a kanom is really an anomalous mortgage (as held in some cases) or whether as a mortgage transaction it is a usufructuary mortgage transaction but certain other terms appropriate to a lease transaction are added on to the usufructuary mortgage transaction, as seems to have been held

in *Sridevi v. Virarayan* (1), (Subramania Aiyar and Davis, JJ.). I shall assume however that a kanom does not come within the definition of usufructuary mortgage under S. 58, Cl. (d), T. P. Act, because there is usually a provision that a portion of the usufruct is to be paid as rent to the mortgagor; whereas S. 58, Cl. (d), seems to assume that the whole of the rent is to be enjoyed by the mortgagee till the mortgage debt is wiped out by the usufruct or redeemed by payment in order to bring such a transaction within the definition of usufructuary mortgage. The document in question in the present case is not a kanom, as it does not entitle the mortgagee as of right to enjoy the mortgaged property for more than a year, but it does give possession of the mortgaged property to him and provides for payment of portion of the usufruct as rent to the mortgagor, the remainder wiping out interest. Even so I am prepared to follow what seems to me to be the basis of the decision in *Sridevi v. Virarayan* (1), that where the mortgagee takes possession of the mortgaged property according to the contract of mortgage and where there is no covenant or undertaking in the mortgage document by the mortgagor to pay the mortgage amount, there is a contract (probably in the nature of an implied contract) that the mortgagee should not have a power of bringing the properties to sale, and hence the power given in the first part of S. 67 to the mortgagee to bring a suit for sale cannot be taken advantage of by such a mortgagee.

I therefore concur in the dismissal of this appeal with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1899] 22 *Mad.* 350.

A. I. R. 1914 Madras 318

OLDFIELD, J.

Koil Kandadai Amman Ramanujachariar and others—Petitioners.

v.

The Conjeevaram Hogsanpet Danarakshaka Nidhi Ltd. and others—Respondents.

Civil Revn. Petn. No. 653 of 1912, Decided on 16th December 1913, from order of Dist. Judge, Chingleput, in Civil. Misc. No. 12 of 1911.

Civil P. C. (1908), O. 21, Rr. 91 and 92 (2)—Proceedings to set aside sale—Person al-

leged by auction purchaser to be real owner is not necessary party—Proceedings under R. 92(2), are not final.

A person alleged by the auction purchaser as the real owner of the property is not a necessary party to a proceeding to set the sale aside. The proper course is to proceed against him by suit, otherwise he would be deprived of the benefit of a second appeal. Proceedings under O. 21, R. 92 (2), are not final and a third person is not concluded by an order under that rule: 8 *Mad. 99, Foll.* [P 319 C 1, 2]

T. R. Ramachandra Aiyar and T. R. Krishnaswamy Aiyer—for Petitioners.

S. Venkatachariar—for Respondents.

Judgment.—The question raised by this civil revision petition can be stated shortly. It is whether in proceedings under O. 21, R. 91, Civil P. C., the person alleged by the auction purchaser to be the real owner of the property sold is a necessary party. The lower Courts have held that such person, the petitioner here, must be impleaded, disallowing the objection which he made before them.

Their decisions are supported only by the argument *ab inconvenienti*; and it is, no doubt, true that the petitioner could not have obtained in a regular suit a fuller enquiry than has been held. They have however overlooked the fact that he has been prejudiced in respect of his right of appeal. For against an order under O. 21, R. 92, Civil P. C., there is one appeal only, whilst, if petitioner had proceeded by suit (whether or not after claim or objection proceedings), a second appeal would have been open to him. There is no reason for supposing that he can be deprived of this advantage by the fact that his title was disputed during the short period between the holding and confirmation of the sale.

The material provision of law, the proviso to O. 21, R. 92 (2), Civil P. C., can in fact be interpreted consistently with this objection. It provides for notice to "all persons affected by" the application. But the application will not affect a stranger to the proceedings who claims the property, since the relief contemplated in it, is only the return to the purchaser of his money. There is nothing in the proviso or elsewhere which entails that a claimant to the property need be affected before an attempt is made to take delivery of it from him or some person in possession under him.

No case directly in point has been referred to. The corresponding portion of

the former Code was, no doubt, less widely expressed than O. 21, R. 92 (2). But as regards refund of purchase money *Sivarama v Rama* (1) and *Pachayappan v. Narayana* (2) are clear authorities for the view that proceedings under S. 313 or O. 21, R. 91, do not necessarily end in any final decision and that the matter can be reopened, according to the former case, by application under S. 315 or O. 21, R. 93, Civil P. C., (that being the alternatives entailed by the circumstances before the Court in it) or, according to the latter, by a regular suit. When even between the purchaser and decree-holder and as regards return of the purchase money, such proceedings are not final, they cannot result in a final adjudication against a claimant such as the petitioner, and he cannot be held to be a necessary party to them.

In these circumstances the orders of the lower Courts must, so far as they are against him, be set aside, the miscellaneous petition being dismissed as against him with costs throughout.

S.N./R.K. *Order set aside.*

(1) [1885] 8 *Mad. 99.*

(2) [1888] 11 *Mad. 269.*

A. I R. 1914 Madras 319

BENSON, OFFG. C. J., AND AYLING, J.
Public Prosecutor—Appellant.

v.

Abdul Hameed and others—Accused.

Criminal Appeal No. 8 of 1912 and Cr. Ref. 17 of 1911, Decided on 2nd August 1912, against decision of Sess. Judge, Coimbatore, in Sessions Cases Nos. 40 and 55 of 1911.

(a) Criminal P. C. (5 of 1898), S. 297—**Jury can be charged only when evidence on both sides is taken and counsel are heard.**

According to S. 297 the Judge can only charge the jury after all the evidence on both sides has been taken and counsel on both sides have concluded their addresses to the jury.

[P 321 C 1]

(b) Criminal P. C. (5 of 1898), S. 303—**"Verdict" means collective opinion and not individual opinion of jurors.**

By the word "verdict," in S. 303 should be understood the collective opinion of the jury as a body arrived at after mutual consultation and ascertained and announced by the foreman. In cases of disagreement the individual opinions of the jurors are never intended to be disclosed.

[P 321 C 2]

(c) Criminal P. C. (5 of 1898), S. 303—**When verdict is ambiguous or incomplete Judge can only question jury.**

The Judge is only entitled to question the jury as to their verdict, where it is ambiguous or incomplete.

[P 322 C 1]

J. L. Rozario - for Appellant.

T. Richmond—for Accused.

Judgment.—This appeal and reference arise out of what is known as the Coimbatore Mohurram riot which occurred on the evening of 12th January 1911. Put briefly, the facts are as follows :

The 12th January was the last day of the Mohurram festival, in connexion with which it is usual for men and boys to paint and disguise themselves in imitation of tigers and to dance in the public streets. On the afternoon of the day in question the Coimbatore Town Inspector began (so far as appears) to enforce an old order of the District Magistrate embodied in a book of Standing Orders (Ex. A) prohibiting persons from thus dancing as tigers without license from the police. Between about 5 and 6 p. m. he stopped the dancing of five unlicensed men ; the last two of whom are the present accused 2 and 23. These men were dancing near the station, and to secure compliance with his command the Inspector first took away the "tails" they were wearing and then partially washed the paint off their faces. The two men nevertheless resumed dancing and the Inspector incensed at their disobedience, appears to have gone out and beaten them with a stick. By this time a considerable crowd had collected and the tahoot procession in its progress through the town had arrived close to the station. Apparently the processionists sympathized with the "tigers" and declined to proceed unless the tails were restored. Matters began to look serious, and the Inspector, who had retired to his room upstairs in the station, wrote a note to the Reserve Inspector calling for assistance. The exact time at which this note was written and at which it was despatched is not clear ; but the Inspector appears to have given the mob to understand that he had sent for the reserve, probably meaning to frighten them. Unfortunately it produced the opposite effect ; they realized that if anything was to be done no time must be lost, and made a rush for the station shouting "deen, deen." The small force of constables who endeavoured to stop them was driven back with sticks and stones ; and the mob entered the station. Some of the police took refuge upstairs, others in the Station House Officer's room below. This was forced open and

a bonfire was made in the road in which a good deal of the station furniture was consumed. The record room was fired and the records burnt ; and the staircase was also set fire to, so that the Inspector and his companions upstairs were in considerable danger of their lives. The Inspector escaped by the roof and one or two others from a window, but the remainder, including a European lady, the wife of a European Sergeant of the Reserve Police, were only rescued by the arrival of the Police Reserve at about 7-40, and the dispersal of the mob.

Upon the above facts, which are deposed to by 25 prosecution witnesses and are practically beyond dispute, 23 persons, who are said to have been members of the mob which attacked the station, have been put on their trial for offences under Ss. 147, 152, 436, 457 and 149, I. P. C. A jury was empanelled to try the charge under S. 457, the jurymen sitting as assessors on the other charges. A majority of the jury found eight of the accused (6, 7, 11, 13, 16, 20, 21 and 23) guilty of an offence under S. 457, and the rest not guilty. The Judge disagreeing with the verdict of "guilty" has referred the case of the above eight persons for the orders of this Court under S. 307, Criminal P. C., and has acquitted the remaining accused on all the charges. From his judgment and the letter of reference, he appears to be of opinion that no offence whatever has been brought home to any of the accused persons. Government, on the other hand, has appealed against the acquittal of the 15 accused whom the jury found "not guilty."

As far as the case of the eight persons found guilty by the jury is concerned, the effect of the reference is to open up the whole case and to render it our duty to consider whether the evidence against each is sufficient to justify a conviction for all or any of the offences charged. But as regards the others, who have been found "not guilty," we can only go into the evidence, if we find such misdirection in the charge or irregularity in the procedure, as would, in our opinion, have occasioned a failure of justice. This, then, must be the first point for consideration.

Now as pointed out by the learned Advocate-General, the procedure of the Sessions Judge is distinctly irregular in

more points than one. It is thus set forth in paras. 5 and 6 of his judgment :

"After the evidence of the prosecution was closed, I asked the vakil for the defence to examine, in the first instance, certain witnesses who he stated would prove clear alibis for accused 18 and 19 as these witnesses seemed to be the principal witnesses on whom he relied. There was a host of other witnesses cited for the defence, and it seemed to me that the quickest way of getting through the case would be for the vakils and myself to sum up first on the case generally, and then on the case as against each of the accused, one by one, leaving it to the jury to say if they wished to hear the witnesses for the defence cited by him or were prepared to find that the prosecution had not made out a case against him. This procedure was followed until the case of accused 6 was reached. By that time it appeared that too much time was taken up by speeches and as the vakil, who represented all the accused, then stated that he intended examining only a few of the host of witnesses cited, he was asked to examine them at once in a batch. After all these witnesses had been examined, the vakils on both sides summed up once for all. I then summed up first generally on the facts to re-call the salient points in the case to the jury, and after that with regard to the evidence for and against each accused person, starting from accused 6."

It is, no doubt, desirable that the case against each of the several accused should be clearly and distinctly presented to the jury, and the procedure laid down in the Code is quite compatible with this being done. But S. 297, Criminal P. C., specifically enacts that the Judge shall only charge the jury "when the case for the defence and prosecutor's reply . . . are concluded," i. e., after all the evidence has been taken on both sides and counsel on both sides have finished addressing the jury. The Judge's charge to the jury in the case of accused 1 to 5 was clearly premature and contrary to the sections above quoted. The Judge was, no doubt swayed by the laudable desire to save time; but, as he himself admits that object was not attained and as he further acknowledges (para. 98 of his charge to the jury) in at least one instance arguments adduced on behalf of one

accused (accused 6) led him to materially alter his view of the reliability of certain evidence against earlier accused, in whose case a verdict had already been recorded.

It may be argued that this irregularity cannot be said in itself to have affected the issue of the case; but the next divergence from the procedure laid down in the Code is of a more serious nature and is opposed to a fundamental principle of the scheme of trial by jury. S. 303, Criminal P. C., says that "the jury shall return a verdict on all the charges" and by "verdict" should be understood the collective opinion of the jury as a body, arrived at after mutual consultation, and ascertained and announced by the foreman. In cases of disagreement among the jury, the individual opinions of members are never intended to be disclosed. In the present case except in the case of accused 1, 2, 4 and 5 regarding whom the procedure adopted is not certain, the record makes it clear that no verdict in this sense has been recorded at all. In the case of accused 6 to 23, the Judge has called on each member of the jury individually to answer a series of questions of which he was furnished with a typed copy and which run as follows:

"(1) Do you find this accused guilty of any offence? (2) If you find him guilty of any offence, then what do you find was the common object of the unlawful assembly at the time when it is proved by reliable evidence he was last seen in the unlawful assembly? (3) What offences, if any, do you find were committed by the accused personally? (4) Do you find on the evidence that any other members of the unlawful assembly committed any other offences, besides those, which this accused personally committed during the time this accused was a member of the unlawful assembly? (5) Do you find on the evidence that this accused knew that such other offences as were committed by other members of the unlawful assembly during the time he was still a member of the assembly, were offences likely to be committed in pursuance of the common object of the assembly at that time?"

In the case of accused 3, these questions do not appear to have been put; but the individual opinion of each member of the jury has been recorded as to the accused's guilt of an offence under S. 457,

as well as of offences triable with the aid of assessors. In other words he has treated the jury exactly as if they were assessors in relation to the charge under S. 457, except that he has not felt authorized to override the opinion of a majority of them where it is in opposition to his own.

In the case of accused 3, there is a further serious irregularity. As regards the offence under S. 457, I. P. C., three of the five jurors expressed individual opinions that the accused was guilty. As already explained, this can hardly be regarded as "verdict" in the proper sense of the term at all; but if it be so treated, it is perfectly clear and specific and the only course open to the Judge was either to accept it or to refer the case to the High Court under S. 307, Criminal P. C. He has done neither; but on the day following that on which these opinions were recorded, has twice questioned the jury, the second occasion being after a verdict, (or what passed for a verdict) of "not guilty" had been returned regarding accused 4. Under S. 303, Criminal P. C., "the Judge may ask the jury such questions as are necessary to ascertain what their verdict is" and under S. 304: "When by accident or mistake a wrong verdict is delivered, the jury may, before or immediately after it is recorded, amend the verdict," but it has been repeatedly laid down that the Judge is only entitled to question the jury as to their verdict where it is ambiguous or incomplete, which was certainly not the case here, nor was it a case within the scope of S. 304. The Judge's procedure was therefore at variance with the law, and we may add that even the final answers of three of the five jurors, which the Judge interpreted as a verdict of "not guilty," are not consistent with each other on a proper view of the law and can only have been given under a misapprehension of the law in a very important particular to which we shall refer later on.

[After considering at length the Judge's charge to the jury and holding that it contained numerous, exaggerated and unfair comments upon the prosecution case their Lordships continued:]

We can only come to the conclusion that the cumulative effect of such comment amounts to positive misdirection while the irregularities in the procedure which we have previously dealt with,

and in particular the individual questioning of the jury, are such as to render it certain that they would exercise a most potent influence over the decision of the jury in the case of all the accused. It therefore becomes necessary to examine the evidence in the case of the acquitted persons as well as in the case of the eight convicted persons referred by the Judge under S. 307, Criminal P. C., in order to ascertain whether the verdict was erroneous and amounted to a miscarriage of justice. (Their Lordships then proceeded to consider the evidence and held that in the case of accused 3, 4, 8, 9, 14, 17 and 22 the acquittal by the jury was erroneous and was due to the misdirection of the Session Judge, and under S. 423, Criminal P. C., found them guilty of the offences charged.)

In the case of accused 6, 7, 11, 13, 16, 20 and 21 also their Lordships convicted them of all the offences charged. Each of these accused was sentenced to two years' rigorous imprisonment.

Accused 1, 2, 10, 12, 15, 18, 19 and 23 were acquitted.

S.N./R.K.

Appeal accepted.

A. I. R. 1914 Madras 322

TYABJI, J.

Gangi Sait—Defendant—Petitioner.

v.

Ahmed Hussain Saib and another—Plaintiffs—Respondents.

Civil Revn. Petn. No. 537 of 1912, Decided on 12th December 1913, from order of Small Cause Court Judge, Madras, in Full Bench Appln. No. 54 of 1912, D/- 15th August 1912.

(a) Civil P. C., O. 6, R. 17—Suit decided by single Judge—Full Bench of Presidency Small Cause Court may allow plaint to be amended if it avoids multiplicity of suits, even if suit is decided by single Judge.

The Full Bench of the Presidency Court of Small Causes may on an application for a new trial allow a plaint to be amended even though the suit was decided by a single Judge. An amendment of a plaint, even if it changes the nature of the cause of action and the suit, can, though unusual, be permitted when its effect is an avoidance of a multiplicity of suits, and a determination in the suit itself of the questions at issue between the parties. [P 323 C 1, 2]

(b) Civil P. C., O. 6, R. 17—Where prejudice can be compensated, Courts should allow amendment.

The real restriction on the power of amendment of pleadings is that the parties should not be prejudicially affected. If the prejudice is such as can be compensated for by the payment of costs, then the Courts ought not to hesitate

to permit the amendment if the ends of justice require it. [P 323 C 1]

(c) Civil P. C., S. 115 — Order of Small Cause Court—Revision over.

The High Court should only interfere with an order of a Small Cause Court where interference is necessary for the ends of justice.

[P 323 C 2]

M. D. Devadoss and Arumainatham — for Petitioner.

C. V. Ananthakrishna Aiyar and Mahomed Ibrahim Sahib—for Respondents.

Judgment.—It was strenuously argued before me on behalf of the petitioner that the learned Judges of the Small Cause Court had no jurisdiction to permit the amendment of the plaint which is here complained of. Various authorities were cited to me showing that the Courts are extremely reluctant to allow an amendment of the plaint under circumstances in which the amendment, as this case did as a matter of fact, change the cause of action. So far as I understand the authorities, the powers of the Court to allow amendments of pleadings are extremely wide, and the real restriction on those powers is that the parties should not be prejudicially affected. If the prejudice to the parties is such as can be compensated for by the payment of costs then the Courts do not hesitate, if they think that the ends of justice require it, to permit the amendment to be made; but in such a case they order costs to be paid so as to compensate the person prejudiced by the amendment.

Now, in this case, it had to be admitted that the effect of the amendment was, at the highest, that the plaintiffs were able to have real questions decided in this suit, whereas, according to the argument for the petitioner, the original plaintiff should have been referred to a fresh suit. There was nothing to show that the defendants were otherwise prejudiced by this amendment. I was extremely anxious to be satisfied on this point and I questioned Mr. Devadoss, I believe, more than once, and I think I am right in saying that his answer was to the effect that I have stated. In these circumstances, I cannot say that I should feel justified in interfering with the order made by the Small Cause Court. I should always be reluctant to interfere with an order of this nature which is in the discretion of the Judges who are aware of the practice of their own Court and of the manner in which

cases are presented before them for adjudication. In this case, the Judges of the Small Cause Court made an order, which, I quite admit, is rather an unusual use of the power of allowing amendments; but I feel no doubt that the order has been made in order that the parties may be brought to the real issues in the case without further technical objections on the part of the defendant. I should have felt sorry if I had felt constrained to interfere with such an order. In proceedings such as the present I am required to interfere only where an interference is necessary for the purposes of justice being done. I therefore dismiss this petition with costs.

As there will have to be a trial afresh of the whole suit, it was suggested on behalf of the petitioner that I should order the suit to be tried by a Judge other than the learned second Judge who heard the suit on the first occasion. The suggestion is supported by a reference to the fact that that Judge has already expressed his opinion on a state of facts which in appearance differs but slightly from the facts as they are now stated in the amended plaint, but that in reality a new complexion is given to the case by the amendment: that the Judge may not feel quite free to express an opinion on the amended plaint. It is argued therefore that it would be desirable that a fresh mind should consider the case as it is now placed before the Court. These are matters which would be in the knowledge and discretion of the second Judge and of the Chief Judge, and I do not wish to express any opinion at this stage on the question. The petitioner can, of course, make an application to the learned Chief Judge who will, no doubt, pass such orders as the interests of justice will require.

S.N./R.K.

Petition dismissed.

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A. I. R. 1914 Madras 323

WALLIS AND SADASIVA AIYAR, JJ.

P. S. Narayana Ayyar and others—Prisoners—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 7 of 1914 and 733 of 1913, Decided on 18th March 1914, against order of Sess. Judge, South Malabar, in Cr. Case No. 57 of 1913.

(a) Evidence Act (1872), S. 133—Conviction based on evidence of accomplice is not illegal, though it is unsafe.

A conviction based upon the evidence of an accomplice or even on the confession of a co-accused, is not illegal, though it is quite unsafe to convict a man on such testimony unless there is reliable corroborative evidence in material particulars. [P 326 C 1]

(b) Practice—Conviction based on confession of accused is not sustained—Testimony of accomplice is in most cases treated on same footing as the confession.

In practice a conviction based solely on the confession of a co-accused, is not sustained and the testimony of an accomplice, though it may have a little higher probative value than the mere confession of a co-accused, is in most cases treated on the same footing for all practical purposes: 21 I.C. 673, *Foll.* [P 326 C 1]

(c) Penal Code (1860), S. 471—Charge of forging bail bond—Forged document containing initials of accused—Charge of forging was held not clearly proved.

Where the charge against one of the accused was that he forged a bail bond and the only evidence to support it was that the forged document contained his initials at its bottom, it cannot be said that the charge of forgery has been clearly proved against him. [P 326 C 1]

(d) Penal Code (1860), S. 471—Forged document entirely in handwriting of one accused—It is clear evidence of forgery.

Where the body of the forged document is entirely in the handwriting of one of the accused, it is clear evidence that he forged it. [P 326 C 2]

M. D. Devadoss—for Prisoner 1.

The Public Prosecutor—for the Crown.

Sadasiva Aiyar, J.—These are appeals by accused 2 and 1 respectively against the convictions and sentences passed upon them in Sessions Case No. 57 of 1913 on the file of the Sessions Court of South Malabar. Accused 1, P. S. Narayana Aiyar, was the Head Clerk of the Stationary Sub-Magistrate's Court of Manjeri and accused 2 was an attender in that Court between November 1911 and June 1912. They were charged, accused 1 with having fabricated and forged the bail bond Ex. A, and accused 2 with the fabrication and forgery and also with abetment of those offences.

The facts are a little complicated. There was a Calendar Case No. 562 of 1911 in that Court in which P.W. 6, Unni Mamu, was the accused and in which P.W. 7, Kutti Rayan, had stood surety for witness 6, Unni Mamu. On 4th November 1911 this Kutti Rayan, P. W. No. 7, executed the genuine bail bond Ex. B, to produce the accused Unni Mamu on the subsequent days fixed for the hearing of that Calendar Case No. 562 of 1912. In January 1912 another

Calendar Case No. 26 of 1912 before the Subdivisional first Class Magistrate of Calicut (not the Stationary Sub-Magistrate of Manjeri) was commenced against one Cheku Gurukal and others on a charge of having committed an offence at Calicut on 4th November 1911. Cheku Gurukal pleaded alibi at Manjeri and wanted to support that plea by fabricating evidence that on 4th November 1911 (the date on which according to the charge against him in Calendar Case No. 26 of 1912 he committed an offence at Calicut) he was in the Manjeri Stationary Sub-Magistrate's Court signing a bail bond on behalf of Unni Mamu the accused in Calendar Case No. 562 of 1911 on the file of the Stationary Sub-Magistrate's Court. He approached the Court attender, accused 2 in this case, before the end of February 1912 in order that a bail bond purporting to be executed by him on 4th November 1911 might be substituted in the records of Calendar Case No. 562 of 1911 for the genuine bail bond, Ex. B, which had been already executed by Kutti Rayan. The forged bail bond Ex. A, which is in the handwriting of accused 2 was accordingly prepared and substituted in the records of Calendar Case No. 562 of 1911. This was, as I said, before the end of February 1912 and after 16th January 1912, and while that case, No. 562 of 1911, was pending in the Sub-Magistrate's Court. Then Cheku Gurukal, the accused in Calendar Case No. 26 of 1912 on the file of the Subdivisional Magistrate's Court, applied for a copy of the bail bond falsely alleging that he had executed on 4th November 1911 a bail bond in the Stationary Sub-Magistrate's Court and got the copy, Ex. R, which was written by P. W. 9 in this case, a copyist of the Stationary Sub-Magistrate's Court. He produced that copy in Calendar Case 26 of 1912 to prove his absence from Calicut on 4th November 1911, but his alibi was disbelieved and he was convicted in that case. Meanwhile suspicion had arisen as to the genuineness of the original of the copy, Ex. R, and inquiries were started in the beginning of May 1912.

Both Exs. B and A were missing from the records of Calendar Case No. 562 of 1911. Then P. W. 12, the Bench Clerk of the Stationary Sub-Magistrate's Court, produced the forged bond, Ex. A, to the Sub-Magistrate and made some

statements as to how it was not placed among the records when they were sent to the record room on 1st May 1912 after the case No. 562 of 1911 had been decided. Then accused 2 produced the genuine bail bond Ex. B some months afterwards and he gave some explanation as to why it had got out of the records of Calendar Case 562 of 1911. Then the case was started against these two accused and also against Cheka Gurukul who was first charged as accused 3 in this case, he having placed Unni Mamu's mark upon the antedated forged bail bond Ex. A. Cheku Gurukul was then taken as approver and he has been examined as P. W. 5 in this case.

The Sessions Judge has convicted both the accused mainly on the direct evidence of P. W. 5, the approver, which, according to the Sessions Judge, is corroborated in certain material particulars by the evidence of the copyist P. W. 9, the Bench Clerk Kailasam Aiyar P. W. 10 and the record-keeper Govinda Menon, P. W. 11. So far as accused 2, the appellant in Criminal Appeal No. 733 of 1913, is concerned there can be very little doubt of his guilt as it was he who wrote the body of the forged document Ex. A, and as he was in possession of the genuine bail bond Ex. B between May 1912 and September 1912 according to his own case. The genuine document came into the records of Calendar Case No. 562 of 1911 on 4th November 1911.

The Bench Clerk, P. W. 10, says: "I am held responsible for papers in pending cases, but not when they are in the record room. I am not responsible for papers after handing them over to the record room." Then the Sub-Magistrate, P. W. 2, says: "The record of a pending case is usually with the hearing clerk; accused 1 was never a hearing clerk." In the usual course of business therefore the genuine bail bond Ex. B must have been with P. W. 10 from November 1911 till 30th April 1912, when the records in that calendar case were sent to the record room with the index *ex parte* in the handwriting of the Bench Clerk and partly in that of accused 2. The story of P. W. 10 is that somehow the genuine bond, Ex. B, had got off the record, that somehow the forged bond, Ex. A, had come into the record; that he noticed the forged bond among the records

in the beginning of April 1912, (the case, 562 of 1911, having been disposed of on 16th April 1912); that the copyist, P. W. 9, told him at once in the beginning of April 1912 that there was a suspicion about the genuineness of Ex. A; that the bail bond, Ex. A, was then found among the records, that he never told the Sub-Magistrate that the suspicious document had somehow got into the records in the place of the genuine bail bond; that he took away the suspicious bond, Ex. A, out of the records and kept it himself in his own custody till he produced it in May 1912 in connexion with the inquiry held in respect of it. In fact, the evidence of this P. W. 10 shows that his words cannot be relied upon. He was responsible for the safety of the records. He seems to have negligently allowed somebody to take away the genuine bond Ex. B from the records in February or March 1912 and to substitute the forged bond Ex. A. One strange fact in this case is that accused 2 P. W. 10, Bench Clerk, P. W. 9, copyist, the record-keeper, P. W. 11, all seem to have known and suspected that some dishonest thing had occurred in connexion with the records of this Calendar Case No. 562 of 1911, but none of them went to the Sub-Magistrate to mention their suspicions till May 1912. It is said by witnesses 9 and 10 for the prosecution that in the index paper Ex. K, prepared by the Bench Clerk (Kailasam Iyer) the Head Clerk (accused 1) had made a pencil note in the remarks column, "not among the records" against paper No. 3 which was either the true bail bond Ex. B, or the forged bond Ex. A. At that time the Bench Clerk had the forged bond Ex. A with him according to his case (and either accused 2 or the Head Clerk must have had the true bond, Ex. B), and yet the Bench Clerk prepared the index No. 3 as if it was among the records with him to be sent to the record room.

Accused 1 (Head Clerk), who according to the prosecution is the principal guilty party, contents himself with making a note "not among the records" and then tells the record-keeper that he will search for it in his own drawer or some other place. The pencil note is admittedly not now found in the index paper Ex. K, in the remarks column, but some other remark in ink is found there and the Bench Clerk, P. W. 10, admits that he

cannot see any trace of this alleged pencil note in the remarks column in that index paper now. The record keeper says that he also saw that note, but he had not mentioned the fact of this pencil note in his statement Ex. P at the departmental inquiry. The Head Clerk (accused 1) seems to be a man of some service and the Sub-Magistrate, P. W. 2, says: "During my connexion with accused 1 I have not heard anything against him; but I have found him slow, though very hard working; I know nothing against his character. I found him satisfactory in money matters." The Head Clerk frequently reported accused 2 for faults. The two accused are on bad terms. Accused 2 also has admitted that accused 1 has reported about his bad work several times. Though it has been held in recent cases that a conviction based upon the evidence of an accomplice or even on the confession of a co-accused is not illegal, it has been also repeatedly and uniformly laid down that it is quite unsafe to convict a man on such testimony unless there is reliable corroborative evidence in material particulars. Macleod, J., in the recent case *Emperor v. Gangapa Kordepa* (1) says that it has been laid down as a rule of practice which deserves all the reverence of law that a conviction based solely on the confession of a co-accused cannot be sustained, and that although the testimony of an accomplice may have a little higher probative value than the mere confession of a co-accused, the two might in most cases be treated as on the same footing for all practical purposes.

The only tangible thing I can find against accused 1 is that he initialed the forged bail bond Ex. A, along with the Sub-Magistrate, P. W. 2; but he and the Sub-Magistrate sign numerous papers every day as a matter of course, and that he failed to note when signing in February 1912 the forged bond Ex. A that it was fraudulently dated in November 1911 should not, in my opinion, be pushed unduly against him, especially having regard to the place where he put in his initials, that is, at the very bottom of the paper. His attender, accused 2, had easy access to all the papers in his table; and the bail bond forms, though in the Head Clerk's custody, are available for

the mere asking for all kinds of clerks, for, according to the Sub-Magistrate, P. W. 2, all clerks are allowed to write bail bonds and the Sub-Magistrate's signature is obtained to bail bonds along with routine papers and he initials as a matter of course. The evidence of the approver shows that he is an utterly unreliable man and I am unable to hold that his evidence has been corroborated in material particulars by any other reliable evidence in this particular case so far as the Head Clerk is concerned. There is this great difficulty also in accepting the evidence of the approver, namely that accused 1, who was an enemy of accused 2 according to the prosecution evidence itself from some time before February 1912, was approached by accused 2 at the instance of the approver and in order to assist the approver to have the forged bail bond introduced in the records. I am therefore of opinion that the evidence against accused 1 is both insufficient and unreliable and I would acquit him of the charges against him.

As regards accused 2, as I said before, he is the man who wrote the forged bail bond Ex. A. It was he who wrote the entries 1 to 10 in the index paper, Ex. K, as if the bail bond, item 3, was still among the records. He had possession of the genuine bail bond Ex. B, which he must have somehow taken out of the records. His story that the Head Clerk had placed it under some blotting pad and that he, accused 2, stole it from underneath the pad is utterly unworthy of credit. The approver's evidence is fully corroborated so far as accused 2 is concerned and I would affirm his conviction and dismiss his appeal, No. 633 of 1913. Accused 1 will be released and set at liberty.

Wallis, J.—I agree for the reasons given by my learned brother that the appeal of accused 2 must be dismissed. As to accused 1, I feel more hesitation. However, as regards the corroboration relied on by the Sessions Judge, the evidence of the Sub-Magistrate as to what another witness told him accused 1 had said is mere hearsay and inadmissible. Further, I do not consider it proved by satisfactory evidence that the index of the documents of the case in which the bail bond was given ever contained an entry in accused 1's handwriting that the bail bond

(1) [1913] 21 I. C. 673=38 Bom. 156=14 Cr. L. J. 625.

was missing. The Magistrate did not make as complete an inquiry as he ought immediately after he discovered that the bond was missing, and there is no mention of this entry in some of the early statements where it might be expected. This is the only evidence in writing which weighs much against accused 1, and I do not think it is proved by satisfactory evidence. I am willing to give the accused the benefit of the doubt and accordingly allow the appeal, acquit him and order him to be discharged.

S.N./R.K.

Order accordingly.

A. I. R. 1914 Madras 327

SADASIVA AIYAR AND SPENCER, JJ.

Subbammal—Plaintiff—Appellant.

v.

Krishna Aiyar—Defendant—Respondent.

Letters Patent Appeal No. 254 of 1912, Decided on 17th December 1913, against judgment of Miller, J., in Second Appeal No. 1004 of 1912.

(a) Hindu Law—Partition—Partition between Hindu female heirs consisting of mutual relinquishment of respective life interests is valid.

Where two Hindu female heirs, inheriting a life interest in properties from a male propositus divide the said properties not for mere convenience of enjoyment, but under a contract that each of the female heirs gives up in praesenti her life interest in the properties falling to the share of the other female heir, such a complete relinquishment is valid and would prevent each of the females from claiming the properties which fall to the share of the other, if she happens to survive the latter: 16 I. C. 428 and 22 Mad. 522, *Foll.* [P 327 C 2]

(b) Deed—Construction.

Where a document dealing with three items of property contains the words "*sarwa swathantra badhyamayum and santhathi pravase-mayum*" in connexion with two and those words are omitted in regard to the third the intention would be to give up the right of survivorship in respect of the two and to preserve it as to the third item. [P 327 C 2; P 328 C 1]

T. V. Seshagiri Aiyar—for Appellant.

T. R. Ramachandra Aiyar—for Respondent.

Judgment.—The first question arising in this Letters Patent appeal is whether when two female heirs *A* and *B*, inherit-

ing life interests in properties belonging to a male propositus divide the said properties not for mere convenience of enjoyment, but under a contract containing terms which indicate that each of the female heirs intends to give up in praesenti her life interest in the properties which fell to the share of the other female heir such a complete relinquishment is valid so as to prevent her (*A* and *B*) from claiming those properties if she happens to survive her co-heir (*B* or *A*).

That question has been answered by this Court in the affirmative in *Sudalai Ammal v. Gomati Ammal* (1), following similar answers given in several previous cases beginning with *Ramakhal v. Ramasami Naicken* (2).

Mr. T. V. Seshagiri Aiyar ingeniously argued (if I understood him right) that such a relinquishment of the whole life interest by *A* involves a relinquishment of the right of survivorship which is in *A* contingent on her surviving *B* and such a relinquishment is invalid under S. 6, T. P. Act.

This argument is based on the assumption that a vested life interest (which is a present interest well known to the law and allowed by the law to be alienated) can be and ought to be divided into two extraordinary interests (not recognized by the law as alienable), namely (1) the right of *A* to enjoy the properties jointly with *B* during *B*'s lifetime assuming that *B* will die before *A* and (2) the right in contingent possibility of *A* to get the undivided share of *B* by survivorship assuming again that *B* will die before *A*.

Not only are we of opinion that the above argument based on this division of an entire life-interest in imagination into two interests is unsustainable, but even if there is anything in this argument that is not a sufficiently strong argument to justify us in overruling the current of decisions in this Court during the last 15 years. The next question is whether the partition deed Ex. A does contain words indicating that, so far as plaintiff Schs. 1 and 3 properties (document Schs. 2 and 4 properties) are concerned the plaintiff (appellant) intended to give up her life interest in those properties. The words *sarwa swathantra badhyamayum and santhathi pravesamayum* have been inter-

(1) [1912] 16 I. C. 428.

(2) [1899] 22 Mad. 522=9 M. L. J. 101.

preted by the Courts below and by the learned Judge of this Court (from whose decision this Letters Patent appeal has been filed), as indicating such relinquishment and alienation by the plaintiff and we are not prepared to say that they are wrong, though if some other usual words as "we have no connexion with each other's rights of properties hereafter but only connexion by blood relationship," had been also inserted the matter would be beyond controversy. Probably such words were not added because the two sisters (plaintiff and defendant's mother) did intend to retain common interest in the plaint Schs. 2 and 3 properties and it is even contended that as regards Sch. 2 property the parties intended the ordinary right of survivorship to take its course in favour of that sister (whether the plaintiff or the defendant's mother) who happened to survive the other. In short the argument of the appellant's *vakil* based on the difference in the phraseology of the document in different portions that is the fact that the Tamil words already referred to are attached to the enjoyment of Schs. 1 and 3 properties and such words are omitted in relation to Sch. 2 house to be enjoyed in common strongly supports the construction adopted by the lower Courts that the plaintiff gave up completely her life interest in Schs. 1 and 3 properties in favour of the defendant's mother and of the defendant's mother's descendants.

The last question is whether, as regards Sch. 2 house the plaintiff gave up her life interest completely or whether she and her sister were to enjoy it in common the usual contingent right of survivorship being left unaffected in favour of that sister who happened to survive the other. The difference of language above pointed out supports the plaintiff's case on this point and though the 12th ground of the second appeal memorandum treats Schs. 2 and 3 properties on the same footing, that mistake should not be pressed against the appellant when the language of the document Ex. A. itself is reasonably clear. But as regards this property, the plaint Sch. 2 house, the plaintiff has by Ex. 1 sold away her life interest in half the house to her sister and cannot claim that share now and though the whole house was claimed by the plaintiff in the plaint the second appeal relates only to the other

half of the said house. This other half-share on the above view has come back to her on her sister's death.

In the result there will be a preliminary decree for the plaintiff for partition of Sch. 2 house into two equal shares and for possession of one half-share with liberty to the defendant and the plaintiff to apply under the Partition Act and with liberty to the Court of first instance to pass orders under that Act.

As the appellant has substantially failed she will pay here respondent's costs in this appeal. The order as to costs passed in the lower Courts will stand.

S.N./R.K.

Appeal allowed.

A. I. R. 1914 Madras 328

WALLIS AND OLDFIELD, JJ.

Devaguptapu Kameswaramma—Defendant 4—Appellant.

v.

Vadaddi Venkatasubba Rao & others—Plaintiffs and Defendants—Respondents.

Civil Appeal No. 1667 of 1912, Decided on 29th April 1914, against decree of Temporary Sub-Judge, Rajahmundry, in Appeal Suit No. 42 of 1912.

(a) Civil P. C. (1882), S. 253 — Proviso in S. 253 as to enforcement of decree against surety applies also to appellate decree — Restitution under S. 583 can be ordered — Civil P. C. (1882), S. 583.

The provision contained in S. 253 as to enforcement of the decree against a surety applies also to appellate decrees and the restitution of money paid to a surety can be ordered under S. 583 of the Code: 13 *Mad. 1, Foll.*

[P 329 C 1, 2]

(b) Civil P. C. (1882), S. 610—Son if joint with father is liable for surety debt of his father—Property obtained by son after partition cannot be proceeded against to enforce liability for surety debt.

A son is liable for the surety debt of his father only if they lived as members of a joint Hindu family, but if there was a partition even if made after the date of the order passed against the father as surety the property obtained by the son on such partition cannot be proceeded against to enforce such liability: 24 *Mad. 555, Ref.*; 8 *I. C. 131*; 18 *M. L. J. 599, Foll.*; 11 *Bom. 37*; 3 *Cal. 198 (P. C.)*; 5 *Cal. 148 (P. C.)*; 13 *Cal. 21 (P. C.)* and 28 *Bom. 383, Dist.* [P 329 C 2; P 330 C 1]

(c) Decree—Order for restitution is equal to decree.

An order for restitution is tantamount to a decree. [P 329 C 1]

(d) Civil P. C. (1908), Ss. 50 and 52—Property obtained by son on partition with father is not assets of father in son's hands within Ss. 50 and 52.

The property obtained by son on partition with his father cannot be said to be "assets"

of the father in the hands of the son within the meaning of Ss. 50 and 52, so long as the father is living. [P 330 C 1, 2]

A. Krishnasami Aiyar—for Appellant.

B. N. Sarma—for Respondents.

Wallis, J. — In this case the present defendant 2 obtained a decree for maintenance against defendant 3 and recovered in execution Rs. 637, which she was allowed to draw, on giving security under S. 253, Civil P. C. The surety was defendant 1, the father of the plaintiff. The decree was reversed by the High Court and defendant 1 as surety was ordered to pay defendant 3 the money which had been recovered from him by defendant 2 under the decree. The order was made under S. 253, Civil P. C., which read with S. 583, Civil P. C., was applicable to security for the performance of appellate decrees according to *Thirumalai v. Ramayyar* (1). This decision has been questioned before us on the ground that it is inconsistent with the later decision in *Arunachallam v. Aruanchallam* (2), decided by the same Judges.

In that case the security had been given pending an appeal to the Privy Council, and it was necessary to invoke the aid of S. 610, Civil P. C., to render S. 253 applicable to the case. The learned Judges apparently were of opinion that it might have been invoked, but for the fact that in 1888 a special proviso had been introduced into S. 610 that in so far as the order awards costs to the respondents, it may be executed against a surety therefor to the extent to which he has rendered himself liable in the same manner in which it may be executed against the appellant. With great respect it appears to me that what we have to look to is the meaning of Ss. 253 and 610 as originally enacted in 1877. The fact that the legislature 11 years later in 1888 inserted a proviso in S. 610 only shows the interpretation which the framers of the amendment were disposed to place upon the sections as they then stood. This interpretation is not authoritative, and in these circumstances the addition of the proviso is no reason for modifying the opinion which the Court would otherwise have arrived at on the construction of the original sections. Even where a proviso of this kind is introduced into a section at the time of

enactment, it is often done ex abundanti cautela, and it by no means follows that the operation of the section is affected thereby. In these circumstances I prefer to follow the earlier decision of the learned Judges in *Thirumalai v. Ramayyar* (1) which has been cited with approval in *Chettikulam Venkitachala Reddiar v. Chettikulam Kumara Venkitachala Reddiar* (3), more especially as this interpretation of the sections has been adopted in the express provisions of the present Code. I am therefore of opinion that the order was rightly made against defendant 1. This order defendant 3 executed against property, which fell to the plaintiff at a partition between himself and his father, defendant 1, after the date of the order against the father. The plaintiff objected that the properties were not liable to attachment, and on the rejection of his claim filed the present suit to establish his right. The defence in the lower Court was that the partition was collusive and inoperative, but the lower Courts rejected this contention and gave the plaintiff a decree.

In second appeal the point has been taken that even supposing the partition to have been good, the present defendant 3 is none the less entitled to execute the decree against the plaintiff to the extent of the joint family property which has come to him, the order equivalent to a decree which he obtained against the plaintiff's father before the partition. The order under S. 253 may, I think, be considered as equivalent to a decree against the father, and it appears to be now settled in this Court that a suretyship liability, such as this, is one which a Hindu is under a pious obligation to discharge. I think it is also clear that plaintiff as a Hindu son is liable for the debt to the extent of the joint family property which came to his hands at partition: *Ramachandra Padayachi v. Kondayya Chetti* (4). The only question then is: Is a decree for such a debt obtained against the father before partition executable after partition against the son and the joint family property allotted to him? In *Krishnasami Konan v. Ramasami Ayyar* (5), where the father had contracted the debt before partition and a suit had been brought

(1) [1890] 18 Mad. 1.

(2) [1922] 15 Mad. 203=2 M. L. J. 1.

(3) [1905] 28 Mad. 377.

(4) [1901] 24 Mad. 555.

(5) [1899] 22 Mad. 519=9 M. L. J. 197

and a decree passed against him after partition, it was held that the decree could not be executed against the properties which had fallen to the son in partition, because the principle upon which the son cannot object to ancestral property being seized in execution for an unsecured personal debt of the father is that the father, under the Hindu law, is entitled to sell on account of such debt the whole of the ancestral estate. This necessarily implies that at the time the property is attached it remains the undivided property of the father and the son. The same view has been taken under very similar circumstances by Miller and Krishnaswamy Iyer, JJ., in *Lakshmana Chettiar v. Govindarajalu Naidu* (6) : see also *Rathna Naidu v. Anjanachariar* (7).

It is sought to distinguish these cases on the ground that the order equivalent to a decree was made against the father in this case before the date of partition, but this circumstance does not appear to make any difference as at the date of execution the property now in question had ceased to be joint family property, and the cases referred to on the other side, *Jagabhai Lalubhai v. Bhukandas Juggivandas* (8), *Deendyal Lal v. Jugdeep Narain Singh* (9), *Suraj Bansi Koer v. Sheo Persad Singh* (10), *Nanomi Babuasini v. Modhun Mohan* (11) and *Govind v. Sakharam* (12), were all cases in which the property remained joint and so subject to alienation by the father in satisfaction of his debt. Lastly it has been attempted to base an argument on S. 53 of the present Code which provides that for the purpose of Ss. 50 and 52 property in the hands of a son which under the Hindu law is liable for the payment of the debt of his deceased father in respect of which a decree has been passed, shall be deemed to be property of the deceased father which has come to the hands of his son as his legal representative. This statutory fiction however only applies to the case of a deceased father, and we should not be

justified in extending it to a case where the father is still living or in inferring, as has been suggested, that as the decree could under the section be executed against the property in question if the father was dead, it must a fortiori be executable against the same property when the father is alive. The answer is that the legislature has not made any such provision. In the result the second appeal fails and is dismissed with costs.

Oldfield, J.—I concur.

S.N./R.K.

Appeal dismissed.

* A. I. R. 1914 Madras 330

SADASIVA AIYAR AND SPENCER, JJ.

Assistant Sessions Judge of North Arcot
—Petitioner.

v.

Ramaswami Asari—Accused.

Criminal Misc. Petn. No. 546 of 1913,
Decided on 10th February 1914, from
order of Reference to High Court.

* Criminal P. C. (5 of 1898), Ss. 188 and 179 to 187—S. 188 gives jurisdiction to British Indian Courts in cases not coming within their jurisdiction under S. 178 to 187—Proviso to S. 188 does not restrict special jurisdiction notwithstanding anything contrary in S. 177—Criminal P.C., S. 177:1 *Mad.* 171, *Overruled*.

Section 188, which follows Ss. 178 to 187, was intended to draw into the net of the jurisdiction of the British Indian Court cases which notwithstanding the full use of Ss. 179 to 187 could not be brought within their jurisdiction, and the proviso could not have been intended to restrict the extended jurisdictional privileges conferred by Ss. 173 to 184 on Courts which, according to the ordinary rule of S. 177, would not have had jurisdiction: 19 *All.* 111 and 35 *All.* 29, *Foll.*; 1 *Mad.* 171, *Overruled*; 13 *Mad.* 423 and 24 *All.* 256, *Dist.* [P 332 C 1, 2]

S. Swaminadhan for Public Prosecutor
—for the Crown.

R. N. Aiyangar—for Accused.

Facts.—The accused was a commission agent residing in Bangalore City. The complainant from time to time sent to him jewels for sale. Jewels for Rs. 40 were once sent to him and he instead of selling them pledged the same with a sowcar. He was charged before Tiruvannamalai Magistrate's Court for criminal breach of trust and he was acquitted. On appeal by Government, the order of acquittal was set aside without a proper notice to the accused by the High Court. He was then charged and committed to trial before the Assistant Sessions Judge; when the case for trial came on, objection was taken to the jurisdiction of the Court

(6) [1910] 8 I. C. 131.

(7) 1908] 18 M. L. J. 599=4 M. L. T. 277.

(8) [1887] 11 Bom. 37.

(9) [1876-77] 4 I.A. 247=3 Cal. 198=1 C.L.R. 49 (P.C.).

(10) [1884] 5 Cal. 148=4 C. L. R. 226=6 I. A. 88 (P.C.).

(11) [1886] 13 Cal. 21=13 I. A. 1 (P.C.).

(12) [1904] 23 Bom. 363=6 Bom. L. R. 344.

to commit. The present application was to quash the commitment on that ground.

Spencer, J.—I think that the Assistant Sessions Judge is mistaken in supposing that the Deputy Magistrate had no jurisdiction to commit the accused for trial before him for want of a certificate under S. 188, Criminal P. C. The complainant is alleged to have entrusted certain jewels at Vellore to the accused, a Native Indian subject of His Majesty, for sale on commission for him, and the accused is alleged to have dishonestly converted the jewels, concerned with the first two counts, to his own use by pledging them at Bangalore City and to have dishonestly misappropriated the jewel concerned in the third count at Madras. It was apparently part of the arrangement that the accused should account for the jewels to the complainant at Vellore, or return them or their price to Vellore. His failure to account for the property was a part of the offence, acts including illegal omissions. The loss which was the consequence, which ensued, occurred at Vellore and this is sufficient under S. 179, Criminal P. C., to give jurisdiction to the Subdivisional Magistrate of Tiruvannamalai to commit the case to the Sessions as directed by this Court in Criminal Revision Case No. 191 of 1913: see *Queen-Empress v. O'Brien* (1) and *George Langridge v. Grace Atkins* (2) which explain the case of *Sirdar Meru v. Jethabhai Amirbhai* (3).

The Illus. (d) to this section is an instance of a criminal act done outside British India and the consequence of the offence ensuing in British territory.

The decision of *Reg. v. Adivigadu* (4) based on the Code, 10 of 1872, and relied on by the Assistant Sessions Judge has been superseded by the amendment of S. 410, I.P.C., by Act 8 of 1882. The same remark applies to *Queen-Empress v. Murga Chetty* (5).

In *Imperator v. Tribhun* (6) certain observations are made by two Judges of the Sindh Judicial Commissioner's Court to the effect that S. 181 (2) applies only as between Courts of local jurisdiction in British India and is governed by the pro-

visions of S. 188, Criminal P. C. A similar observation was made by a single Judge of this Court as regards S. 180 in *Sessions Judge, Tanjore, v. Sundara Singh* (7). But our attention has not been drawn to any decision to the effect that S. 179 must be read as subject to S. 188; and the illustration to the section is against such a theory. Even as regards Ss. 180 and 181 the decision of *Emperor v. Baldewa* (8) shows that a British subject who commits a robbery in a Native State and dishonestly retains stolen property in British India can be tried in a British Court even without a certificate under S. 188, and thus throws doubt on the correctness of the observations of *Imperator v. Tribhun* (6) and *Sessions Judge, Tanjore, v. Sundara Singh* (7). Moreover the words "or the offence was committed" in S. 181 (2) and the words "when a Native Indian subject * * * commits an offence" in S. 188 seem to indicate that the latter section is exclusive of the rule as to jurisdiction arising out of the receipt or retention of misappropriated property.

In the case of *Queen-Empress v. Kathaperumal* (9) and *Emperor v. Kalicharan* (10) it does not appear that there was any retention of stolen property in British India.

In Civil Miscellaneous Petition No. 97 of 1911 a Native Indian subject of His Majesty was charged with abetment of an offence which was committed in British India and the commitment was quashed for want of a certificate under S. 188. In this case the only act for which the accused could have been tried was the act of instigation and that took place wholly outside the jurisdiction of British Courts. This decision to some extent supports the theory that S. 180 is governed by S. 188 as it declares that the object of the former section is to give jurisdiction to a Court when the offence is not committed within its limits but within the limits of some other British Indian Court. While doubting the correctness of this view when the words of the two sections do not contain anything directly to that effect, I prefer to base my decision upon S. 179, Criminal P. C.

(1) [1897] 19 All. 111=(1896) A.W.N. 191.

(2) [1912] 17 I.C. 792=35 All. 29.

(3) [1906] 8 Bom.L.R. 518=4 Cr.L.J. 54.

(4) [1875-78] 1 Mad. 171.

(5) [1880-81] 5 Bom. 338.

(6) [1912] 15 I.C. 802=5 S.L.R. 266=13 Cr. L.J. 580.

(7) [1910] 6 I.C. 308=11 Cr.L.J. 306.

(8) [1906] 28 All. 372=(1906) A.W.N. 52=3 A.L.J. 146=3 Cr.L.J. 247.

(9) [1890] 18 Mad. 423=2 Weir 147.

(10) [1904] 24 All. 256=(1904) A.W.N. 232=1 Cr.L.J. 914.

I must therefore decline to interfere with the order of commitment in this case.

Sadasiva Aiyar, J.—I agree entirely. The scheme of Chap. 15, sub-Chap. (A), in which Ss. 177 to 189 appear seems to me to be intended to enlarge as much as possible the ambit of the sites in which the trial of offence might be held and to minimize as much as possible the inconvenience which would be caused to the prosecution, by the success of a technical plea that the offence was not committed within the local limits of the jurisdiction of the trying Court. Ss. 178 to 184 all confer more extended powers and larger jurisdiction to Courts than would belong to them if the ordinary rule found in S. 177, (namely, that the inquiry and trial shall take place in the Court within the local limits of whose jurisdiction the offence was committed), were carried to its strict logical conclusions. S. 188 comes in (almost at the end of the sub-Chap. A) to make three further encroachments on the general rule of S. 177 by enacting that,

(a) where the criminal is a Native Indian subject of His Majesty and he commits any offence even beyond British India;

(b) where the criminal is a British subject and he commits an offence in a Native State; and

(c) where the servant of the King-Emperor (whether a British subject or not) commits an offence in a Native State, the offence in all these three cases can be tried at any place where he is found in British India: provided that the Political Agent certifies that the charge ought to be tried in British India or the Local Government sanctions such inquiry. Surely the proviso to S. 188 (which section comes in after Ss. 178 to 187) could not have been intended to restrict the enlarged liberties and privileges as regards jurisdiction given to the Courts by the previous sections. I should rather think that S. 188 which follows Ss. 179 to 187 was intended rather to draw into the net of the jurisdiction of the British Indian Courts cases, which notwithstanding the full use of Ss. 179 to 184, could not be brought within the jurisdiction of any British Indian Court, than to restrict by its proviso 1 the extended jurisdictional privileges conferred by Ss. 178 to 184 on Courts which according

to the ordinary rule of S. 177, would not have had jurisdiction. The proviso to S. 188 will come into operation only when the British Indian Court cannot get jurisdiction under Ss. 179 to 184 and has to depend on the first part of S. 188 to get such jurisdiction. I therefore, with great respect, dissent from the decisions reported as *Imperator v. Tribhun* (6), and *Sessions Judge, Tanjore, v. Sundara Singh* (7). As regards the decision of Civil Miscellaneous Petition No. 97 of 1911, while it could be distinguished (as pointed out by my learned brother) as affecting only S. 180 of the group of Ss. 179 to 184, I feel loath to make any such distinction as no difference in principle can be made between the extended jurisdiction conferred by S. 180 and the extended jurisdiction given by the other sections.

I therefore respectfully dissent from that decision also and refuse to accept the Sessions Judge's reference.

S.N./R.K. *Reference not accepted.*

A. I. R. 1914 Madras 332

SADASIVA AIYAR, J.

In re *Obalampalli Ramalakshmanna*—Defendant—Appellant.

Second Appeal No. 639 of 1913, Decided on 7th January 1914, from decree of Dist. Judge, Kurnool, in Appeal No. 55 of 1912.

Civil P. C. (5 of 1908), O. 34, R. 1—Person claiming paramount title or opposed to that of mortgagor can be made party to mortgage suit although S. 85, T. P. Act, was construed otherwise—Transfer of Property Act, S. 85.

Order 34, R. 1, does not prohibit a person claiming a title paramount or opposed to that of a mortgagor being made a party to a mortgage suit although S. 85, T. P. Act, was construed as enacting otherwise: 33 Cal. 425, Dist. [P 332 C 2; P 333 C 1]

A. Krishnaswami Aiyar—for Appellant.

Judgment.—I do not think that the lower Courts acted without jurisdiction or illegally in trying the question of the title of defendant 1 to the mortgaged property. Defendant 1 may not have been a necessary party to the mortgage suit under S. 85, T.P. Act: see (*Jaggeswar Dutt v. Bhuban Mohan Mitra* (1) corresponding to O. 34, R. 1, Civil P. C.; but I am not inclined to go so far as some of the observations in the case of *Jaggeswar Dutt v. Bhuban Mohan Mitra* (1) seem to lead one namely that the plaintiff in

(1) [1906] 33 Cal. 425=3 C. L. J. 205.

a mortgage suit is not entitled to implead as defendant a person claiming a title paramount or opposed to that of the mortgagor and that the Court ought not to decide that question if objection is raised. No such prohibition is found in the Civil Procedure Code.

On the merits the lower appellate Court's findings of fact must be accepted. The second appeal is dismissed.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Madras 333

MILLER AND SADASIVA AIYAR, JJ.

Venkatarama Aiyar — Plaintiff—Appellant.

v.

Suppa Nadan and *others*—Defendants—Respondents.

Second Appeal No. 2298 of 1912, Decided on 21st April 1914, from decree of Sub-Judge, Trichinopoly, in Appeal Suit No. 361 of 1911.

(a) Limitation Act (1908), S. 31 (1)—Whether instrument is mortgage within S. 31 (1) does not depend on date of execution.

The question whether an instrument is or is not a mortgage within the meaning of S. 31 (1) does not depend upon the date of its execution.

[P 333 C 1]

(b) Transfer of Property Act (1882), S. 58—"Mortgage" includes instruments creating no actual transfer of interest or express powers of sale.

The term "mortgage," as defined in S. 58, T. P. Act, includes also instruments which create no actual transfer of interest or confer express power of sale.

[P 333 C 2]

(c) Transfer of Property Act (1882), S. 58—Mortgage executed before Act came into force—No transfer of interest or express power of sale—Mortgage is simple mortgage and within benefit of Limitation Act (1908), S. 31 (1).

A mortgage, though executed before the Transfer of Property Act came into force, creating no transfer of interest or conferring no express power of sale is still a simple mortgage within the meaning of S. 58, T. P. Act, and within the benefit of S. 31 (1), Lim. Act.

[P 333 C 2]

V. C. Seshachariar for *T. R. Venkatarama Sastri*—for Appellant.

K. V. Krishnaswami Iyer—for Respondents.

Judgment.—We think it is open to us to hold that the question whether an instrument is or is not a mortgage, within the meaning of S. 31 (1), Lim. Act, of 1908, does not depend on the date of its execution. In *Aliba v. Nanu* (1) the view taken by Muthusami Aiyar, J., was that the enactment of the Transfer

(1) [1886] 9 Mad. 218.

of Property Act created new rights and liabilities in the parties to a mortgage so that what might be a mortgage, as defined in S. 58 of that Act, might not be a mortgage if executed before that Act. But this was not decided by the Full Bench in *Rangasami v. Muthukumarappa* (2), and is doubted by Shepherd, J., in *Ramachandra Rajaguru v. Modhu Padhi* (3). Though the learned Judge adhered to his opinion in *Rangasami v. Muthukumarappa* (2), there he was also of opinion that the document then in question was not a mortgage within the definition of the Transfer of Property Act in the absence of transfer of property or agreement giving a power of sale. But later cases have decided that to effect a mortgage it is not necessary to have an express transfer of interest or an express agreement whereby the creditor acquires a power to sell the property in default of payment, and that an instrument in which these stipulations are not expressed may yet be a mortgage within the definition of S. 58, T. P. Act and its holder a mortgagee within S. 31 (1), Lim. Act. The matter is discussed in *Rama Brahman v. Venkatanarasu Puntulu* (4) in which the cases are referred to. The authority of *Rangasami v. Muthukumarappa* (2) is there determined to the extent that we cannot take our definition of a mortgage from it, and the Full Bench does not decide that the document before it, though it would have been a simple mortgage if executed after the Transfer of Property Act, was not so because it was before its enactment.

The document before us was executed before the Transfer of Property Act, but it is, in our opinion, a simple mortgage within the definition of S. 58 of that Act, and so it is a mortgage and within the benefit of S. 31 (1), Lim. Act.

We reverse the decree of the Court below and remand the suit to the Court of first instance to be disposed of according to law.

Costs will abide the result.

S.N./R.K. *Decree reversed.*

(2) [1887] 10 Mad. 509.

(3) [1898] 21 Mad. 326.

(4) [1912] 16 I. C. 209.

A. I. R. 1914 Madras 334 (1)

SADASIVA AIYAR AND SPENCER, JJ.

Koppuravuri Subbarayudu and another
—Petitioner and Debtors—Appellants.

v.

Guntur Cotton, Jute and Paper Mills Co., Ltd. and others—Creditors 1 to 20
—Respondents.

Appeal No. 93 of 1912, Decided on 21st November 1913, against order of Dist. Judge, Guntur, in Insolvency Petn. No. 7 of 1911, D/- 29th June 1912.

Provincial Insolvency Act, S. 25 (2)—Before rejection of petition on ground that it was abuse of process of Court, finding that assets exceed liabilities is necessary.

Before a Court can reject a petition in insolvency filed by the debtors on the ground that it was merely an attempt by them to have their estates managed by Courts and is thus an abuse of the process of the Court, there must be a finding that the assets exceed liabilities on evidence before it, and that the debtors are in a position to pay up their debts out of their assets. 15 I. C. 870, *Foll.* [P 334 C 1, 2]

V. Ramdoss—for Appellants.*P. Nagabhushanam and T. Ramchandra Rao*—for Respondents.

Judgment.—The reasons given by the learned District Judge for dismissing the petition by the appellants to adjudicate them as insolvents are not as full and clear as might be expected.

Taking the petition as a whole, the assets, though of the nominal value of Rs. 7,128-3-0, are alleged by the petitioners to be really worth only Rs. 4,893, whereas the liabilities are Rs. 6,652 odd.

It was held in *Ponnuwamy Chetty v. Narayanaswami Chetty* (1) that the allegations in the petition ought to be ordinarily accepted by the Court, unless there is reason to suspect that the debtor is trying to abuse the process of the Court while really able to pay up wholly his debts by means of assets which are or can be easily and within a reasonable time converted into liquid assets.

In the present case the learned District Judge had practically no materials before him on which he could have properly arrived at the conclusion that the assets were really worth more than the liabilities. The District Judge does not again state definitely that the petition was filed with the bad intention of having the petitioner's affairs managed through the Court when the petitioners were really able to pay up their debts easily out of their assets.

(1) [1913] 21 I. C. 293.

We think that the order of the learned Judge cannot be supported on the record as it stands. We set it aside and send back the case for fresh disposal. The petitioners and the creditors will be given an opportunity to adduce evidence on the question whether the approximate real value of the assets is greater than the liabilities, and whether the petition is intended as an abuse of the provisions of the Insolvency Act to enable the debtors to have their affairs settled through Court when they are really able to pay up their debts in full with ordinary diligence out of their assets; See *Preonath Roy v. Nibaran Chandra* (2). The costs incurred hitherto will be costs in the cause.

S.N./R.K.

Case sent back.

(2) [1912] 15 I. C. 870.

*** A. I. R. 1914 Madras 334 (2)****Full Bench**WHITE, C. J., AND SANKARAN NAIR
AND OLDFIELD, JJ.*Peria Aiya Ambalam and others*—De-
fendants—Appellants.

v.

Shunmugasundaram and others—
Plaintiffs—Respondents.

Second Appeal No. 1973 of 1911, Decided on 10th December 1913, from decree of Dist. Judge, Ramnad, in Appeal Suit No. 123 of 1911.

*** (a) Adverse Possession — Possession of stranger dispossessing mortgagee would not be adverse to mortgagor unless he is dispossessed or notice to mortgagor is given.**

The possession of a stranger who dispossesses a mortgagee in possession, would be adverse to the mortgagor if the latter also were dispossessed. Mere dispossession of the mortgagee will not amount to such adverse possession; there must be at least notice to the mortgagor that possession is held against him also: 2 *Mad.* 226; 7 *Mad.* 26; 10 *Mad.* 189; 21 *Mad.* 153, *Foll.*

[P 339 C 2]

*** (b) Adverse Possession—Mortgagee and claimants under him represent mortgagor's possession — If dispossession of mortgagee does not call in question mortgagor's right, possession taken against mortgagee is not adverse to him and time does not run against him.**

As long as the mortgagee is in possession he and all claiming under him represent the mortgagor's possession. If the mortgagee in possession is dispossessed on grounds affecting only his right as for instance his right as heir to represent the original mortgagee or his right to possession in spite of a third party's lien on the property, then the dispossession of the mortgagee obviously does not imperil or call in question any right of the mortgagor; the mortgagor is not concerned or entitled to insist on his be-

ing immediately restored to possession; and the possession taken is not adverse to him and can. not cause time to run against him: 12 B. H. C. R. 180; 18 Bom. 51 and 27 Bom. 43, *Foll.*

[P 340 C 1]

*** (c) Adverse Possession—Mortgagor entitled to immediate possession—Possession of trespasser denying mortgagor's title—Possession adverse against mortgagee is also adverse against mortgagor.**

Where the mortgagor is entitled to immediate possession or the possession of the trespasser is coupled with a denial of the title of the mortgagor then adverse possession against the mortgagee would also be adverse against the mortgagor: 30 All. 119, *Ref.*

[P 340 C 2]

(d) Adverse Possession — Owner of property dispossessed — Trespasser's possession to his knowledge is adverse to owner from its inception,

Where the owner of the property in possession is dispossessed the trespasser's possession is adverse to him from its inception, as, to his knowledge, the property is held against his will.

But if his mortgagee who has been placed in possession by him is followed by another person there is no presumption of law that such possession was taken without any right. [P 341 C 1]

C. V. Anantakrishna Aiyar—for Appellants.

S. Muthiah Mulaliar—for Respondents.

Order of Reference

Sadasiva Aiyar, J. — Defendants 2 and 3 (appellants) trespassed into the house mentioned in the plaint in 1898 and dispossessed the usufructuary mortgagee of the house, the equity of redemption vesting in the plaintiff, and the mortgage term expiring only in 1917.

This suit for declaration of the plaintiff's title to the house was brought in 1909 on the allegation that defendants 2 and 3 denied the plaintiff's title to the equity of redemption when the plaintiff remonstrated with them for constructing additional buildings upon the lands in 1908. One of the questions for decision is whether this declaratory suit is barred by limitation.

The plaintiff bases his cause of action in 1908 when defendants 2 and 3 denied his title and when he remonstrated with them, and he contends that he has six years from 1908 to bring his suit for declaration.

Defendants 2 and 3 contend that they have been in adverse possession of the house from 1898 to the plaintiff's knowledge, that they have been denying the plaintiff's title from 1898 and setting up title in themselves and hence this declaratory suit brought more than six years

after 1898, and more than three years after the plaintiff attained majority, is barred.

That the period of limitation for a declaratory suit is six years under Art. 120, Lim. Act (the period being calculated from the date when the right to sue accrues) is now settled unless the case comes under the classes of suits praying for the special declarations provided for in Arts. 92, 93, 118, 119, 125 and 129 (that is suits for declarations in respect of forgeries of documents, adoptions, alienations by Hindu widows and maintenance etc.).

Now declaratory suits might be of very various kinds and the question when the right to sue accrues in respect of a particular class of declaratory suits seems to be a question of great difficulty in many cases. S. 42, Specific Relief Act, provides in general terms that any person entitled to any legal character or to any right to property may institute a suit against any person denying or interested to deny his title to such character or right, and the Court may in its discretion make the needed declaration that he is so entitled. Now, if a suit can be instituted not only against the person denying, but even against one merely interested to deny, when does the right to sue accrue for a suit brought against a person who is merely interested to deny? Is it as soon as the defendant becomes interested to deny or the plaintiff apprehends that he may actually deny? And if the cause of action arises only when the denial occurs should that denial be by a formal act; or can an oral denial made to a third person or a denial made in writing and not communicated to anybody, give rise to a cause of action and will the plaintiff be barred after six years from such denial? Can the defendant be allowed to say that he wrote a denial in his closet and put it in a box without communicating it to anybody and that six years from that date is the period for bringing the declaratory suit? Further, does each separate denial give rise to a separate cause of action? On these questions the case law has not been very consistent. In *Chuk'un Lal Roy v. Lalit Mohan Roy* (1) it was held that a suit for declaration of title to immovable property is not barred so long as plaintiff's right to such property is a subsisting right, and that

(1) [1893] 2 Cal. 906.

the right to bring a declaratory suit is a continuing right so long as the right to the property itself is subsisting. But this dictum of the Calcutta High Court has been dissented from in *Raiah of Venkatagiri v. Isakapalli Subbiah* (2). Even in the latter case there is no definite indication as to when the right to sue accrues in such cases. In that case there was an attachment of property by a Magistrate under S. 146, Criminal P.C., in consequence of the disputes raised by the defendant. The learned Judges say: "Right to sue certainly accrued on the date of the attachment which is rightly given as the date of the cause of action." At least some days before the Magistrate attached the property, the defendant must have begun his denial of the plaintiff's title, and how could the date of the attachment and not the date of the original denial be rightly given as the date of the cause of action?

In *Ottapurakkal Thazhate Soopi v. Cherichil Pillikkal Uppathumma* (3), it was held that "the right of junior members of a tarwad to sue for a declaration that an alienation by the karnavan is not binding on the tarwad, accrues the moment the document is completed and not when the plaintiff obtains knowledge of the alienation." Now the alienation was evidently made by a registered deed. In that case, the learned Judges held that "the knowledge or ignorance of the plaintiffs of the fact of the alienation having been made does not seem to be material on the question of the accrual of the cause of action for the declaratory suit." In *Dattatraya Gopal v. Ramaehandra Vishnu* (4) it was held that though the defendants had denied the plaintiffs' title in 1888 before the Survey Officer in a proceeding to which the plaintiffs were not parties, the cause of action for the plaintiffs' suit for declaration, filed in 1896, did not accrue in 1888, but in the year 1892 when the defendants opposed the petition put in by the plaintiffs to the Survey Officer to review his order of 1888 passed ex parte. At pp. 537 and 538, the learned Judges make some observations which lead one to think that they were of opinion that time must be counted only from the date when the plaintiffs had notice of the

entries in the Survey Officer's register of 1888 and that the conduct and denial of the plaintiff's title must somehow affect the plaintiffs before the right to sue accrues. In *Akbar Khan v. Turaban* (5) the defendant, in derogation of the plaintiffs' title, had the defendant's own name entered in the revenue papers in respect of the property in suit in 1895. In 1903 the plaintiff attempted to have the entry corrected and the defendant resisted the plaintiff. The learned Judges held that there was only one cause of action which arose in 1895, and that the suit brought within two years of 1903 was barred. They refer to a previous unreported decision of the Allahabad High Court which seems to have taken a different view and try to distinguish it. That unreported decision is set out at p. 10 (of 31 *I. A.* in the notes at the bottom of that page (and is reported as 1 *I. C.* 556). With the greatest respect, I think that that case so reported in the foot-note cannot be distinguished as was distinguished in the principal case. The learned Judges who decided the case reported in the foot-note say: "The Courts below reckoned as the starting point the order of the Settlement Officer referred to above. No doubt the plaintiffs might upon this order being made, have instituted a suit for a declaratory decree, but in our opinion they were not bound to do so. The defendant might have taken no steps to enforce any right under the order of 5th May 1899 but when he did so, plaintiffs, in our opinion, got a fresh cause of action for asking for a declaratory decree." Thus the learned Judges in the foot-note case seem to have held that one cause of action accrued when the denial of title took place and a fresh cause of action when the defendant tried to enforce any order made in consequence of such denial of title.

In *Mamabi v. Acharath Parkat Maliga* (6), where Art. 120 was applied to a suit for pre-emption by an ottidar under the customary law of Malabar, it was held that the right to sue to enforce the plaintiff's right to pre-emption accrued only when he had knowledge of the sale of the land by the mortgagor to a third person. I am inclined to think that where the right to sue for the declaration of title of immovable property ac-

(2) [1903] 26 Mad. 410.

(3) [1910] 5 I. C. 698=33 Mad. 31.

(4) [1900] 24 Bom. 533.

(5) [1909] 1 I. C. 557=31 All. 9.

(6) [1912] 17 I. C. 337.

crues by reason of a mere denial of title behind the plaintiff's back by the defendant, whether the denial is made orally or by writing or by an act before a public officer, the plaintiff's right to sue could not be held to accrue till he gets knowledge of such denial. Of course, it might be argued that the denial might have taken place several years ago and the plaintiff cannot be allowed to bring a declaratory suit several years afterwards simply because his knowledge of such denial dated only within six years before suit. But this danger is very easily avoided by the Court using its very wide discretion to refuse declaration in such circumstances, as the granting of declaratory relief is always in the discretion of the Courts: see S. 42, Specific Relief Act.

Coming to the facts of the present case, taking the denial of the plaintiff's title by defendants 2 and 3 as the date of the cause of action or as the date of a cause of action, the finding of the lower Courts is that the definite denial by the defendants took place in 1908 when the defendants made additions to the building and when remonstrated with by the plaintiffs denied the plaintiff's title. But the contesting defendants argued that when they got in possession in 1898 they must be presumed to have got into such possession adversely to the plaintiffs. Possession is no doubt prima facie notice to all the world of the right under which possession is taken. But is possession taken by a trespasser of a house adverse not only against the usufructuary mortgagee of the house but also against the mortgagor though the mortgagor might not be entitled to claim possession at once? In other words the question is whether a trespasser's dispossession of the usufructuary mortgagee of a house is adverse possession against the mortgagor barring also the latter's title to the equity of redemption. On this question there seems to be a conflict of opinion, between two recent decisions of two different Benches of this Court both cases being reported in Vol. 21 M.L.J. In *Ramaswami Chetti v. Ponna Padayachi* (7) Abdur Rahim and Ayling, JJ., held that "the existence of a mortgage at the time of the commencement of adverse possession of the mortgaged property cannot prevent

the person in possession from acquiring ownership of the land both as against the mortgagor and mortgagee unless it be the case that the adverse possession was intended to be limited to the mortgagor's interest only." In that case the mortgage was a simple mortgage and the mortgagor continued in possession till the trespasser evicted him. In the case reported as *Parthasarathi Naikan v. Lakshmana Naikan* (8) it was held that the interest in the immovable property which was affected by adverse possession was "that interest and that interest only, which the person who was entitled to immediate possession at the time the adverse possession began had at that time" and that possession adverse to the mortgagor was 'not adverse to a simple mortgagee. In this case, *Parthasarathi Naikan v. Lakshmana Naikan* (8) the learned Judges considered the earlier case of *Ramaswami Chetti v. Ponna Padayachi* (7) but declined to follow the said earlier case. The case of *Ramaswami Chetti v. Ponna Padayachi* (7) has been reported in 36 Mad. 97. If in the present case the principle of the ruling in *Ramaswami Chetti v. Ponna Padayachi* (7) be followed the denial of the plaintiff's title must be held to date from 1898 and the present suit for declaration is barred. If however the latter case is followed, the possession of 1898 will be adverse only to the mortgagee and such possession will not necessarily constitute the denial of the mortgagor's (plaintiff's) title and the suit will not be barred.

The cases in *Ramaswami Chetti v. Ponna Padayachi* (7) and *Parthasarathi Naikan v. Lakshmana Naikan* (8) were cases in which it was contended that the simple mortgagee's rights were barred by the fact that the mortgagor (who had been in possession until he was dispossessed by the trespasser) had lost his rights by adverse possession. The present is the converse case; here the usufructuary mortgagee has been dispossessed by the trespasser and the mortgagor who had given up possession to the mortgagee is sought to be barred. But I think the principles to be applied are the same. Is a mortgagor who has transferred possession to a usufructuary mortgagee for twenty years entitled to bring a suit for possession

(7) [1911] 9 I. C. 28=35 Mad. 87.

(8) [1911] 9 I. C. 791=35 Mad. 231.

against the trespasser who has ejected the mortgagee within those twenty years? If he is not it seems to me to be hard on the mortgagor to treat the trespasser's possession as adverse against himself also. Having regard to the conflict of views between the cases of *Ramaswami Chetti v. Ponna Padayachi* (7) and *Parthasarathi Naikan v. Lakshmana Naikan* (8), we deem it advisable to refer the following question for the decision of a Full Bench.

Where a trespasser dispossesses a mortgagor in possession (the mortgage being simple) or a mortgagee in possession (where the mortgage is usufructuary), is such possession of the trespasser adverse against the simple mortgagee in the one case or against the mortgagor who is not entitled to possession in the other case?

My learned brother, notwithstanding the case of *Rajah of Venkatagiri v. Isakapalli Subbiah* (2) feels some doubt on the question, whether the cause of action for a declaration of title does not arise afresh on each denial of title (so long as the title of the plaintiff subsists), as was held in *Chukkan Lal Roy v. Lalit Mohan Roy* (1) bearing in this respect some analogy to a suit for the restitution of conjugal rights which used to be governed by Art. 35, Lim. Act, 15, of 1877 (this article has been omitted from the Limitation Act of 1908). We therefore refer this other question also to the Full Bench, namely Whether a fresh cause of action for a suit for declaration of title arises from distinct denial of the plaintiff's title so long as the title itself is not lost, or whether there cannot arise any new causes of action based on new denials of title after the first denial.

Tyabji, J.—I agree.

(This second appeal coming on for hearing before the Full Bench on Friday, 24th of October 1913, upon perusing the grounds of appeal, the judgments and decrees of the lower appellate Court and the Court of first instance and the material papers in the suit and the said Order of Reference to the Full Bench, and upon hearing the arguments of the counsel, the case having stood over for consideration till this day, the Court expressed the following:)

Opinion.

Sankaran Nair, J.—The first question that is referred to us is "Where a

trespasser dispossesses a mortgagor in possession (the mortgage being simple) or a mortgagee in possession (where the mortgage is usufructuary), is such possession of the trespasser adverse against the simple mortgagee in the one case or against the mortgagor who is not entitled to possession in the other case?"

The facts which gave rise to this reference are these: the plaintiff mortgaged his house with possession for a term which would expire in 1917. The mortgagee was dispossessed by the defendants in 1889. In 1908 they made certain additions to the building, and when the plaintiff remonstrated with them they denied the plaintiff's title to the equity of redemption. The plaintiff brings this suit for a declaration of his title within six years from 1908. The defendant's plea is that limitation for the suit must be calculated from 1898, when they took possession of the property from the mortgagee.

"On behalf of the plaintiff it may be argued that, as a mortgagor is not entitled to the possession of his property until he redeems his mortgage, the possession of a trespasser who dispossesses a mortgagee cannot be adverse to him; and, in any event, as the mortgage in the case before us is for a term which has not expired, he could not redeem and recover possession from the trespasser; and limitation cannot run against him when there is no remedy open to him to recover possession of his property. Mr. Anantakrishna Aiyer contends that a mortgagor may sue to recover possession to be delivered to the mortgagee and therefore, limitation runs against the mortgagor when a trespasser takes possession of the property from the mortgagee claiming the property himself.

The question when limitation begins to run against the mortgagor when the usufructuary mortgagee is deprived of the possession of the property mortgaged has come often before this Court. The earliest decision is reported of *Ammu v. Rnmakrishna Sastri* (9). In that case, while the representatives of the mortgagees were in possession of the property there was an inquiry by an officer of the Government, who held that the mortgaged property belonged to the Government, and it was thereupon granted to them by the Government under separate

(9) [1878-80] 2 Mad. 226.

pattas. The mortgagor was a party to that inquiry. The District Judge, following a Bombay decision [*Vithoba bin Chabu v. Gangaram* (10)], held that there could be no trespass on the title of the mortgagor so long as he had only an equitable interest. This decision was reversed in appeal, the learned Judges holding that, though there might be cases in which the estate of the mortgagee alone was the subject of trespass and the title by prescription might therefore be acquired to the estate of the mortgagee leaving the estate of the mortgagor unaffected, yet there were other cases in which the rights and interests of both the mortgagor and the mortgagee might be invaded and possession held adversely to them both. And in such cases, where the mortgagor may have made over possession to the mortgagee, if the interest of the mortgagor is invaded, although he has not actual possession of the land, his remedy is to bring a suit for the recovery of the interest from which he has been ousted, and he cannot bring a suit for redemption against the wrongdoer within the time allotted for suits for redemption. It will be noticed that in this case a representative of the mortgagee himself was allowed to claim title by prescription. A fortiori, therefore a stranger in adverse possession of the equity of redemption would be entitled to claim such a title.

In *Chathu v. Aku* (11), it was pointed out that the right to redeem was only a right of action and therefore though, a person received the rents and profits from the mortgagee, claiming to be the owner of the equity of redemption, the right of the true owner was not barred unless the claimant had had actual possession of the property itself for 12 years.

In *Mussad v. The Collector of Malabar* (12), the Court held that the action of the Government in merely declaring the lands to be Government property and conferring a title upon the representative of the mortgagee could not affect the mortgagor's title unless the latter was shown to have been aware of these proceedings, and the decision of *Ammu v. Ramakrishna Sastri* (9) was distin-

guished on the ground that in that case there was a formal inquiry to which the mortgagor was a party. In *Ittappan v. Manavikrama* (13), Subramania Aiyar, J., was apparently prepared to go further and to hold that, as the mortgagor having once put the mortgagee in possession had no right to the possession of the property himself until the mortgage was paid off, limitation would not commence to run against him in favour of a trespasser till redemption; but he stated that in the case before him, even if the view adopted in *Ammu v. Ramakrishna Sastri* (9) be correct, the possession of the person taking the property from the mortgagee would not be adverse until the mortgagor had notice of it. That was also the opinion of Shepherd, J.

According to these Madras cases therefore, where a stranger dispossesses a mortgagee in possession, whether adverse possession will run against the mortgagor or not depends upon the fact whether there was dispossession of the mortgagor also. Mere dispossession of the mortgagee will not amount to such adverse possession; there must be at least notice to the mortgagor that possession is held against him also.

The decisions of the other High Courts also are substantially to the same effect. The decision of *Vithoba bin Chabu v. Gangaram* (10), which holds that there can be no adverse possession of an equity of redemption, has been already referred to. It is dissented from by the learned Judges in *Ammu v. Ramakrishna Sastri* (9). In a later case, *Puttappa v. Timmaji* (14) Sargent, C. J., and Candy, J., following the English case of *Cholmondeley v. Clinton* (15), held that the possession of a trespasser may be adverse to the mortgagor. In *Chinto v. Janki* (16), the same question was fully discussed, and Fulton, J., stated the law in the following terms: "I think that although the possession of a trespasser may undoubtedly, be adverse to the mortgagor, the burden of proving when it became so rests on the former. Prima facie, by his act of possession he merely ousts the mortgagee who is entitled to hold the property." Referring to the plea of the trespasser in that case that

(13) [1898] 21 Mad. 153=8 M. L. J. 92.

(14) [1890] 14 Bom. 176.

(15) 4 Blig. 1=4 E. R. 721=22 R. R. 83.

(16) [1894] 18 Bom. 51.

(10) [1875] 12 M. L. J. 180.

(11) [1884] 10 Mad. 26.

(12) [1887] 10 Mad. 189.

he had many years before got he his name entered in the Government records as owner and had since then purported to hold directly under the Government, he pointed out that there was no finding as to when the plaintiff's name was removed from the survey records and whether the plaintiff had any notice of it, and that it was for the defendant to show when he asserted that he was the owner of the property and not the mortgagee; and he referred to the lower Court the issue when the trespasser's possession became adverse to the plaintiff. Telang, J., was strongly inclined to hold that the mortgagor had no right to recover possession of the property so long as the mortgage money was not paid off; but he agreed with Fulton, J., in remitting the issue to the lower Court for trial. The question was again discussed in a more recent case, *Tarubai v. Venkatrao* (17), where Batty, J., laid down the law correctly in the following words: "No doubt, as long as the mortgagee is in possession, he and all claiming under him represent the mortgagor's possession. If the mortgagee in possession is dispossessed on grounds affecting only his right, as, for instance, his right as heir to represent the original mortgagee, or his right, as in *Paramanandas Jiwandas v. Jamna Bai* (18), to possession in spite of a third party's lien on the property, then the dispossession of the mortgagee obviously does not imperil or call in question any right of the mortgagor, and the mortgagor is not concerned or entitled to insist on being immediately restored to possession; and the possession taken is not adverse to him and cannot cause time to run against him.

"To give the mortgagor a right to insist on immediate possession, there must be an unequivocal ouster preventing the possession of the mortgagor from continuing altogether by leaving no room for doubt that the person taking possession does not profess to represent the mortgagor but to hold in spite of him. In such a case, the mortgagor is as effectually and unmistakably displaced as if there had been no mortgage at all. When an ouster takes place in that manner the mortgagor knows that no one is in possession who can represent or con-

tinue his possession, or who is entitled preferentially to possession, and therefore he becomes entitled (and it is necessary and his duty, if he does not want his right to be barred) to claim possession immediately."

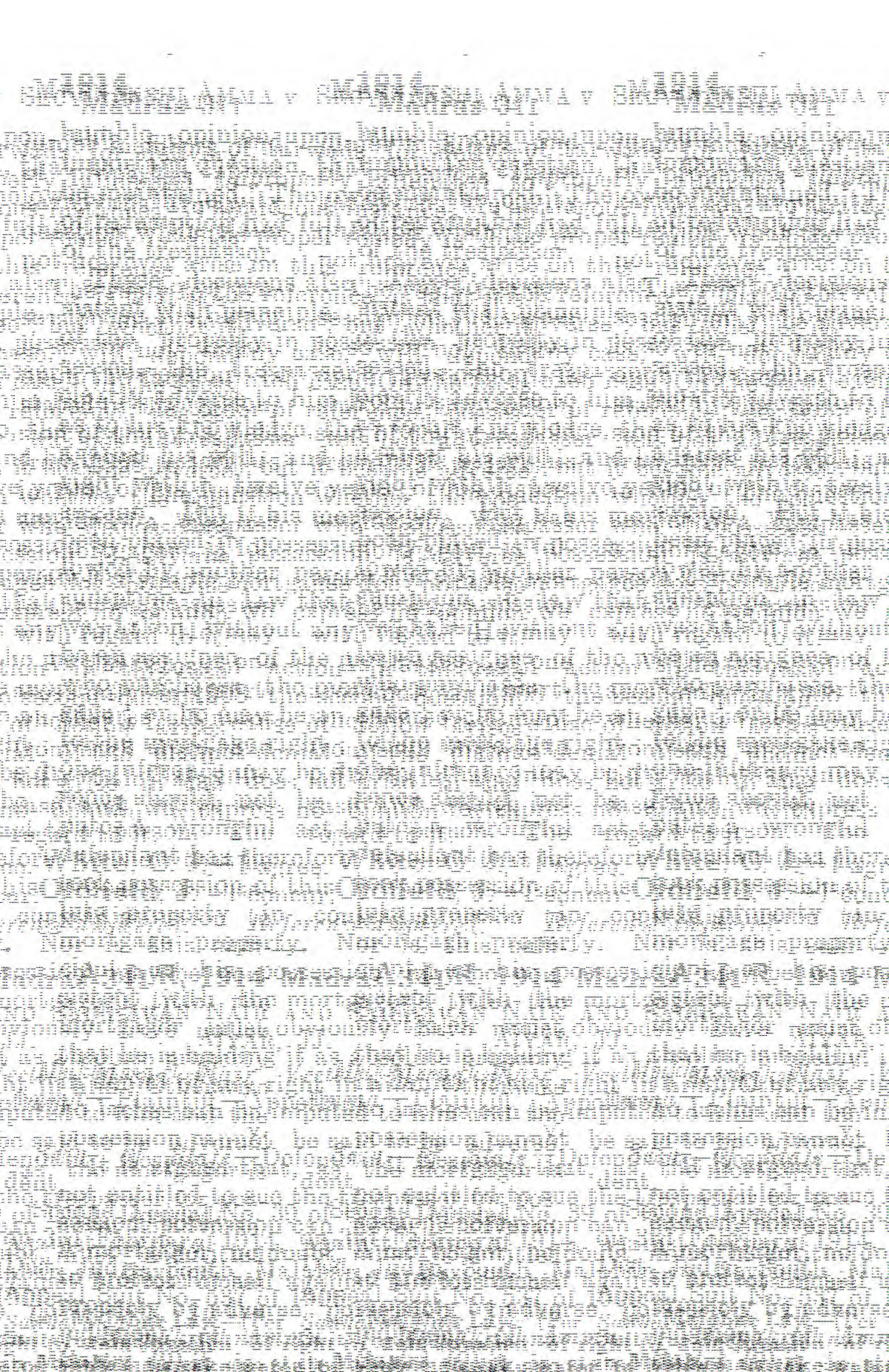
There was only one Allahabad case cited, *Ismdar Khan v. Ahmad Hussain* (19), where also the same principle is laid down, that prima facie the possession of the trespasser is not full proprietary possession but was possession of limited nature which would have the effect ordinarily of extinguishing the limited interest of the mortgagee and vesting that in the defendant; but there may be cases where the adverse possession against the mortgagee would also be adverse possession against the mortgagor, as, for example, where the mortgagor is entitled to immediate possession or where the possession of the trespasser is coupled with a denial of the title of the mortgagor.

These cases establish that an equity of redemption may be lost by adverse possession; but for that purpose it is not sufficient for a trespasser, who has ousted a mortgagee, to prove that possession is held on an exclusive title, without also showing that it was acquired and retained with an assertion of an adverse title to the knowledge of the mortgagor. These decisions were apparently not cited before the learned Judges who made the reference. They are in accordance with the English law also. That an equity of redemption may be barred has been finally decided in England. In the leading cases of *Cholmondeley v. Clinton* (15), Lord Chancellor Eldon said: "I say, without entangling myself with the difficulties about seisin and intrusion, I am of opinion, that the adverse possession of an equity of redemption for twenty years is a bar to any other person claiming that equity of redemption; and it is an adverse possession which produces the same effect as those things you call abatement, intrusion and disseisin which belong to legal estates. It is an adverse possession which has the same effect; and, for the peace of families, and for the peace of the world, I think, ought to have the same effect; and therefore without going through more of the cases, I submit it to your Lordships, as my

(17) [1903] 27 Bom. 43=4 Bom. L. R. 721.

(18) [1886] 10 Bom. 49.

(19) [1908] 30 All. 119=5 A. L. J. 85 = (1908) A. W. N. 25.



Government has no right thereto. (*Sadasiva Aiyar, J., dissenting*) 17 I. A. 62 (P.C.) Ref.

[P 350 C 1, P 342 C 2]

(b) **Madras Land Encroachment Act (1905) S. 2—Presumption as to ownership in Government in S 2 is inapplicable to beds of streams in Malabar.**

The course of decision on the subject reviewed. The presumption in S. 2, Madras Act (3 of 1905), that Government is the owner of all unoccupied lands and beds of streams, has no application to beds of streams in Malabar which are private property. [P 348 C 1]

(c) **Easements Act, S. 15—Right to dam up stream can be acquired by prescription.**

A prescriptive right to dam up a stream is acquired by the continued exercise of the right for 25 or 30 years. [P 348 C 2]

(d) **Riparian Rights—In absence of evidence as to who are proprietors, plaintiff is entitled to declaration of right to dam stream.**

In the absence of evidence as to who the proprietors are on either side of the stream, the plaintiff will be entitled to a declaration of her right to dam up a stream. [P 348 C 2]

(e) **Malabar Law—Government as representing public is presumed to be owners of beds of natural streams in Malabar which do not originate or flow through land of private persons.**

Per *Sadasiva Aiyar, J.*—According to the Common Law of India the Government, as representing the public, should be presumed to be the owners of the beds of natural streams and of the sites of public paths in Malabar as well as in other districts and such permanent rights of the state over beds of natural streams which do not both have their origin in and also flow, till the end of their course continuously, through the land of some private owner and over the sites of public roads and paths, are not inconsistent with the rights of private proprietors in Malabar. [P 350 C 1, 2]

(f) **Madras Land Encroachment Act (1905), S. 2—After enactment of Act public roads, lanes, beds of rivers, etc., are presumed to be Government and not private property—Burden to prove latter lies on those asserting it.**

After the enactment of Madras Act 3 of 1905, the presumption is that all public roads, streets, lanes and paths and the beds of rivers, streams, nalas, lakes and tanks, canals and water-courses, are Government and not private property and the burden of proving that they are private property lies upon the person who asserts that they are not Government property. [P 350 C 2]

(g) **Civil P. C., O. 1, R. 1—Suit for declaring right to dam stream in Malabar—Jenmis are necessary parties.**

To a suit for a declaration of an easement right to dam up a stream in Malabar at a particular point the jenmis of the lands lying on either side are necessary parties and in their absence the suit ought to be dismissed. [P 349 C 2]

K. P. M. Menon—Appellant.

Govt. Pleader—for Respondent.

Sankaran Nair, J.—The Judge has now found that the plaintiff has been constructing the dam at that spot across

the bed of the stream or thodu for the past 25 or 30 years, but he has also held that in view of the presumption that the stream is Government property it must be held that the plaintiff has failed to establish a right of easement as she is bound to prove uninterrupted user for 60 years. Objection is taken to this finding and it is argued that there is no presumption in Malabar that the river beds form Government property. It is contended that they form the property of the riparian owners, as under the English Law, and therefore proof of user for 25 or 30 years is sufficient to create a right of easement in plaintiff's favour.

I shall first deal with the contention as to the ownership of the bed of the stream. In the case of river beds which are not tidal and navigable the law is clear. "Prima facie every proprietor of land on the banks of a river is entitled to that moiety of the soil of the river which adjoins to his land and the legal expression is that each is entitled to the *soil usque filum aquae*": *Wright v. Howard* (1).

In America also Story, J., has held the same view in *Tyler v. Wilkinson* (2): Prima facie every proprietor upon the bank of a river is entitled to the land covered with water in front of his bank to the middle thread of the stream or as it is commonly expressed *ad medium filum aquae*. The Privy Council in *Khagendra Narain Chowdhry v. Matangini Deti* (3) recognized the same right in a suit to which the Government was a party. In this Presidency the rule has been always enforced in numerous cases. A very strong case is that reported in the *Sadar Court Reports* for 1858, p. 188, where the claim of the proprietor to the accretion to his land was upheld though it was framed only as a continuation of an accretion to a Government village: *Sree Raja Ooppalapaty Joges Jagannadharauze v. Sub-Collector of Rajahmundry* (4). The Malabar jenmis are undoubtedly proprietors of land under these decisions. Prima facie therefore the same rule applies.

But the District Judge refers to the judgment in Appeal Suit 245 of 1894, District Court, and in another, apparent-

(1) [1883] 1 Sim. & S. 190=1 L.J. (o. s.) Ch. 94=24 R. R. 169=57 E. R. 76.

(2) 4 Manson U.S.R. 397 Fed. Case No. 14,212.

(3) [1890] 17 Cal. 814=17 I. A. 62 (P.C.).

(4) [1858] S. A. D. 188.

ly Appeal Suit No. 500 of 1907, Sub-Court, in support of his view and gives certain other reasons in support of his conclusion. It becomes therefore necessary to examine them.

An earlier judgment of his own Court directly in point was not apparently brought to his notice. The District Judge, Mr. Wigram, the learned author of the Malabar Law, in Revised Appeal Suit No. 643 of 1876 on the file of the District Court of South Malabar considered this question. In deciding the appeal he first of all assumed that the lands reclaimed from the beds of rivers were the property of riparian proprietors, but afterwards admitted a review to have the question fully argued. In his revised judgment he stated the point for decision in these terms: "Whether by the custom of Malabar having the force of law, lands newly formed in, or reclaimed from, the beds of rivers are the property of Government." I quote his judgment in extenso:—

"2. The English law on the subject is succinctly stated in Shelford's Real Property Statutes, 8th Edition, by Carson, p. 112. Where a river is not navigable the presumption is that the soil is the property of the owners on each side to the middle of the river and in the more recent cases it has been held that the soil of the alvens is not the common property of the respective owners on the opposite sides of a river, but that the share of each belongs to him in severalty and extends *usque ad medium filum aquae*, and again that the right of ownership of a moiety of the bed of a river passes under a conveyance of lands on the banks of a river although the conveyance points to a boundary which would not include any part of the bed: *Bickett v. Morris* (5) and *Crossley v. Lightowler* (6).

"3. The principle seems to have been adopted by the Privy Council in a Bengal case reported as *Felir Lopez v. Muldun Mohun Thakoor* (7), although it did not form the ground of the decision. Their Lordships say: 'There is another principle recognized in the English law derived from the Civil law that where

there is an acquisition of land from the sea or a river by gradual, slow and imperceptible means, there, from the supposed necessity of the case and the difficulty of having to determine year by year to whom an inch or a foot or a yard belongs, the accretion by alluvion belongs to the owner of the adjoining land.

"The same principle was adopted by the Madras Sukar Court in the case of a *Godavari Lunkah* (S. U. Decision of 1858), p. 188, and still more recently by the High Court in *Second Appeal No. 480* of 1870 (not reported).

"If such is the rule of law to be applied when the riparian proprietors are zamindars who derive their estate from the ruling power, a fortiori ought it to be applied to Malabar where from time immemorial the lands have been held by private persons.

"4. The documentary evidence adduced by the Collector to prove the custom which, it must be taken, is an exception to the general rule is as follows":

After referring to the documentary evidence^{*} he continued:

"And the Tahsildar of Ponnani, two wealthy jenmis and the kariasthan of a third have been examined.

"5. Upon the evidence adduced it is impossible to doubt that at all events since 1854 the Government have claimed a right to deal with all lands newly acquired by the action of the rivers or reclaimed from the river by human exertions as their absolute property and that

* "VI Judgment of the civil Court of Tellicherry in A. S. No. 141 of 1861.

VII Judgment of the civil Court of Tellicherry in A. S. No. 464 of 1861.

VIII Plan of the locality now in dispute prepared under the Collector's orders after the suit commenced.

IX Three kaichits executed to the Government as jenmi in 1828.

X Two pottas granted by the Government in 1835 and 1839.

XI Book showing the grant of cowles in 1853-54 in which the share of the jenmi for lands in the beds of rivers is reserved to Government.

XII Five kaichits executed to the Government as jenmi for waste lands near the banks of rivers (1855).

XIII Eight kaichits of a similar nature (1859-60).

XIV Book containing a list of waste lands sold by Government (1858 to 1865).

XV Correspondence between the Collector of Malabar and the Board of Revenue regarding salt-water swamps (1856 to 1859)."

(5) [1855] 1 H. L. (S.) 47=12 Jur. (n. s.) 833 14 L. T. 835.

(6) [1833] L. R. 3 E. 279.

(7) [1837-1870] 13 M. L. A. 457=5 B. L. R. 521=14 W. R. P. C. 11=2 Suth. 833=2 Bar. 594=20 E. R. 625.

that claim has never been disputed by riparian proprietors, some of whom have actually purchased such lands adjoining their estates from the Government.

"There may have been isolated cases in which the Government asserted the same claim prior to 1854 ; but I cannot say that the evidence adduced on the point is satisfactory.

* * * * *

"8. The question therefore resolves itself to this : Can a course of dealings for 23 years acquiesced in by those interested to dispute them establish a custom which the law will recognize ?

"I confess that I expected to have evidence adduced of what took place when the Zamorin was a reigning Sovereign and of what takes place to this day in Cochin and Travancore, the neighbouring States where lands are held on similar tenures. A custom must be based on immemorial usage and the cautious language of the Collector in the first letter of the correspondence (XV) shows that even as regards salt-water swamps on the banks of backwaters he was in 1856 doubtful as to the rights of Government. "9. On the ground that defendant 6 has wholly failed to prove the existence of any custom in Malabar which is—(torn) to the general—(torn) of law and that the proceedings of former Collectors are perfectly consistent with an ignorance on the part of the land-owners of their rights I shall confirm my former decree and order, defendant 6 to pay the costs of plaintiff of the rehearing." The same view was taken in A. S. No. 204 of 1881, District Court, South Malabar. This was a case from the Palghat Taluk.

The next case that may be referred to is the well-known Attapadi case—*Secretary of State v. Vira Rayan* (8). That suit referred to a tract of land about 232 square miles in extent. A large block of land was not claimed by any of the defendants. There were lands, streams, hills and forests which formed the upper part of the watershed of the Bhavani river. The question for decision was whether the rule that was presumed to be applicable to waste lands in the eastern districts that they formed the property of the Government was also applicable to Malabar and it was held by the High Court that it did not. The

(8) [1886] 9 Mad. 175.

decision proceeded on the grounds that Malabar was a land of private proprietors and the Government must prove their title and possession within the statutory period to recover possession. And there is no presumption of ownership in their favour of any property then in suit which included rivers and forests. The riparian proprietors were treated as owners of riverbeds lying within or adjoining their estates. It appears to me the question now in dispute is concluded by that decision.

The next case that I may refer to is the one reported as *Secretary of State v. Kadirikutti* (9). I shall refer to it in some detail as the matter in dispute was raised in another form in that case and finally settled. There the question was whether a strip of land which had been reclaimed from the bed of a river belonged to the Government or not. The District Munsif held that according to the English law the land belonged to the plaintiff in that suit as a riparian proprietor. He was of opinion that according to the Malabar Law as declared in the case above referred to, i. e., the Attapadi case, the Government had no proprietary right over lands in Malabar and for that reason also it belonged to the plaintiff. He held further that according to the Hindu Law also the right is acquired by the first person who makes a beneficial use of the soil and that the plaintiff having been in possession of the land was entitled to it. He also decided that, though the Government had proved that since 1858 they had been invariably claiming lands formed by the recession of rivers throughout Malabar, and that such claims had been acquiesced in, it was not sufficient to prove a valid custom.

In appeal the contention was "that, by custom, they (i. e., accretions to a river bank) belong to Government," and the District Judge states that the Government had advanced their claim only during the previous 30 years and that it was not contended that such claim was advanced before that date. He held that it could not be treated as a valid custom and that "in parts of India where Government has a right to all waste lands the question might be deserving of consideration, but in Malabar, where Government have admittedly no rights

(9) [1893] 13 Mad. 369.

on waste land", the claim could not be supported.

The judgment in second appeal is reported as *Secy. of State v. Kadirikutti* (9). The High Court held that in the absence of local usage or statutory enactment to the contrary, the English Law must be applied to India. According to that law it was pointed out that "the Crown is regarded as owner of the land covered by the sea "and" what is true with regard to the sea is equally true with regard to tidal navigable rivers" and that the land which was gained from the sea by sudden dereliction or alluvion or from the tidal navigable rivers also belonged to the Crown. It was pointed out that "the rule referred to by the District Munsif according to which the riparian properties are entitled to the bed of the river, *ad medium filum*, is not applicable in the case of navigable rivers in which the tide flows and re-flows." Then followed certain observations on tidality and navigability. Then they said: "There seems no reason to doubt that the principles above indicated are the principles according to which the law must be administered in British India in the absence of local usage or statutory enactment to the contrary." And one of the principles referred to is the right of the riparian proprietor to half the bed of the stream as under English Law. It was also pointed out that the Judicial Committee had already applied the principles of English Law to Indian cases. The principle that waste lands are not the property of Government was declared to have no application to land covered by the water of the sea or by a tidal river. Throughout the judgment the learned Judges assume that the right of the Crown can only exist in the case of tidal navigable rivers and they accordingly remitted issues to try the questions whether the river there in question was a tidal navigable river and also other questions to which it is unnecessary now to refer. If the beds of rivers not tidal or navigable belonged to Government there would have been no necessity to remit the issues.

The entire judgment leaves no room to doubt that the rules of English Law as to river beds were applied in its entirety and the reason of the law too was stated. It was that the land covered by the water of the sea or a tidal river was not

the land of the neighbouring jenmi when it remained covered with water. Unless we are prepared to hold that the rule of the English Law is to be applied only when it is in favour of the Government and not to be applied when it is against the Government, it is difficult to hold that that decision does not conclude the matter now in dispute. It will be seen that the learned Judges expressed no disapproval of the decision of the lower Courts which held that neither by the Common Law of Malabar, which was declared to be the same as the English Law, nor according to the custom set up by the Government they had any interest in the bed of the stream. But it was in accordance with the view that the English Law was applicable that they held that such law itself recognized a distinction in the case of tidal navigable rivers and that they sent down this issue. To my mind it is perfectly clear that the question before us is concluded by that decision. It is remarkable that the learned Judges there did not refer to the earlier decision of Mr. Wigram which proceeded on the same view of the applicability of the English Law and it is also noticeable that before the High Court there was no attempt to dispute the correctness of the proposition that the English law in its entirety was applicable to Malabar. The authorities relied upon are English and Privy Council decisions which applied these principles to India. I think therefore that, unless that decision is overruled by a Full Bench, the question cannot be decided in favour of the Government.

The next case that may be referred to is the judgment relied upon by the District Judge in Appeal Suit No. 245 of 1894, District Court, South Malabar. The Munsif in disposing of the original suit, found that the Government had proved a custom as to the ownership of river beds in the taluk of Palghat. His judgment was confirmed in appeal. In disposing of the appeal, Benson, J., then District Judge, stated the law in these words:

"With regard to issue 2 it is admitted that the river in which the accretion occurred is not tidal or navigable, and that the right of Government to accretions depends on the proof of a valid custom, failing which the English law would be applicable, and the accre-

tions would belong to the riparian owners."

In considering the evidence he stated that he did not attach any importance to the action of the Government in respect of the dams and anicuts as it was quite possible that the Government might have a right to control and regulate the flow of the water without having a right to the bed of the stream. But he found that the evidence showed that for 33 years the Government had exercised these rights. That under the general law a riparian proprietor is the owner of half the bed of the stream in Malabar was not denied. The decision is only an authority on the question that a local custom against a general common law exists in the taluk of Palghat.

It is unnecessary to consider whether that decision upholding a local custom in derogation of the general law will now be followed. The alleged custom was of recent origin. It was shown not to be uniform and there was a decision the other way. It is open to all the objections advanced by the Judicial Committee to a custom of impartibility confined to the Madras Presidency in the Pittapore case. The local custom presupposes that the general law applied to Palghat before its origin. The Government claimed and exercised their rights in river beds not in virtue of any local custom because Palghat land tenures are not alleged to differ from the rest of Malabar, but in accordance with what was erroneously asserted to be the general or Customary law applicable to all Malabar. The instances therefore are not proof of any local custom.

The Judge next refers to the judgment in Appeal Suit No. 500 of 1907, which came to the High Court in Second Appeal No. 377 of 1909. In that case the Subordinate Judge before whom the case came on appeal stated that the proposition which the Secretary of State put forward "is no doubt extraordinary, but he is entitled to get an opportunity to establish it if he can" and he accordingly remitted an issue to try the general question whether by the usage of Malabar the beds of even non-tidal and non-navigable rivers and streams are vested in the Crown. In submitting the finding the Munsif states that though the issue referred to all rivers and

streams, "the evidence was confined to such streams as flow through the lands of several jenmis and through several amshoms. Small streams are therefore now excluded from the claim by Government." The suit related to lands in the Ernad taluq and he found that the Government has been collecting jenmabhogam for nineteen years. He also referred to the vagueness of the evidence which did not show the distinguishing characteristics of the rivers claimed by the Government. The Subordinate Judge in appeal found that the Government had been exercising rights of ownership in regard to such natural streams as ran for many miles and irrigated the lands of several jenmis in several amshoms. With reference to the ownership claimed he says that the nature of the stream, whether it is a river or whether it is only a "thodu" as he calls it, is a question of fact which must be decided upon the facts of each case, and he accordingly upheld the Government claim. Here also it is to be noted that the claim of the Government as advanced was not a general claim to all river beds as now put forward, but to what the Subordinate Judge calls rivers and large streams. In second appeal the decrees of the lower Courts were reversed on a preliminary ground so that the question of ownership was not decided by this Court.

There are no doubt observations in the judgment of the Subordinate Judge which support the Government claim and deny the right of riparian proprietors; they apply with equal force to similar claims of the zamindars in India and of owners in England and in America. I am therefore not prepared to attach much weight to them.

The Judge refers to the numerous instances proved in the Palghat suit. But they were all recent and the custom was challenged within thirty or forty years. The jenmabhogam was treated as revenue and could not be disputed in the civil Courts. Payment of jenmabhogam is submission to necessity and not evidence of consciousness of validity of the claim. Resistance would have resulted in the imposition of penal assessment or revenue sale of property. Similarly purchase by riparian proprietors from Government is proof of evasion as pointed out by Parker, J., in *Secretary of State v. Ashta-*

muthi (10) and purchase of peace rather than recognition of Government claim.

It may be useful to notice the law on the point as understood before 1852 and the probable origin of the practice which is now sought to be converted into a valid custom, if not, as proof of the ancient Customary law itself.

In 1800 Dr. Buchanan who was specially directed by the Governor-General to report on the condition of the District reported that the "whole soil" belonged to the private proprietors, i. e., Brahmins Nambudris, Devasvoms and royal families: see Vol. 2, p. 60.

The view of Major Walker who wrote the first book on Malabar Land Tenures as to jenm right is well known. In the early years of the last century, when the question whether the zemindari settlement should be introduced into these districts was under discussion, the officials were unanimous in reporting that "in Malabar with the exception of a few estates forfeited by rebellion there appear to be no Sircar or Government lands, individual proprietary right generally prevailing throughout the Province." See para. 178 of the Report of the Board of Revenue in 1809 (5th Report, Vol. 2, p. 440).

In 1807 Mr. Thackeray who was deputed to inquire into the land tenures of Malabar also reported: "Almost the whole of the land in Malabar cultivated and uncultivated, is private property and held by jenmum right which conveys full absolute property in the soil."

In a dispatch in December 1813 relating to the settlement of Malabar, the Directors similarly observed that in Malabar they had no property to confer with the exception of some forfeited estate: see Revenue Selection, Vol. 1, p. 511. This was the basis of the Attapadi judgment. The same reasoning applies also to river beds.

Colonel Munro's report in 1817 is very instructive. He states that Malabar was divided into villages which were called desims, that the headman was called the desway when he had the direction of the religious ceremonies of the village pagoda and the management of the pagoda lands and servants and that otherwise he was called jenmi. He further says that the desways "were at one time the sole proprietors of the lands of their respective

villages . . . 'There was a desway to every village, except where the village was the private property of the Chief of the district when the rights of the head of the village belonged' to that chief. He gives the sources of income: see para. 5. He had no proprietary interest whatever of the sort that is now set up on behalf of the Government.

The Collector, Mr. Conolly, in a memorandum drawn up for the Government in 1840 stated that "all land in Malabar is strictly private property:" see his letter to Government, dated 8th October 1853, No. 34-B, Judicial Department—enclosure to minutes of consultation under date 15th November 1853, Judicial Department. Till 1850 no attempt was made to claim ownership in river beds. In 1852 Mr. Strange was appointed Special Commissioner to inquire into the Moplah outrages and there was a long correspondence relating to land tenures which made it difficult for Moplah and poor persons to get lands for cultivation on fair terms. It therefore became the object of Government to restrict within such limits as the law would allow them the extensive claims which were put forward on behalf of the jenmi in order to assign lands to Moplahs and other persons to evade the jenmi tyranny and they began to show increased activity in allotting wastelands which belonged to jenmis to any person who applied to take them up by virtue of a supposed right of the Government now declared to be non-existent. They also began to assert their claims to assign river beds and accretions from the rivers and we find from that time till about 1877 such rights were asserted in various instances. In 1877 when the matter was brought before Mr. Wigram in South Malabar he disallowed the Government claim on the ground that it was opposed both to the English law and to the Customary law of the country. On the same ground Mr. Cox disallowed it in North Malabar. I am not aware that from that time any judicial officer has recognized the general claim of the Government that is now recognized by the District Judge. To me it is clear that a practice which sprung up only after 1850 disallowed in a judgment in 1877 in which all the available evidence was apparently given and contested whenever set up in a Court of law after-

wards cannot now be held to be a valid custom.

They can only be treated as unauthorized interferences with private property. The evidence of the so-called custom to grant jenmis' lands on cowle was stronger in *Secretary of State v. Kadirikutti* (9) and derived some support from the ancient Malabar law as to waste lands. Yet it was not upheld. Here the principles of the Malabar land tenures negative the claim advanced on behalf of Government. The theory is that the land was the property of the Nambudris and the Devaswoms. The fact that before the Mysore invasion no land tax was paid is due to this fact. The royal families and the local chieftains also acquired jenm and later, all classes but they claimed the same completeness of ownership as the Brahmins. Jenm deeds may be found in the old books and reports and in Logan's Malabar Manual, Vol. 2. They purport to sell the entire land within defined boundaries including stones good or bad stumps of nux vomica thorns, roots, pits, mounds, treasure, lower earth, water, ores, canals, streams, forests. They prove an ownership as complete as possible. In England the theory is that the land is held directly or indirectly under the Crown. In India the zamindars hold them under Government sanads. Yet they have got the rights that are held to appertain to riparian proprietorship; stronger reasons exist for recognizing them in favour of jenmis. Many streams and channels are dry for months and are capable of actual occupation or cultivation; their beds are often cultivated. I have no hesitation in disallowing this contention and in holding that the channel is private property. If the river bed is private property then Act 3 of 1905 has admittedly no application.

It is stated that no claim has been advanced by any jenmi to this thodu. But it is not shown that any claim was on any occasion advanced by Government to the knowledge of Kiyake Kovilagam the only riparian proprietor whose name appears in the records. That the tenant obtained permission to put up dams is no evidence against the jenmi. Moreover such permission was necessary to flood the path. It may be as Mr. Benson pointed out in the Palghat case this erection of a dam is not any evidence

in support of Government. I offer no opinion on this point. I hold therefore that the thodu or water course in question is private property.

The plaintiff has proved user for twenty-five or thirty years. She has acquired the right to construct the dam. The Government Pleader contends that she cannot acquire any easement against her own jenmi. But it is admitted that there is no evidence that her jenmi is the the riparian proprietor where the dam is constructed. It is probable he is the jenmi on one side of the channel. But there is no evidence of it and if he is the jenmi the plaintiff would be entitled to do it with his consent and as there is no evidence who the riparian proprietors are on either side of the dam, I would declare her right to construct a dam.

But if she wishes to construct a dam of the kind she has been putting up in recent years she must show that she is entitled to flood the path. The channel being private property it is true the surface of the path alone can be presumed to have been dedicated to the public. But the plaintiff cannot claim to have acquired the right claimed by prescription against the Crown representing the public as she has not proved 60 years' user as of the right claimed. Even the user proved by her was with the consent of the revenue officials and therefore not evidence in support of the claim of easement against Government. She has not shown that the path was dedicated subject to her claim, as it is not proved that the dedication of the path was subsequent to the date of the first erection of the dam.

The plaintiff can therefore only erect a dam which would not interfere with the use of the path.

This was the only condition sought to be imposed by the revenue officials, though subsequently higher claims were advanced.

I might add that the Government Pleader's contention, that these questions do not arise on the allegations in the plaint and in the absence of the jenmis, comes too late. It is concluded by the two previous orders of this Court. The Government did not apply to make the jenmis parties, or if the objection had been raised earlier, either the plaintiff might have made them parties or the Court might have directed it to be done.

I would therefore modify the decrees of the Courts below by declaring the plaintiff's claim as above indicated and confirm the decrees in other respects; the parties to bear their own costs throughout. But as my learned brother disagrees with me, the second appeal is dismissed with costs.

Sadasiva Aiyar, J.—I have had the great advantage of a study of the judgment written by my learned brother in this case. I regret however that my conclusion is somewhat different from his.

As I read the plaint, this is a suit for two reliefs: (1) for the declaration of "the plaintiff's easement right to put up a dam in the Kottamal Thodu and taking water from it in accordance with the ancient usage for the use of 'the cultivation of the plaint lands';" (2) for past and future damages consequent on the Collector's alleged wrongful acts. . . . directions and threats. Now an easement is "a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done in or upon, or in respect of certain other land not his own": see the definition in S. 4, Easements Act. At the first blush, the plaint seemed to admit (that is, a perusal of the plaint leaves the impression in the mind that it impliedly admitted) that the bed of the thodu over which the plaintiff wanted to establish her right to build a dam belonged to the only defendant in the case, namely the Secretary of State, and that the plaintiff wanted a declaration of her easement right to put up a dam on that bed belonging to the defendant. But the plaintiff seems to have contended before a Division Bench of this Court in Second Appeal No. 606 of 1907 that she did not mean to make any such admission that the bed of the thodu or the thodu belonged to the Government. This contention was accepted by the learned Judges who heard the said Second Appeal No. 606 of 1907; and the case was remanded to the lower appellate Court for fresh disposal.

Now it seems to me that if the plaintiff wanted to have a declaration of her easement right over the land of a third person and if that third person was not the defendant in the suit, she ought to inform the Court who the third person was

(other than the defendant), who was the owner of the land over which the plaintiff claims the easement right. Even after second remand, the plaintiff would not clearly state to whom the bed of the stream belonged over which she wants to erect the dam. The contention before the District Judge seems to have been that the thodu is private jenm property and that the bed of the stream belongs to the jenmis who own lands on either side of the thodu. Assuming that half the breadth of the bed measured from one bank at the point where the dam is sought to be put up belongs to the jenmi who owns the lands on that bank and the other half breadth to the jenmi who owns the lands on the other bank, who are these two jenmis? One of the jenmis seems to be the plaintiff's own landlord against whom she cannot claim any right of easement. The other jenmi's name is not disclosed. As against that undisclosed jenmi the plaintiff can establish an easement right only if she proves by suitable evidence that either by grant or by prescription, that is by peaceable and open enjoyment as an easement and as of right without interruption for 20 years, she has acquired the easement right claimed by her. It seems to me clear that that undisclosed jenmi is a necessary party to a suit for a declaration of such an easement right, so that he might have an opportunity of showing that he made no such grant as is claimed by the plaintiff if a grant is claimed by the plaintiff or that the plaintiff did not erect the dam as of right but by license, or that there has been interruption or even that she never erected any such dam except in recent years. In short there is no evidence in this case which can be treated as legally establishing an easement right over the bed of the stream at the site of the dam as against the owners of that bed, assuming that the bed of the stream belongs to the jenmi's private owners, and not to the Government. On this short ground I would dismiss the suit especially as the grant of a declaratory relief is a matter of discretion.

Even taking the view that the plaintiff has a right of easement to construct a dam over that portion of the bed of the stream over which she has been constructing a dam hitherto, but that she is not entitled to flood the path higher up

which, if I understand my learned brother aright, is the view taken by him, it is clear, as my learned brother points out, that the plaintiff's right of easement is not as extensive as she claims in the plaint but only a more restricted right, that is, the right is subject to the onerous condition that she should not interfere with the use of the path by the public. Even in this view, it seems to me that her suit for a declaration of the comprehensive right claimed by her ought to be dismissed, as the Court is entitled to exercise a discretion in these matters and it is not bound to give a declaration of the qualified right even holding that that qualified right is proved by the plaintiff. On the above views, it is unnecessary to go into the difficult question of law discussed by my learned brother as to the right of the Government to the beds of streams in Malabar and to the sites of public pathways in Malabar. I might, however be permitted to say that I am not satisfied that the beds of natural streams and the sites of public paths even in Malabar do not belong to the Government as a rule. As regards waste lands strictly so called, that is, uncultivated waste, capable of cultivation or of afforestation or mineral working, etc., we may take it that the *Secretary of State v. Vira Rayan* (8) has settled that "there is no presumption in favour of Government's right so far as the Malabar districts are concerned."

But, as Lord Halsbury said, the decision in a particular case is an authority only for the points actually decided in that case, that is, those points necessary for the decision of the case, and I am not satisfied that *Secretary of State v. Vira Rayan* (8) decided that there is no presumption that the beds of natural streams or sites of public paths do not belong to Government. I am inclined to the view that the Government, as representing the public should be presumed to be the owners of the beds of natural streams and of the sites of public paths in Malabar as well as in other districts and I believe that that is the common law of India, whatever may be the common law in England or whatever may have been the Roman law on this point. Malabar might have been "a land of private proprietors," but the paramount

rights of the State over the beds of natural streams, which do not both have their origin and also flow till the end of their course continuously through the land of the same private owner, and the paramount rights of the State over the sites of public roads and paths are not inconsistent with Malabar being a land of private proprietors, that is of being a land in which all cultivated lands, cultivable waste lands, house-sites, residential sites, lands from which profits can be obtained in the shape of forest or mineral products and similar lands belonged to private proprietors at one time, and presumably and prima facie do not belong Government now. That the Government have been trying to contest the claims of jenmis over waste lands from several years even before Act 3 of 1905 was passed cannot be disputed. So far as public roads, streets, lanes and paths and the beds of rivers, streams, nalas, lakes and tanks, canals and watercourses are concerned, the presumption should be, after the date of Act 3 of 1905, that they are Government property and not private property: see S. 2, Madras Act 3 of 1905.

If any private owner wishes to establish that the bed of a natural stream or the site of a public road belongs to him, it seems to me that the burden of proof is clearly cast upon him to establish the same: see *Kundukuri Mahalakshamma Garu v. Secy. of State* (11) after Act 3 of 1905 was enacted. In this case, no such proof has been given. As regards the case in *Secy. of State v. Kadirikutti* (9) the only thing decided there was that even in Malabar the bed of a tidal navigable river does belong to the Government. It may be said that there are implied assumptions made in some of the sentences in that judgment that if a river is not a tidal navigable river the bed belongs to adjacent owners as in English Common Law, and that the breadth of the stream belongs half and half to the adjacent owners. But this implied obiter dictum cannot, in my opinion, be treated as even an authority binding on us much less a conclusive authority, especially after the passing of the Madras Act 3 of 1905. However, as I said, the question is not free from difficulty and I do not wish to express my final view on that question especially in

view of the decided opinion to the contrary expressed by my learned brother. In this particular case, as I said before, it is unnecessary to finally consider that question. Lastly, I am unable to get over the finding of fact in this case by the District Judge that the bed of the stream belongs to the Government. He bases his finding on six facts : (a) that no claim has been made by any jenmi to the thodu ; (b) that D. W. 1 proves that the stream in question takes its rise in the hills, flows for twelve or fifteen miles through several amsoms and is known as "the Government Sircar thodu;" (c) that it is entered in the Settlement Register as the jenmam property of Government ; (d) that permission was obtained by the plaintiff from the defendant (that, is the revenue officers) to dam the thodu ; (e) that there is the presumption under S. 2, Act 3 of 1905 that the bed of the stream is Sircar land ; (f) that there is also a decision in Appeal Suit No. 245 of 1894 of the District Court of Calicut establishing Government's right. Even taking it that the last two reasons given by the District Judge for his finding are unsound, there are the other four facts and the circumstances mentioned by, the District Judge to support his finding and though each one of the facts taken separately may not be sufficient to support the finding, it cannot be said that a Court is not justified in treating the title of Government to the thodu to be proved by those facts taken together. Because the District Judge relied also upon a doubtful presumption of law to arrive at his finding, it cannot be said that his finding of fact is so materially vitiated that it should be set aside in second appeal. As Tyabji, J., remarked in a recent case *Pingaleviswanatha Row v. Chinnakolandai Mainar* (12) "Courts are not expected merely, so to say, to weigh in balances of gold the evidence on one side or the other, and if the scales go down by a hair's breadth on one side or the other, they are not expected to proceed on the basis that that fact is proved for all purposes." As the District Judge did not merely act upon a presumption in favour of the rights of Government, but relied also upon other circumstances to find in favour of Government, I think that we are not entitled to interfere with his finding of fact (that

(12) [1914] 22 I. O. 869.

the thodu belongs to Government) in second appeal. In the result I would dismiss the appeal with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 351

Full Bench

WHITE, C. J., AND SANKARAN NAIR
AND OLDFIELD, JJ.

Churiyayi Kanaran—Plaintiff—Appellant.

v.

Thattarai Chirutha and another—Defendants—Respondents.

Letters Patent Appeal No. 237 of 1912, Decided on 7th January 1914, from judgment of Sundara Aiyar and Sadasiva Aiyar, JJ., in Second Appeal No. 1271 of 1911.

Malabar Compensation of Tenants Improvements Act (1900), Ss. 3 and 5—Lease of mortgage property to tenant by mortgagor—Tenant bona fide effecting improvements is tenant within S. 3 and can claim compensation under S. 5 even from purchaser in execution of mortgage decree.

Where, after mortgaging his land, the mortgagor leases it out to a tenant and that tenant in the bona fide belief that he is in possession as a tenant effects improvements on the land, he is a tenant within the meaning of that term in S. 3 and, therefore, is entitled to claim compensation under S. 5, even from a purchaser in execution of the mortgage decree who tries to evict him from the land.

[P 351 C 2, P 352 C 1]

C. V. Ananthakrishna Aiyar—for Appellant.

V. Ryru Nambiar—for Respondents.

Judgment.—The question for decision is whether the defendants, tenants holding under the mortgagor, defendant 1, are entitled to get the value of improvements made by them on eviction by the purchaser in execution of the mortgage decree obtained by the plaintiff. We proceed on the footing that the lease to the defendants is subsequent to the creation of the mortgage. The plaintiff's case is that it was not open to a mortgagor to create any right in derogation of his mortgage. The defendants claim the value of improvements under the Madras Act 1 of 1900. S. 5 of that Act declares the right of "every tenant" to receive compensation for improvements on ejection. It is argued that this section entitles the tenant to receive compensation only from his lessor. There is no such restriction in the section itself. The definition of the term (see S. 3) shows that it includes persons

other than those included in the word as defined in the Transfer of Property Act and includes persons who did not enter into possession under any agreement with, or with the consent of, the person entitled to obtain possession of the property. Customary law leaves no doubt on the point.

In Major Watkin's Report on the Land Tenures of Malabar (1801), a recognized authority, it is stated: "Should there be a paramba without any known owner and a kudian (tenant), believing that it was without a master settled on it and made considerable improvements, on the return of the Jenmkar or any one producing sufficient proofs that he was the owner of the paramba, the kudian must in that case, without dispute, accede to the demand, provided the Jenmkar pays kuli Kanom or the value of the improvements."

Accordingly the "tenant" according to S. (3) includes any person who enters into possession of waste land without the consent of the owner but with the bona fide intention of paying the customary rent to the owner when ascertained. Similarly, the holders of lands under cowles granted by Government received, before the passing of the Act, the value of improvements on surrendering the land to the jenmi; so also tenants holding under invalid kanoms, leases or mortgages granted by the karnavan when surrendering the lands to the tarwad; tenants let into possession by a person claiming jenm title on eviction by the person found to be the true jenmi of the land also received compensation. The section, accordingly, defines "tenants" to include mortgagees as well as persons who in good faith believed themselves to be mortgagees or tenants. It is clear therefore, that the defendants, who are in possession as tenants under the mortgagor, are "tenants" within the definition and accordingly entitled to get compensation for improvements on eviction. It is not contended before us that the defendants are entitled to hold possession against the purchaser. The decrees of the lower Courts which direct the sale of defendant 1's interest in the property will be modified by ordering the sale of the property subject to the right of the defendants to receive compensation for the value of improvements. With this modification the decree is

confirmed and the appeal dismissed with costs.

S.N./R.K.

Decree modified.

A. I. R. 1914 Madras 352

WALLIS AND AYLING, JJ.

M. Subroya Aiyar—Accused — Petitioner.

v.

Kadar Rowthan Abdul Kadar Sahib—Complainant—Respondent.

Criminal Revn. No. 681 of 1913 and Criminal Revn. Petn. No. 552 of 1913, Decided on 3rd March 1914, from judgment of Chief Presy. Magistrate, Egmore, in Calendar Case No. 15,126 of 1913.

(a) Criminal P. C. (1898), S. 198—Statement in newspaper true as regards complainant and untrue as regards others—Complainant is not aggrieved party within S. 198.

Where a statement in a newspaper is true as regards the complainant though untrue as regards others, the complainant is not an aggrieved person within the meaning of S. 198

[P 352 C 2]

(b) Penal Code (1860), S. 499—Article as fair comment on public affairs and as mere expression of opinion is not defamatory.

An article in a newspaper which is a fair comment on public affairs and is merely an expression of opinion cannot be said to be defamatory, unless it is proved that it was the outcome of a dishonest or corrupt motive.

[P 353 C 1]

J. C. Adam—for Petitioner.

E. R. Osborne for T. Rangachariar—for Respondent.

Percy Grant—for the Crown.

Order.—The accused was entitled to discuss the qualifications of the complainant and others for municipal office, and so long as he abstained from aspersing their private character was entitled to considerable latitude. Read with the context the statement, "among them a single educated man" means no more than that there was none who could speak English or write his mother-tongue Tamil without a mistake. It is not disputed that this statement is true as regards the present complainant and in these circumstances we do not think he is a person aggrieved by the publication of these words within the meaning of the section.

The statements that "the Jamath itself is controlled by two or three very well-to-do men" and that "practically the whole of Vaniambady is led for any action against the Municipality by two or three men" are not defamatory at all as there is no allegation that they were

actuated by any dishonest or corrupt motive and, in any case, are fair criticism. The statement, "they knew full well that amongst them there is not a single man fit to be a chairman" must be read with the rest of the sentence, "and that only recently Government passed an order to the effect that the Revenue Divisional Officer only should be the Chairman of the Municipality."

This last statement is admittedly true, and the former statement does not exceed the bounds of fair comment upon it. The last statement charged, "finally I would challenge anyone to point out a single non-official fit to be the Chairman of this unique Municipality which requires a very strong man to guide" is only an expression of opinion on a public question which the writer was entitled to publish.

The conviction must be set aside and the fine if paid must be refunded as well as the Rs. 4-4-0 ordered to be paid to the complainant for costs.

S.N / R.K. Conviction set aside.

A. I. R. 1914 Madras 353

WALLIS, J.

Dwarka Doss Govardana Doss—Plaintiff.

v.

Danakoti Ammal and others—Defendants.

Ordinary Original Civil Jurisdiction No. 42 of 1913, Decided on 6th Oct. 1913.

(a) Transfer of Property Act (1882), S. 54—Transfer of mortgage by deposit of title-deeds does not require registration—Registration Act (3 of 1877), S. 17.

A transfer of a mortgage by the deposit of title-deeds does not require registration under either the Transfer of Property Act or the Registration Act: 3 Bom. 312, Dist; 11 Bom. L. R. 405, Ref. [P 354 C 2]

(b) Transfer of Property Act (1882), S. 54—Transfer of mortgage is transfer of mortgage debt with securities and does not require registration under Transfer of Property Act.

A transfer of a mortgage is a transfer of the mortgage-debt with its attendant securities and not a sale of the immovable property; therefore no registration is required by the Transfer of Property Act of such a transfer: 18 Mad. 454, Foll; 26 Bom. 305, Ref; 24 Mad. 449, Dist. [P 353 C 2]

C. P. Ramaswamy Iyer—for Plaintiff.
V. Masilamani Pillay—for Defendants.

Judgment.—In this case the defendants executed a promissory note in favour of Rajah Venugopala Bahadur and effected an equitable mortgage at the

same time by deposit of title-deeds. Rajah Venugopala Bahadur subsequently endorsed the promissory note to the present plaintiff and at the same time handed over to him the title-deeds which had been deposited with him.

The case was posted on the undefended board, but at the hearing, it was objected for the defendants, that the plaintiff was not entitled to any relief in respect of the mortgage for want of registration. The objection came to this, that the registration was requisite both under S. 54, T. P. Act, and under the Registration Act. With regard to the first, great reliance is placed upon an observation of Sir V. Bhashyam Iyengar in *Ramasami Pattar v. Chinnan Asari* (1), in which he expressed his dissent from the decision of *Subramaniam v. Perumal Reddi* (2). I might content myself with saying that that decision is binding upon me more especially as the remarks of Sir V. Bhashyam Iyengar were purely obiter. The question before him was whether a mortgagee in a suit for redemption could set up in answer an agreement with the mortgagor giving him a right of pre-emption. The ground upon which Sir V. Bhashyam Iyengar was disposed to think that the transfer of a mortgage required registration under S. 54, T. P. Act, was that he considered that it came within the words of intangible thing in S. 54, T. P. Act, and that therefore a transfer of mortgage for consideration amounted to a sale, whereas the learned Judges, who decided *Subramaniam v. Perumal Reddi* (2) were of opinion that it did not. Admitting however that the language of S. 54 taken by itself may be wide enough to cover such a transaction, I am not satisfied that it therefore follows that the learned Judges who decided *Subramaniam v. Perumal Reddi* (2) were wrong in the result at which they arrived. Apart from the definition, a transfer of a mortgage is a transfer of the mortgage-debt with its attendant securities rather than a sale of immovable property, and what we have to see is whether, taking the provisions of the Transfer of Property Act as a whole, it is right to hold such a transaction comes within the definition of such a sale in S. 54. Admitting that a mortgagee has an interest in im-

(1) [1901] 24 Mad. 449 at p. 463.

(2) [1895] 18 Mad. 454=5 M. L. J. 92.

movable property, still it is undoubtedly accessory to, and attendant upon, the mortgage debt. With the extinction of the mortgage debt, the interest ceases, and with the transfer of the mortgage debt, the beneficial interest, at any rate, of the original mortgagee also ceases.

Now the Transfer of Property Act has provided for the transfer of a mortgage debt, that is to say, that it may be transferred in the same way as any other actionable claim, and it has further provided by S. 8 that, "Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof. Such incidents include where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer." If it be held that in the case of all mortgages of immovable property a registered transfer is necessary to pass the mortgage interest to the transferee, that seems to me to be inconsistent with the terms of this section. Mortgages of immovable property are by far the largest and most important class of securities and it scarcely seems to me that if the legislature contemplated that such securities should only pass from the mortgagee to the transferee by means of a registered instrument, they would scarcely have inserted this provision in such general terms. If a registered instrument is really required, it is not true to say that when the property is a debt, the securities therefor pass to the transferee. The conclusion to which I am disposed to come to is that the special provisions relating to the transfer of mortgage debts and the transfer of securities for such debts are applicable rather than the perfectly general provisions of S. 54. *Generalia specialibus non derogant*: General provisions do not derogate from special provisions; and it certainly seems to me the most satisfactory course to hold that registration is not required under the Transfer of Property Act to pass a mortgage security on immovable property from the transferor to the transferee. If that be not so, it is difficult to see what is to become of the mortgage

security when the debt is lawfully transferred. Is it to become extinguished? As pointed out in *Tarvadi Bholanath v. Bai Kashi* (3) by Sir Lawrence Jenkins, that is not anyone's care. The only other alternative would be to hold that the transferor-mortgagee is a trustee for the transferee, and that seems to me to be inconsistent with, and opposed to the provisions of S. 8, T. P. Act. For these reasons, both on the authority of *Subramaniam Chetty v. Perumal Reddi* (2), which is binding upon me, and also on principle, I am of opinion that registration is not required under the Transfer of Property Act for a transfer of the mortgage by the mortgagee.

The next objection is that the registration is necessary under the terms of the Registration Act. In this case we are dealing with a mortgage by deposit of title-deeds. It is not necessary for me to consider the question whether the transfer of an ordinary mortgage created by a registered instrument requires to be registered under the terms of the Registration Act. I think it is quite clear that a transfer of a mortgage by deposit of title-deeds does not require registration. Reliance was placed upon the decision of *Ganpat Pandurang v. Adarji Dadabhai* (4). That case is distinguishable from this because there, there was a document of transfer set out in Westropp, C. J.'s judgment, which provided for the transfer not only of debts but of securities held with them. It was held that document required registration, and was consequently inadmissible, and that the terms of the contract having been reduced to writing, no other evidence could be looked to. At the same time in the Court below Sir Charles Sargent expressly held that an equitable mortgage by deposit of title-deeds was transferable without registration; and in this connexion he referred to a case, *Kedarnath Dutt v. Shamlall Khettry* (5), which is a very strong case though it is not a case of transfer. There, as held by the appellate Court, there was a promissory note which recited a deposit of title-deeds, so that it might be said it was an agreement which required registration under the Registration Act, but the appellate Court held that this was a mere recital and that it

(3) [1902] 26 Bom. 305=4 Bom. L. R. 18.

(4) [1878-79] 3 Bom. 312.

(5) [1873] 11 Bom. L. R. 405=20 W. R. 150.

did not require registration. The case here is very much stronger because in this case there is no agreement reduced to writing at all about the transfer: there is merely an endorsement on a promissory note and handing over of the title-deeds. The present case therefore seems to me much stronger than the one in *Kedarnath Dutt v. Shamlall Khettry* (5). I therefore hold that this objection also fails.

In the result there will be the usual mortgage decree for the plaintiff for Rs. 19,991 with further interest on the principal amount at contract rate for six months and costs. Sale in default. Personal decree for the balance.

S.N./R.K.

*Suit decreed.***A. I. R. 1914 Madras 355 (1)**

SESHAGIRI AIYAR, J.

Gangala Ramokotayya and another—Petitioners.

v.

Bhimavarapa Guruva Reddy and another—Respondents.

Civil Revn. Petn. No. 573 of 1912, Decided on 18th February 1914, from order of Dist. Judge, Kistna, in Misc. Appeal No. 23 of 1911.

Provincial Insolvency Act (1907), S. 37—Sale before adjudication—Evidence at insolvency proceedings is admissible against purchaser in proceedings under S. 37.

Where a sale made by an insolvent is impugned under S. 37, Provl. Insol. Act, evidence given at the insolvency proceedings, can be used against the purchaser, though not a party to the insolvency proceedings, to prove that the insolvent was unable to pay his debts at the time of the sale. [P 355 C 2]

V. P. Ramadoss—for Petitioners.

P. Nagabhushanam—for Respondents.

Judgment.—I have to satisfy myself in this case that there has been a violation of law by the District Judge in passing the order he has passed. The District Judge, upon the evidence given in the insolvency proceedings has come to the conclusion that at the time of the sale the insolvent was not in a position to pay his debts; and he refers to other circumstances which indicate that this is a case in which by collusion between the petitioner and the insolvent the sale has been brought about in order that the other creditors of the insolvent may not be able to get their share of the property. I am asked to say that the evidence given at the insolvency proceedings should not be used against the petitioner

and that evidence de novo must be taken in order that, under S. 37, Provl. Insol. Act, it may be adjudged that the insolvent was not in a position to pay his debts. I have been referred to no authority for this position. The District Judge upon the materials which were available to him in the case has come to the conclusion I have referred to and I can find no ground to disturb his findings. I dismiss the revision petition with costs.

S.N./R.K.

*Petition dismissed.***A. I. R. 1914 Madras 355 (2)**

SANKARAN NAIR AND AYLING, JJ.

Vellaichami Servai—Defendant—Appellant.

v.

Mamundi Servai and another—Plaintiffs—Respondents.

Second Appeal No. 155 of 1912, Decided on 4th February 1914, from decree of Dist. Judge Madura, in Appeal Suit No. 142 of 1911.

Hindu Law—Custom—Stridhan property of widow of Agambadia caste having no issue goes to her parents.

According to custom, the stridhanam property of a widow of the Agambadia caste who leaves no issue, goes to the parents and not to her husband's kindred. [P 358 C 1]

S. Srinivasa Aiyangar and V. Purushothama Aiyar—for Appellants.

T. Rangachariar and K. V. Krishnaswamy Aiyar—for Respondents.

Judgment.—The third issue framed in the suit was: "Are the husband's relations disentitled to the property of a woman according to the custom among the Agambadia caste." The form of the issue threw on the defendants the onus of proving that the husband's relations are not entitled to inherit according to the usage of the community to which the parties belong. In the circumstances of the case, it would have been better to word the issue so as not to throw the onus distinctly on one side. The customs of the Agambadia community are not in all respects identical with those prevailing among other castes. Re-marriage of widows seems to be common among them. It is not clear whether re-marriage is regarded as putting an end to all ties of kindred created by the first marriage between the woman and her first husband's relations. The payment of *parisam* is, according to the finding of the lower Courts, a usual incident in all

marriages—apparently the lower Courts also consider that *parisam* was originally at least regarded as “bride-price” paid to the parents of the bride. They have also assumed that when “bride price” was paid, the *stridhanam* property of a married woman went to parents, in the absence of issue, in preference to her husband or his *sapindas*. No finding has been recorded on the question whether the community has adopted any different rule of succession in later time. We consider it desirable to modify issue 3 thus: “What is the rule of succession applicable to the *stridhanam* property of a woman in the absence of any issue in the community to which the parties belong? If there are different rules of succession depending on differences in the form of marriage, what are they? Is there any special rule applicable to the property of a re-married woman?” We request the lower appellate Court to submit findings on the above questions. Both parties may adduce fresh evidence. The Court, may, if it considers it desirable to do so, examine competent persons as Court witnesses to enable it to arrive at satisfactory findings on the questions at issue. The finding will be submitted within three months from the date of the receipt of this order. Seven days will be allowed for objections. The further hearing of the case is adjourned till the receipt of the findings.

(In compliance with the order contained in the above judgment, the District Judge of Madura submitted the following:)

Findings.—The following are the issues on which I am required to submit finding:

I. What is the rule of succession applicable to the *stridhanam* property of a woman in the absence of any issue in the community to which the parties belong? If there are different rules of succession depending on differences in the form of marriage, what are they?

II. Is there any special rule applicable to the property of a re-married woman?

Further evidence has been adduced. The plaintiff examined nine additional witnesses and defendant 2, twelve. At the commencement of the inquiry, I expressed willingness to examine as Court witnesses any competent persons accepted by both sides. No agreement was

come to, although some names were suggested by defendant 2, and consequently no Court witnesses were examined.

The parties are agreed that there is but one rule of succession which is not subject to modification on account of any differences in the form of marriage. This furnishes the answer to the second part of issue 1.

They are also agreed in holding that there are no special rules applicable to the property of a re-married woman. Issue 2 is therefore answered in the negative.

Passages in the evidence indicate, that the rites and ceremonies followed at marriages amongst *Agambadias* vary to some extent according to the social position of the parties. In this the community is, no doubt, following the world-wide practice of imitating those who are regarded as holding a socially superior position. Imitation in this country is rendered easier by the fact that the customs imitated are for the most part immutable, while elsewhere there is frequently a tendency to discard a custom because others have taken to adopting it. It by no means follows however that a community intends to adopt along with the form all the legal consequences which attach to it amongst those who have followed it for generations. It is common ground that, in the caste now in question re-marriage of widows is permitted and dissolution of marriage is freely allowed. The only condition imposed in case of divorce appears to be the payment of a sum of money varying in amount according to the circumstances of the case.

The plaintiff contends that the property of a woman passes on her death without issue to the last of her husbands or to his kindred to the exclusion of previous husbands and their families, and this quite irrespective of the fact that it may have been acquired during the subsistence of some prior marriage. Defendant 2, on the other hand, alleges that the property goes to the parents of the woman or their family. Some of the plaintiff's witnesses base the husband's rights on the fact that he must perform the obsequies of the owner. It is conceded by most of the defendants' witnesses also that these rites should be carried out by the husband, though as one of them puts it, the husband's family

sometimes declines to do so, if no property is to come to them saying, "Why should we shave our heads for nothing." The defendants' evidence is however that the performance of the ceremonies does not in itself confer any rights in the property. The explanation given is that the only property that a husband's family can expect to get is what belonged to him and is in the hands of his widow and that the instances of refusal arise only in the case of a widow who holds no property of her husband. In this connexion, it may be noted that most of the evidence as to custom now produced relates specially to the particular facts of the present case, i. e., to the succession to an issueless widow and not to the rule applicable where the husband survives the wife. The defendants' witnesses however state generally that this makes no difference.

No explanation appears in the evidence as to the origin of the practice of paying "parisam." It seems probable that it is a survival from a time when an actual "bride price" was paid as is surmised by the District Munsif. If this be the correct explanation, then marriages in the Agambadia caste must originally at any rate have been celebrated in the Asura form. Presumably the rule of succession to a woman's property was that incidental to marriage in an "unapproved form." It has not been suggested in the evidence for the plaintiff, that there has been a change in the rules of succession in later times and I do not think that such a change can be inferred from the fact that the husband no longer gives "as much wealth as he can afford" for the purchase of a bride but makes merely a nominal payment which cannot be regarded as price at all.

It seems to me that the rule contended for by the defendants is more in consonance with the admitted marriage customs of the caste than that which the plaintiff relies upon. The former rule is easily applied and leads to no complications. With the latter, the case is the reverse. According to the defendants' rule, the rights of any particular husband and his kin are dependent on whether the owner of the property chooses to exercise her right of contracting another marriage or not.

Coming to the oral evidence, I prefer that of the defendants' witnesses. Seve-

ral of them are persons who from their position in the caste are well able to speak about its usages. Others give evidence from personal experience of the application of the rule, e. g. D. W's. 12 and 16 are men who have been adversely affected by it. Almost all give instances illustrative of how the rule works from cases with which they are personally acquainted. Nothing has been elicited to show that they are particularly interested in supporting the defendants' version. Some inconsistencies have been pointed out in their evidence, but I do not think that these relate to any differences in principle but merely to the application of the rule in hypothetical cases. To give opinions on such matters might well puzzle persons more competent than these witnesses. On the other hand, the plaintiff's witnesses are not persons who hold any special position in the caste. Several of the instances cited by them in support of their statements are not apposite, e.g., P. W. 16 refers to property which admittedly belonged to the family of the husband of the woman whom he mentions: vide also P. W. No. 17. Several of the witnesses have not made it clear whether they are referring to property of a deceased husband in the hands of a widow about which there is no dispute or to cases of the kind to which this inquiry relates. From the judgment of the High Court, it appears that the burden of proof is not to be cast distinctly on either side. Taking the evidence as a whole, I think, that adduced for the defendants is entitled to the greater weight. I would therefore answer the first question by saying that the stridhanam property of a woman goes to her parents' family in the absence of issue. The material available is not sufficient for a determination of how the succession is worked out in detail. The witnesses say generally that the parents succeed, but, as far as the instances given go, there appears to be no preference of females over males and the property has usually been taken by the father or his male descendants.

Some questions have been put to witnesses regarding the subdivisions of the caste and as to differences in custom prevailing in these divisions. It has not however been argued that the plaintiff relies upon membership of any particular

division in support of his case and it is, therefore unnecessary to refer to the matter further.

(This second appeal coming on for final hearing after the return of the findings of the lower appellate Court upon the issues referred by the Court for trial, this Court delivered the following:)

Judgment.—The question is whether, according to custom, the stridhanam property of a widow of the Agambadia caste who left no issue goes to the parents of the widow or their family or to her husband's kindred. The District Judge has found that according to custom the parents are entitled to the property. Objection is taken to this finding. In this caste, re-marriage is allowed by custom. Divorce also is freely allowed; the only condition is payment of certain money. It is not shown that the parties have any gotra and that the wife on marriage adopts the husband's gotra. On marriage the husband pays parisam, a small sum of money to the parents. This is very probably a survival from the time actual "bride-price" was paid. These facts support the conclusion drawn by the District Judge from the oral evidence in favour of the father's right of succession. Instances have been proved in which this rule has been followed by the caste. We think for these reasons that the District Judge is right. We therefore reverse the decree of the District Judge and restore that of the District Munsif with costs in this and the lower appellate Court.

S.N./R.K.

Decree reversed.

A. I. R. 1914 Madras 358

WALLIS, J.

Mohanlal Kanailal—Plaintiff,

v.

Kesrimull Chordiya and another—Defendants.

Original Civil Appeal No. 188 of 1913,
Decided on 18th December 1913.

Stamp Act (1899), S. 13—Pro-note written on impressed stamp paper of insufficient value—Blank impressed sheet added to make out the deficiency—Pro-note was held not duly stamped and was inadmissible.

Where the forms of promissory note were written on an impressed sheet of Rs. 1-8-0 and another blank impressed sheet of 12 annas was attached to make up the deficiency in the value of the stamp required for the pro-note.

Held: that under S. 13, Stamp Act and R. 7 Statutory Rules, made in pursuance thereof,

the promissory note was not duly stamped, and, therefore, was inadmissible in evidence.

[P 359 C 1]

P. Duraiswami Iyengar—for Plaintiff.

W. Barion, C. P. Ramaswami Iyer and N. Viswanatha Iyer—for Defendants.

Judgment.—This is a suit on an instrument on paper impressed with a stamp. The stamp is marked hundi but the instrument is really a promissory note written on a stamp paper of Rs. 1-8-0. There has been pasted on this paper another similarly impressed paper bearing a stamp of 12 annas. When this promissory note was tendered in evidence, Mr. Barton took the objection under S. 35, Stamp Act that it was not admissible because it was not duly stamped. Under that section, a promissory note if not duly stamped is absolutely inadmissible. Now S. 13, Stamp Act provides: "Every instrument written upon paper stamped with an impressed stamp shall be written in such manner that the stamp may appear on the face of the instrument and cannot be used for or applied to any other instrument." And S. 75 of the Act provides that "the Governor-General in Council may make rules to carry out generally the purposes of this Act." And S. 76 provides that "all rules published as required by this section shall, upon such publication, have effect as if enacted by this Act." Now admittedly also the "rules," that is, R. 7 (a), Chap. 2 of the impressed sheets is as follows: "7-a When two or more impressed sheets are used to make up the amount of duty chargeable in respect of any instrument, a portion of such instrument shall be written on each sheet so used."

Now it appears to me that in this case two impressed sheets have been used to make up the amount of duty chargeable in respect of this promissory note, but that the whole of the instrument has been written on only one of the sheets. The object of the rule appears to be in furtherance of the provisions of S. 13 that the stamp paper should not be used or applied for any other instrument; and the present document illustrates the necessity of the rule because in its present state no part of the instrument having been written on one of the two impressed sheets, it would be possible for anybody with a little water to separate this sheet from the sheet on which the promissory

note is written and use it for a new promissory note. I cannot see how an instrument which offends against S. 13 and the statutory rule made to give effect to S. 13 and which is to be regarded as part of the Act, can be said to be "duly stamped." It is said that this is not an uncommon practice. If so, the sooner it is stopped or the law is altered, the better. But these are not considerations which can legitimately be allowed to operate upon my judgment. I am constrained to uphold the objection and to dismiss the suit. No costs.

S.N./R.K. *Suit dismissed.*

A. I. R. 1914 Madras 359 (1)

SESHAGIRI AIYAR, J.

Patoju Sangayya—Defendant—Petitioner.

v.

Patoju Sanyasi and another—Plaintiffs—Respondents.

Civil Revn. Petn. No. 567 of 1912, Decided on 16th February 1914, from decree of Sub-Judge, Kistna, in Small Cause Suit No. 220 of 1912.

Negotiable Instruments Act (1881), S. 78—What constitutes indorsement for collection, stated.

Where from the terms of an endorsement on a promissory note, no accountability can be enforced between indorsor and the indorsee, it is not an indorsement for collection merely, and the latter alone can bring a suit on the note: 30 *Mad.* 88, *Foll.* [P 359 C 1]

P. Prakasam—for Petitioner.

V. Ramadoss—for Respondents.

Judgment.—It is argued before me that the indorsement on Ex. A shows that the plaintiff was an agent for collection and not the real payee. I cannot accede to this contention. The language is perfectly clear, the indorsement gives full rights to the plaintiff to recover the amount and there is no accountability between the plaintiff and defendant 2 after the collection. Therefore I hold that it is not an indorsement for collection and for collection only. That being my view, the plaintiff is a holder as defined in S. 8, Negotiable Instruments Act; and under S. 78, as interpreted in *Subba Narayana Vathiar v. Ramaswami Aiyer* (1), he is the only person entitled to bring a suit to recover the amount. I am inclined to think that what is stated in the affidavit, put in immediately after the suit was decided,

(1) [1907] 30 *Mad.* 8 = 1 M. L. T. 377 = 16 M. L. J. 508 (F. B.).

correctly represents what took place during the course of the trial. If I thought there was a real defence to the suit I would have given an opportunity to the petitioner to examine his witnesses. As I hold that the defence of payment by defendant 1 to defendant 2 is no answer to the claim of the plaintiff I do not think it necessary to send down the case for examining the witnesses. I dismiss the petition with costs.

S.N./R.K. *Petition dismissed.*

A. I. R. 1914 Madras 359 (2)

SADASIVA AIYAR AND TYABJI, JJ.

Vasudeva Reddy—Appellant.

v.

Nallapa Reddy—Respondent.

Civil Misc. Appeal No. 310 of 1912, Decided on 17th February 1914, from order of Dist. Judge, Trichinopoly, in Appeal Suit No. 412 of 1911.

(a) **Registration Act (1877), S. 49, Cl. 2 (7)—Agreement to lease affects immovable property.**

An agreement to lease is a transaction affecting immovable property and should be registered: 8 I. C. 520, *Foll.* [P 360 C 1]

(b) **Registration Act (1877), S. 49, Cl. 2 (7)—Unregistered lease is not evidence of even agreement to lease.**

An unregistered lease deed cannot be used as evidence of even an agreement to lease.

[P 360 C 1]

T. R. Venkatrama Sastri—for Appellant.

M. O. Parthasarathy Aiyangar and C. Narsimha Chariar—for Respondent.

Facts.—This is a suit for the enforcing of specific performance of an agreement to lease. The plaintiff is a lessee; defendant 1 is the minor landlord and defendant 2 is his guardian appointed by the Court. The plaintiff entered into an agreement with defendant 2 that he should lease out certain lands for five years at a rental of Rs. 160 a year. The terms were these: The plaintiff shall be allowed to fell for his own use all the trees on the land, except tamarind trees; and in consideration thereof the plaintiff should remove at his cost the prickly-pears overgrown on the land. The terms were reduced to writing, but no stamp paper was purchased, and the deed was not executed or registered. The District Munsif construed this to be a sale and held defendant 2 as not authorized to effect it without the sanction of the Court and dismissed the suit. The District Judge on appeal held that there was merely an

agreement to lease and the writing can be used as evidence for that purpose though neither stamped nor registered. The present appeal is against that decree.

Judgment.—We think that the learned District Judge was right in his view that the suit is based on the prior agreement to lease and not on the unregistered lease-deed, which is inadmissible in evidence, to prove that the plaintiff has obtained an interest as lessee. The remand order passed by the District Judge is therefore right.

But the District Judge was in error in holding that the unregistered lease-deed is admissible as evidence of the prior agreement to lease. The decision of *Narayanan Chetty v. Muthiah Servai* (1) (by which we feel ourselves bound) shows that an agreement to lease is also a transaction affecting immovable property. A document which requires registration and is not registered cannot be used as evidence of any transaction affecting immovable property, S. 49, Cl. (c), Registration Act, and hence the unregistered lease-deed cannot be used as evidence of even an agreement to lease.

With these observations we dismiss the appeal with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1910] 8 I. C. 520=35 Mad. 63.

A. I. R. 1914 Madras 360

WALLIS AND AYLING, JJ.

Abdul Latiff Sahib and another -- Defendants—Appellants.

v.

Bathula Bibi Ammal—Plaintiff—Respondent.

Misc. Second Appeal No. 31 of 1913, Decided on 4th March 1914, from order of Dist. Judge, North Arcot, D/- 25th February 1913, in Appeal Suit No. 498 of 1912.

(a) Civil P. C. (1908), O. 21, R. 2 — R. 2 applies to all decrees under which money is payable.

Order 21, R. 2, Cl. (1), applies to decrees of all kinds under which money is payable; where therefore the payment of money in satisfaction of such a decree is not certified to Court, it cannot be recognized. [P 360 C 2]

(b) Civil P. C. (1908), O. 21, R. 2, Cls. (1) and (2) — Distinction between decrees for payment of money and other decrees is dropped in new Code.

The distinction which existed under the repealed Code between decrees for mere payment of money and other decrees has been done away with by the present Code: 6 Cal. 786 and 22 Mad. 182, Ref. [P 360 C 2]

R. Subramania Aiyar — for Appellants.

T. Pattabhiram Aiyar — for Respondent.

Judgment.—In this case there was a decree for the delivery of certain immovable property and for the payment of money. In answer to an application for execution the defendants have set up an alleged payment of Rs. 500 by way of adjustment. Both the lower Courts have overruled their objection under O. 21, R. 2, Cl. 3, Civil P. C., as the adjustment was not certified. We think they were right. O. 21, R. 2, Cl. (1), says that where the decree—which read with the earlier part of the sentence means a decree of any kind under which money is payable—is adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such adjustment to the Court. The decree in the present case is only of the kind dealt with in the section, and the section is therefore applicable. The appellant relies upon *Sankaran Nambiar v. Kanara Karup* (1) to show that the rule does not apply to decrees which provide for the delivery of immovable property.

The section has now been amended so as to apply to decrees of any kind under which money is payable, and we see no reason for refusing to give full effect to its provisions. We may observe that under the Code of 1859 it was held in *Baba Mohamed v. Webb* (2) that the corresponding provisions as to adjustments were not confined to adjustments of money-decrees. In *Sankaran Nambiar v. Kanara Karup* (1) the learned Judges relied upon subsequent changes in the Code, but the effect of these changes has been done away with by the insertion in the present section of words rendering it plainly applicable to the present case.

This appeal is dismissed with costs.

S.N./R.K.

Appeal dismissed.

(1) [1899] 22 Mad. 182=8 M.L.J. 175.

(2) [1881] 6 Cal. 786=8 C.L.R. 36.

A. I. R. 1914 Madras 361

SANKARAN NAIR AND BAKEWELL, JJ.

Gnaniar Rowther and others—Defendants—Appellants.

v.

V. Krishna Aiyar and others—Plaintiffs—Respondents.

Second Appeal No. 1521 of 1911, Decided on 19th November 1913, from decree of Dist. Judge, Madura, in Appeal Suit No. 337 of 1910.

Evidence Act (1872), S. 44—Confirmation of Court sale induced by fraud—Ejectment suit by auction-purchaser—Defendant in possession has right to prove plaintiff's fraud.

Where the plaintiff in the ejectment suit relies on his title as a purchaser in a Court auction, it is open to the defendants in possession of the property to show that such purchase was procured by fraud and therefore passed no title to the plaintiff. [P 361 C 1]

K. Sreenivasa Aiyangar — for Appellants.

T. R. Ramchandra Aiyar and *K. Bal-mukund Aiyar* — for Respondents.

Judgment.—The suit in this case was for ejectment, and the plaintiff was bound to prove his title to the land in question, and the defendants were entitled to show that any link in his chain of title was bad, and they sought to prove that he had, by fraud committed by him in execution proceeding, induced a Court to pass an order confirming a sale held by the Court and to grant a sale certificate to the plaintiff's immediate predecessor-in-title. It was argued on behalf of the respondent that this plea of fraud was not sustainable and that the defendants, who were entitled to intervene in the execution proceedings to set aside the Court sale should have adopted that procedure, and cannot in this suit go behind the order of the Court. This argument might hold good in a case where the execution proceedings had been merely irregular, in which case various considerations would influence the Court in exercising its power to set aside a sale; but a party is entitled to show that an order of a Court was obtained by fraud and is in fact a nullity: see Evidence Act, S. 44, and observations of Willes, J., in *Queen-Empress v. Saddlers' Co.* (1). The order of the Court obtained by fraud is in fact in the same category as a forged conveyance; it is a nullity which cannot confer title; and

we are of opinion that the defendants were entitled to set up this plea; and that the learned District Judge should have given a finding upon it. We therefore direct the District Judge to return findings on issues 1 and 2. Findings will be submitted within six weeks from the date of the receipt of this order and seven days will be allowed for filing objections.

(In compliance with the above order the District Judge of Madura submitted the following:)

Findings.—I am required to submit findings on the following issues:

(1) Whether plaint properties belong to plaintiff by purchase?

(2) Whether Narayanan Servai was the owner of these properties and whether the Court sale to defendant 4 and the sale by defendant 4 to plaintiff are valid and binding on defendants 1 to 3?

It was not disputed at the trial of the action before the District Munsif that Narayana Servai was the owner of the properties. The claims under the settlement by Arianachee had been compromised. No argument has been addressed to me on this point on behalf of the respondents. I therefore accept the case put forward in the plaintiff's pleadings that Narayana Servai was the absolute owner of the property. This is my finding on the first portion of issue 2.

The right, title and interest of Narayana Servai in these properties was purchased by defendant 4 in execution of the decree in Second Civil Appeal No. 599 of 1903 and the plaintiff has acquired whatever title defendant 4 possessed. Unless then the execution proceedings were a mere nullity the plaintiff must be considered the owner of the properties and issue 1 must be answered in the affirmative.

I take it that it is for the defendants to establish the case of fraud on which they rely and that they are limited to the specific averments regarding it made in their written statement. The written statement of defendant 1 contains no such particulars but only a general statement that the plaintiff in collusion with the decree-holder in Second Civil Appeal No. 599 of 1903 had the properties fraudulently attached and brought to sale. In the written statement of defendants 2 and 3, there is also a similar general allegation that the execution

(1) [1863] 10 H. L. C. 404=32 L. J. Q. B. 337 =9 Jur. (n. s.) 1081=9 L.T. 60=11 W. R. 1004=11 E. R. 1083=138 R. R. 217.

proceedings were "a series of frauds perpetrated by the plaintiff with the co-operation of his relatives." The only specific allegations are that the plaintiff brought the properties in the name of a minor nephew and that although they were worth nearly Rs. 30,000, they were purchased for Rs. 220.

The allegation that defendant 4 was minor is not now pressed. As to the total value of the properties the evidence is to the effect that in 1910 at least they would be worth approximately Rs. 30,000. P. W. 1 puts the value at Rs. 7,000 or Rs. 8,000 but he is not a person whose word is entitled to credit and he is clearly under-estimating. The statements of P. W. 2 and 3 support the figure already given. It is a little difficult to believe that this is not an exaggeration, for an average rate of Rs. 1,400 an acre is very high but however this may be, there can be no doubt that the lands were very valuable.

There is no suggestion that the plaintiff was making the purchase on behalf of the decree-holder in the Small Cause Suit and the fact that defendant 4 was buying on behalf of the plaintiff who supplied the money does not in itself indicate fraud. It is true that the decree-holder and the plaintiff are relatives and residents of the same village but beyond this there is nothing which directly brings home to the plaintiff any connexion with the execution proceedings prior to the sale. As has already been mentioned the written statements contain no specific allegations regarding the conduct of the execution proceedings. An answer elicited from Narayana Servai that the proclamation was never made in the village has been referred to. This was not relied on before the District Munsif and the plaintiff cannot be expected to be prepared to meet allegations of which he has had no notice. I do not see how the plaintiff can be held responsible for the conduct of the execution proceedings.

The reference to the settlement-deed and the hypothecation by Karuppayee seem to be matters which might quite fairly be referred to with a view to leading intending purchasers to make inquiries. It is not denied that such transactions did exist. In fact there can be no doubt that the extent of the alienations and burdens alleged by different

parties was considerably under-stated. The incorrect assertion that the mortgage under Ex. 2 covered twelve items instead of four only is no doubt a serious misstatement but I am by no means satisfied that it really affected the course of the sale.

As to the inadequacy of the price, it has to be noted that the title of the judgment-debtor to the majority of the items was questioned altogether. A will by the last male-holder and also a settlement by Arianachee were set up and have been relied on by defendants 2 and 3 in their pleadings. A fourth of the land had been alienated prior to the attachment (vide Ex. J.) and a number of encumbrances had been created e. g., Ex. 2, and the claims of defendant 1 in Original Suits Nos. 173, 176 and 177. The total of these comes to about Rs. 8,000. I have no doubt that the price was unduly low but considering the cloud on the title and the litigation and expenditure which must follow before the auction-purchaser could get possession the absence of competition is not altogether to be wondered at. Inadequacy of price is not in itself sufficient to establish the defendant's case and I do not think that they have shown that the inadequacy is the outcome of acts or omissions which would entitle them to have the sale treated as a nullity as against the auction-purchaser. I would therefore answer the second part of issue 2 in the affirmative.

(This second appeal coming on this day for final hearing after the receipt from the lower appellate Court of the findings on the issues referred by this Court for trial, this Court delivered the following:)

Judgment.— We accept the finding and dismiss the second appeal with costs of respondent 1.

S.N./R.K.

Appeal dismissed.

*** A. I. R. 1914 Madras 362**

WHITE, C. J., AND OLDFIELD, J.

Natesa Gramani—Defendant—Appellant.

v.

Tangavelu Gramani — Plaintiff—Respondent.

Appeal No. 30 of 1912, Decided on 17th February 1913, from decree of City Civil Court Judge, Madras, in Original Suit No. 561 of 1910, D/- 26th July 1912.

* Registration Act (1908), S. 17 (1) (b) (d)—Lease of palmyra trees for drawing toddy etc.—Lease amount for two years paid—Document was held not to create interest in immovable property and does not require registration.

Where a document stated that the lessee had taken lease for two years for enjoyment for toddy, palmyra fruit etc., the palmyra trees in a certain garden, that he had paid the amount of the lease for two years and that he would not cut the leaves of any of the trees on which he climbed except those whose leaves had to be cut.

Held: that the document in question was neither a lease of immovable property nor did it create an interest in immovable property.

Held further: that a lease for drawing toddy does not create an interest in "immovable property" within the meaning of S 17 (b) and does not require registration: 6 M. H. C. R. 71; 20 Mad. 58 and 12 W. R. 366, Dist; Marshall v. Green, L. R. 1 C. P. D. 35, Ref.

[P 363 C 2, P 364 C 1]

T. Ethiraja Mudaliar for Balamukanda Aiyar—for Appellant.

C. K. Mahadeva Aiyar—for Respondent.

White, C. J.—The only point taken in appeal was that Ex. A was a document which under the law should be registered but had not been registered and that consequently it was inadmissible in evidence. No objection was taken to the admissibility of the document in the Court of first instance. The document states that the lessee had "taken for lease for two years . . . for enjoyment for toddy, palmyra, fruit, etc, the palmyra trees" in a certain garden, that he had paid the amount of the lease for two years (i. e. Rs. 140) and that he would not cut the leaves of any of the trees on which he climbed except those whose leaves had to be cut. The question is; "Is the instrument a lease of immovable property within the meaning of S. 17 (1) (d), Registration Act, or an assignment of an interest of the value of Rs. 100 or upwards in immovable property within the meaning of S. 17 (1) (b) of the Act? For the purposes of this case, I am prepared to assume that the instrument is a lease, or if it is not, that it is an assignment of an interest of the value of Rs. 140. The Act defines "moveable property" as including "standing timber, growing crops and grass, fruit upon and juice in trees, and property of every other description except immovable property."

On behalf of the appellant Mr. Ethiraja Mudaliar has relied upon two de-

cisions as bearing directly upon the point we have to decide. They are *Sukry Kurdappa v. Goondakull Nagireddi* (1) and *Seeni Chettiar v. Santhanathan Chettiar* (2). The case of *Sukry Kurdappa v. Goondakull Nagireddi* (1) which was not decided until 1871 turned on the meaning of S. 13, Registration Act of 1864. That Act contained no definition of moveable and immovable property. The Act of 1866 introduced the definitions of moveable and immovable property. The Act of 1871, introduced into the definition of moveable property the words "juice in trees." This amendment of the definition would seem to be in consequence of a decision of the Calcutta High Court in the case of *Janoo Mundur v. Hucha Mundur* (3) where the Court held though with some doubt that S. 50 of the Act of 1866 had no application to a lease of a right to take the juice of date trees. In view of the definition to which I have referred I do not think the present case is governed by the decision of this Court in *Sukry Kurdappa v. Goondakull Nagireddi* (1).

In *Seeni Chettiar v. Santhanathan Chettiar* (2) the interest assigned was a right to cut and enjoy for four years the trees, etc., and the grass, korai, gum, karuvella nut etc., which grew in a certain tank for a certain period. Under the instrument the party was entitled to cut and carry away the whole of the vegetable produce growing in the tank in question. The effect of the definition to which I have referred was not considered in that case because no question of the right to take the "juice in trees" arose. In that case the Court was of opinion that the instrument created an interest in immovable property. Subramania Aiyar, J., in his judgment on p. 66 observed that "The fact that the comparatively long period of a little more than four years was granted to the defendant for cutting and removing the trees is to my mind strongly in favour" of the view expressed in the case of *Marshall v. Green* (4) that "it was contemplated that the purchaser should derive a benefit from the further growth of the thing sold from further

(1) [1870-71] 6 M. H. C. R. 71.

(2) [1897] 20 Mad. 58=6 M. L. J. 281 (F.B.).

(3) [1869] 12 W. R. 366.

(4) [1876] 1 C. P. D. 35=45 L. J. C. P. 153=33 L. T. 404=24 W. R. 175.

vegetation and from the nutriment to be afforded by the land."

Shephard, J. pointed out that under the instrument then in question it was not merely the trees and grass then growing and ready to be cut that the defendant was to acquire. He was further to be at liberty and take all the trees which might grow on the ground within the period named.

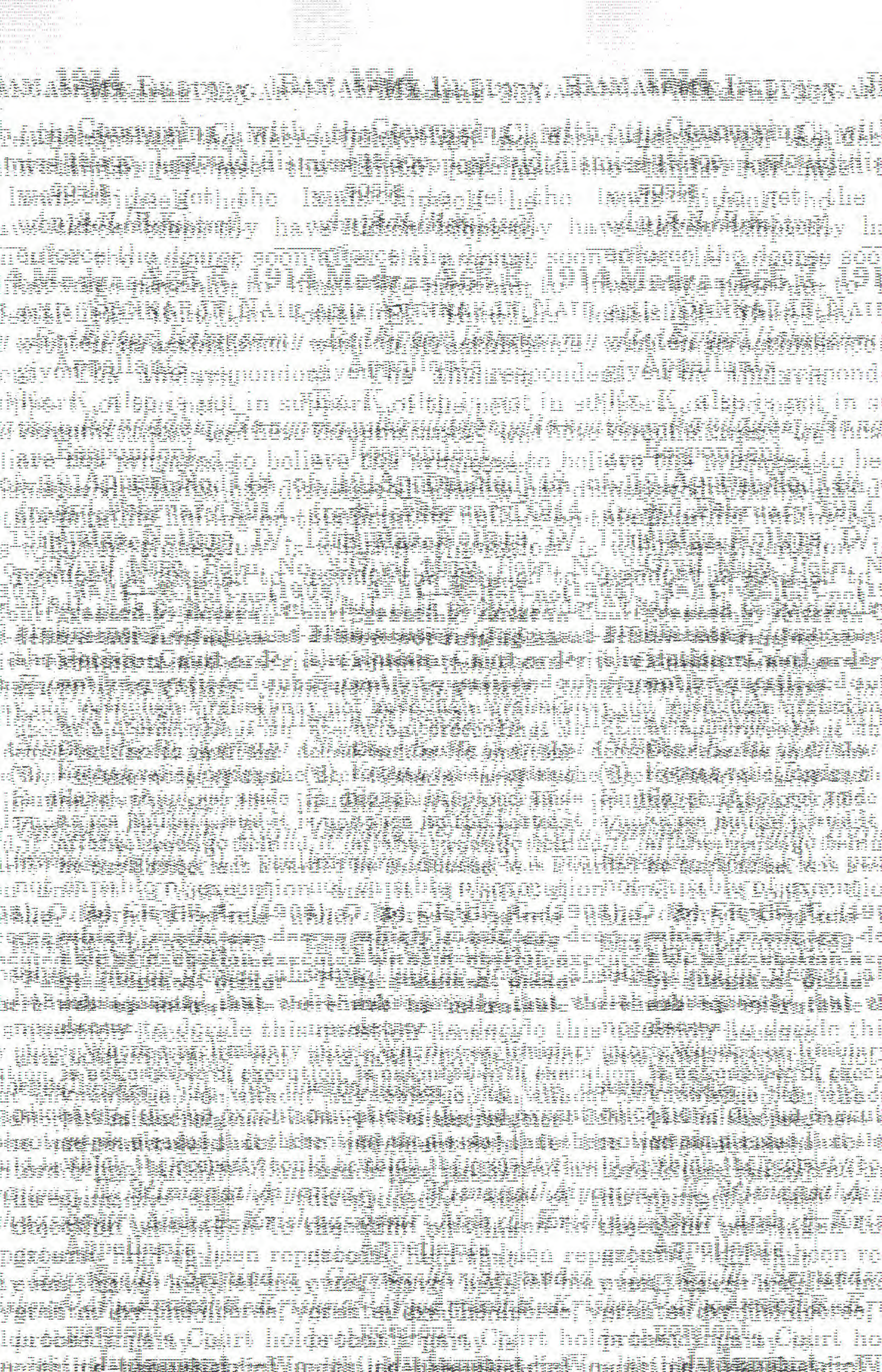
The instrument in question in the present case only gives the right to take toddy and fruit for two years. No doubt any license under which a person is entitled to take toddy in a sense creates an interest in land since without land there would be no tree and without tree there would be no toddy. It may be that in this case there is an implied contract or covenant that the lessor should not cut down the trees in derogation of his own grant. But having regard to the definition to which I have referred, it seems to me the right view is that the instrument in question is not a lease of immovable property and that the interest conveyed by the document is not for the purposes of the Registration Act, an interest in immovable property.

Accordingly I would dismiss this appeal with costs.

Oldfield, J.—The first of the two cases on which the defendant has relied, *Sukry Kurdappa v. Goondakull Nagireddi* (1) can be dismissed shortly because at its date "moveable property" was not defined for the purpose of registration as it now is.

The second *Seeni Chettiar v. Santhanathan Chettiar* (2) was decided after the amendment of the definition in 1871 though without explicit reference to it and it was held that an instrument authorizing the enjoyment and removal of trees, grass and other produce in a tank bed for a period of four years for a consideration of Rs. 3,400 required registration. Now, although a right to the juice of trees was not conveyed by that instrument its terms indicating that no juice-bearing trees were in question, yet it resembled Ex. A in the present case to the extent that the trees being referred to in the judgment as timber, it dealt with moveable property as it is at present defined. That however was not held to be decisive as to the necessity for registration. The ground, on which registration was required was, in the

words of Subramania Aiyar, J., that "parties entering into such a contract may expressly or impliedly agree that the transferee shall enjoy, for a long or short period some distinct benefit to arise out of the land, on which the timber grows. In a case like that the contract would undoubtedly be not one in respect of mere moveables but would operate as a transfer of an interest in immovable property." And in deciding whether the contract then in question fell under the latter description the learned Judge expressly attached importance to its duration, four years and presumably also to the nature of the property, timber grass and under growth which would be augmented by spontaneous growth. No doubt in the present case in which plaintiff's right was to draw palmyra juice, cut such leaves as his doing so involved and take the fruits of the trees, his right to do so for two seasons entailed that he should benefit, to adopt an expression from *Marshall v. Green* (4) by "the nutriment afforded by the land." This benefit however is not in my opinion such an interest in land as S. 17 (1) (b), Registration Act, contemplates. For it involves only a stipulation that the trees are to remain available during the currency of the contract for the use specified in it, not any limitation on the transferor's enjoyment of the land as such. In *Seeni Chettiar v. Santhanathan Chettiar* (2), there was such a limitation. Although as observed in the judgment already referred to there was no such transfer of possession as would constitute a lease, the contract was still subject to the implied proviso that the transferor's "action did not injuriously affect the special rights conferred upon the defendant 1 with respect to the trees etc.," and the enjoyment of those rights would evidently have been irreconcilable with the retention of substantial enjoyment by the transferor. Here it has not been explained and it does not appear how any ordinary use of the land could affect the nutriment it afforded to the trees, their juice or their fruit. It is therefore possible to give unrestricted effect to the reference to the juice of trees in the definition of moveable property in S. 2 of the Act and to hold that Ex. A transferred no interest in immovable property.



A. I. R. 1914 Madras 366 (1)

SADASIVA AIYAR, J.

Adiraja Shetty—Petitioner.

v.

Vittil Bhatta and others—Respondents.
Civil Revn. Petn. No. 622 of 1912, Decided on 16th February 1914, from decree of Dist. Munsif, Karakal, in Small Cause Suit No. 33 of 1912.

Contract Act (9 of 1872), S. 23—Consideration to induce witness to give evidence in pro-note—Pro-note cannot be enforced as consideration is against public policy.

The consideration for a promissory note executed by the defendant to the plaintiff was that the former should induce a third person to give evidence in latter's favour in a pending suit.

Held: that the promissory note could not be enforced as the consideration for it was opposed to public policy: *Shadwell v. Shadwell*, 127 R. R. 604, *Ref.* [P 366 C 1]

B. Sitarama Rao—for Petitioner.

K. Y. Adiga—for Respondents.

Judgment.—Whether the fulfilment of a promise to *A* by *C* to perform a private obligation already incurred by *B*, under an agreement between *B* and *C* will form a good consideration for a promise by *A* to pay something to *B* is a question on which there has been some difference of judicial opinion: see *Shadwell v. Shadwell* (1) and Pollock's Contract Act, 3rd Edn., p. 155.

But the promise to perform a public duty (in the present case to give evidence as witness) by *B* cannot form good consideration for the promise by *A* to pay something to *C*. In my opinion, it is not merely an unreal or illusory consideration: see p. 26 of Pollock's Contract Act, 3rd Edn. "In the case of the duty" (on *B*) "being imposed by the general law, an agreement" to give something either to *B* or to any other person "as a reward" for *B* doing it is, in my opinion, also void as opposed to public policy.

The plaintiff is the petitioner in revision, and his suit brought on a promissory note executed by the defendant in consideration of plaintiff's friend's agreeing to give evidence (I shall take it to be true evidence) for the defendant (who was a litigant in former suit) was rightly dismissed by the lower Courts.

I dismiss the petition with costs.

S.N./R.K.

Petition dismissed.

A. I. R. 1914 Madras 366 (2)

SANKARAN NAIR AND AYLING, JJ.
N. Duraiswami Chetty—Appellant.

v.

N. Govindu Chetty and another—Respondents.

Original Side Appeal No. 40 of 1910, Decided on 23rd March 1914, from decree of Wallis, J., D/- 9th August 1910, in Civil Suit No. 6 of 1908.

Civil P. C. (1908), O. 19, R. 3—Meaning of affidavit stated.

A statement which merely recites facts to the best of the information and belief of the deponent, but does not state the source of his information, is not an affidavit within the meaning of O. 19, R. 3, and cannot be used as evidence in any judicial proceeding: *Young Manufacturing Company Limited, In re, J. L. Young v. J. L. Young Manufacturing Company Limited*, (1900) 2 Ch. D. 753, *Foll.* [P 367 C 2]

K. Ramachandran—for Appellant.

W. V. Rangaswami Aiyangar—for Respondents.

Judgment.—A preliminary decree for partition was passed on 23rd July 1909 directing that an account should be taken of the assets and liabilities of the joint Hindu family to which the parties belonged. The decree also contained the following directions: "Each party hereto for the purpose of taking the said accounts do, on or before the 23rd day of August 1909, file in Court his account of all the property, both moveable and immovable, in his possession; and also of family credits and liabilities verified by the affidavit of himself or some duly qualified person; and that each party do, on or before 6th day of September 1909 file in Court statements, surcharges and objections thereto; and all parties shall be entitled to inspect all books of account and papers and the said statements of accounts and objections." On 23rd August the plaintiff filed his statement of accounts. There was no statement of objections or surcharges filed by defendant-appellant 1 before us before 6th September. He however made an application on 16th November for leave to file the statement. That application was rejected by the learned Judge and he proceeded to determine the case on the evidence before him. His judgment so far as it is material runs as follows: "The plaintiff's account verified by affidavit is the only evidence before me. I find that the properties available for division are those set up in the affidavit filed by the plaintiff on 23rd August 1909." In the

(1) [1861] 127 R. R. 603=9 C. B. (n. s.) 159=
=S. C. 30 L. J. C. P. 145=7 Jur. (n. s.)
311=3 L. T. (n. s.) 628=9 W. R. 163=
142 E. R. 62.

so-called affidavit referred to, the plaintiff stated as follows :

"The particulars given below represent to the best of my information and belief the credits and liabilities of the said joint family." Among the particulars so given are mentioned the following items which form the subject matter of this appeal :

	Rs.	a.	p.
Cash collections ...	1,870	0	0
Money paid as compensation to the husband of one Manikammal ...	250	0	0
Capital in rice and maligai business ...	3,000	0	0
Profits from the rice and maligai business from the year 1902 up to date ...	7,000	0	0

This was accordingly held to be family property available for partition. In appeal it is contended before us that this statement filed by the plaintiff on 23rd August is not evidence against defendant 1 and should not have been made therefore the basis of any decision against him. It is not denied that if it is an affidavit it would be evidence in the case. And the main question that is argued before us is whether this is an affidavit.

Order 19, R. 3, Civil P. C., runs thus :

"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted : provided that the grounds thereof are stated." It is argued before us that this statement was not filed on an interlocutory application and therefore any affidavit to be received in evidence should be confined to facts within the plaintiff's knowledge ; and secondly, even on interlocutory applications on which statements of belief may be accepted it is essential that the grounds thereof should be stated ; and reliance is placed on the decision in *Young Manufacturing Company Limited, In re J. L. Young v. J. L. Young Manufacturing Company Limited* (1). This is a decision on O. 38, R. 3, English Rules of Practice of the Supreme Court, which runs in the same terms. In that case the Lord Chief Justice said :

"I notice that in several instances the deponents make statements on their 'in-

formation and belief' without saying what their source of information and belief is, and in many respects what they so state is not confirmed in any way. In my opinion so-called evidence on 'information and belief' ought not to be looked at at all, not only unless the Court can ascertain the source of information and belief, but also unless the deponent's statement is corroborated by someone who speaks from his own knowledge. If such affidavits are made in future, it is as well that it should be understood that they are worthless and ought not to be received as evidence in any shape whatever; and as soon as affidavits are drawn so as to avoid matters that are not evidence, the better it will be for the administration of justice." O. 19, R. 3, Civil P. C., is quite clear. We are therefore constrained to hold that the statement filed by the plaintiff is not an affidavit and therefore not evidence against defendant 1. It is conceded that there is no other evidence in the case. It appears however from the judgment of the learned Judge dated 15th December that his attention was not drawn to the fact that the statement of the plaintiff was based only on information and belief, though the pleader for the defendant may have argued that this statement is not evidence against him. We think therefore the plaintiff should be given an opportunity of proving his statements. We accordingly request the learned Judge to give the plaintiff an opportunity of adducing evidence to prove his allegations in his statement and return a finding on the question whether the plaintiff has proved that the amount aforesaid or any portion thereof is family property.

Seven days will be allowed for filing objections. The appellant prays that he may be allowed to call evidence before the learned Judge. We leave that question to be determined by him.

(In compliance with the order contained in the above judgment the Hon'ble Wallis, J., sitting in the Original Side of the High Court, returned the following :)

Finding.—This suit having been heard on 11th October 1912, 12th November 1912, and 28th March 1913, and coming on this day (4th April 1913) on reference for the finding called for by the appellate Court in the presence of Mr. W. V.

(1) [1900] 2 Ch. D. 753=69 L.J. Ch. 868=83 L.T. 418=49 W.R. 115.

Rungasamy Aiyangar, vakil for the plaintiff herein, of Mr. K. Ramachandran, vakil for defendant 1, and of Mr. T. Ethiraja Mudaliar, vakil for defendant 2, and upon reading the appeal, judgment and order made herein and dated the 29th day of August 1912, the order made herein, and dated the 12th day of November 1912, the report of the Commissioner appointed herein filed on the 15th day of January 1913, the statement of objections of defendant 1, filed on the 23th day of January 1913, the order made herein and dated the 28th day of March 1913 and the further report of the said Commissioner filed herein on 3rd day of April 1913, this Court doth find that in respect of items 1 and 2, referred to in the said appeal judgment, the full amount of those two items are family properties and that in respect of items 3 and 4 of the said judgment there is only a sum of Rs. 777-5-3 belonging to the joint family as shown hereunder, i.e., the total amount of assets in the rice and maligai business with defendant 1 herein is Rupees two thousand one hundred and five, annas eleven and pies eight (Rs. 8,105-11-8), the sale price of the outstandings purchased by defendant 1 is rupees three thousand five hundred and five (Rs. 3,505), and the amount allowed to defendant 1 as per order of this Court dated 28th March 1913 is rupees seven hundred and fifteen (Rs. 715), and that the balance due by defendant 1 is rupees four thousand eight hundred and ninety-five, annas eleven and pies eight (Rs. 4,895-11-8), and that the net amount of assets in the hands of defendant 1, divisible among the parties hereto, after deducting therefrom the sum of rupees four thousand, one hundred and eighteen, annas six and pies five (Rs. 4,118-6-5) the debts due by the irrecoverable business is rupees seven hundred and seventy seven, annas five and pies three (Rs. 777-5-3); and this Court doth order that the remuneration of Mr. R. Subramania Aiyar, the Commissioner appointed herein, be fixed at the sum of rupees four hundred (Rs. 400) and that the same be paid by defendant 1 in the first instance and divided between the plaintiff and defendant 1 herein.

(This appeal coming on Friday, 13th February 1914, and having been posted to be spoken to this day for final hearing after the return of the above finding upon the issue referred by the appellate

Court for trial, the Court delivered the following:)

Judgment.—We accept the finding and modify the decree in accordance therewith. Each party will bear his own costs in this appeal.

S.N./R.K. *Decree modified.*

A. I. R. 1914 Madras 368

SADASIVA AIYAR, J.

Bila Sanyasi Naidu — Defendant —
Petitioner.

v
Agnihotram Venkatacharyulu and
others—Plaintiffs—Respondents.

Civil Revn. Petn. No. 662 of 1912, Decided on 6th February 1914, from decree of Dist. Judge, Vizagapatam, in Appeal Suit No. 174 of 1911.

Madras Estates Land Act (1908), S. 3 — Inam granted prior to Permanent Settlement is not an "estate" within the Act and suit by such zamindar is not cognizable by revenue Court.

An inam granted by a zamindar prior to Permanent Settlement is not an "estate" as defined in the Estates Land Act, nor is such an inamdar a "landholder" within the meaning of this expression in that Act.

A Suit by such an inamdar to recover rent is therefore, not cognizable by a revenue Court: 20 I.C. 769, *Foll.* [P 369 C 1]

S. Srinivasa Aiyangar—for Petitioner.

B. N. Sarma—for Respondents.

Judgment.—This is a petition under S. 115, Civil P. C., to revise the decree of the District Judge of Vizagapatam in Appeal Suit No. 174 of 1911. The suit out of which that appeal arose was brought by some inamdars against their tenant to recover rent due for the first two instalments of the year Soumya. The plaintiffs' suit was decreed on certain findings of fact and of law. There are nine grounds in the memorandum of civil revision petition presented to this Court. The phrase "the Court below acted illegally and with material irregularity" occurs in several of these grounds but I am satisfied that it only means that the Court committed some error of law or other in arriving at certain findings of facts or of law. S. 115 therefore has no application and the contentions raised in these grounds must be rejected. The only contention which really relates to the question of jurisdiction is that raised in the sixth ground of the memorandum, namely "that a suit for rent of this land ought to have been preferred before the revenue Court"

though the reason why the jurisdiction of the ordinary civil Courts is ousted is not expressly mentioned even in this ground.

It is argued that the inam falls under the definition of an estate within S. 3, Estates Land Act, that therefore the plaintiffs are "landholders" and that the suit for rent against a tenant holding under a landholder ought to be brought in the revenue Courts and not in the civil Courts. It appears in this case that the inam had been granted by a former Maharajah before the issue of the Permanent Settlement sannad to the Maharajah of Vizayanagaram, and, following *Tadikonda Buchi Virabhadrayya v. Sonti Venkanna* (1), I must hold that the inam is not an "estate" or part of an estate nor are the inamdars "landholders" within the definitions of those terms contained in the Estates Land Act. The jurisdiction of the civil Courts has therefore not been lost over a suit for rent by such an inamdar.

I dismiss the petition with costs.

S.N./R.K. *Petition dismissed.*

(1) [1913] 20 I. C. 769.

A. I. R. 1914 Madras 369 (1)

SADASIVA AIYAR, J.

Amirtham Pillai—Defendant—Petitioner.

v.

Nanjah Gounden and *another*—Plaintiffs—Respondent.

Civil Revn. Petn. No. 129 of 1913, Decided on 5th February 1914, from decree of Sub-Judge, Nilgiris, in Small Cause Suit No. 674 of 1912.

(a) **Promissory note**—Promissory note signed by one on condition that other should sign—Person signing is not liable if condition is not fulfilled.

Where one person signs a promissory note on the condition that another person who was to be jointly liable with him should join in the execution and the latter does not, the former is not liable: 25 *Mad.* 389, *Foll.* [P 369 C 2]

(b) **Promissory note**—Material alteration—Material alteration invalidates whole promissory note.

A material alteration invalidates a whole note. This principle applies to a case where although there has been no alteration after the note came into existence, the note was created in the first instance itself with a forged signature of a material character. [P 369 C 2]

T. R. Venkatrama Sastri—for Petitioner.

Judgment.—If, as is implied in the plaint, the two defendants were intended to be jointly liable for the plaint debt,

and were together to execute the promissory note, Ex. A, for that debt so as to make themselves jointly liable, and if defendant 1 did not join in the execution as found by the Subordinate Judge and only defendant 2 signed it, even defendant 2 could not be made liable as he agreed to be liable only if defendant 1 was also jointly made liable: see *Sivasami Chetti v. Seragan Chetti* (1).

Further, a material portion of the promissory note being a forgery, it seems to come within the principle of the decisions which hold that a material alteration invalidates the whole note. I find that that principle has been so applied to a case where there seems to have been no alteration after the note came into existence, but the note was created in the first instance itself with a forged signature of a material character: see Civil Revision Petition No. 601 of 1912, per Miller, J.

I therefore accept this petition and modify the lower Court's judgment by dismissing the suit against defendant 2 also. Defendant 2 will bear his own costs in both Courts.

S.N./R.K. *Petition allowed.*

(1) [1902] 25 *Mad.* 389 = 12 *M. L. J.* 17.

A. I. R. 1914 Madras 369 (2)

SANKARAN NAIR AND AYLING, JJ.

Tommenindi Adeyya—Defendant 1—Appellant.

v.

Chilukuri Venkatarayudu and *others*—Plaintiffs 1 to 4 and Defendants 2 and 3—Respondents.

Appeals Nos. 206 and 207 of 1912, Decided on 28th January 1914, from order of Sub-Judge, Kistna, D/- 28th June 1912, in Appeal Suit No. 315 of 1911.

Civil P. C. (1908), O. 23, R. 1—Suit for partnership and accounts—Amount due to one defendant ascertained and court-fee paid thereon—Suit withdrawn by plaintiff—Defendant's claim must be tried.

Where a plaintiff in a suit for a dissolution of partnership and accounts withdraws the suit after the share of the profits due to one of the defendants has been ascertained, and the court-fee due on it paid by that defendant, he is entitled to pray that his claim must be tried.

[P 370 C 1]

V. Ramesam and *G. Venkataramiah*—for Appellant.

B. N. Sarma—for Respondents.

Judgment.—The suit was for dissolution of partnership and to take accounts. Defendant 2 also in his written state-

ment prayed that accounts may be taken and the plaintiff and defendant 1 may be made to pay him his share of the profits. When the amount was ascertained he paid the court-fee on it. Subsequently the plaintiff withdrew his suit under O. 23, R. (1), Civil P. C. He is entitled to do so on payment of the costs which it is open to the Court to direct him to pay. The question that now arises for decision is whether defendant 2 is entitled to pray that his claim must be tried. We think that according to the decision reported as *McGowan v. Middleton* (1), he is so entitled and that the withdrawal of the suit by the plaintiff does not put an end to it so as to prevent defendant 2 from enforcing the claim put forward in his written statement. We do not see any reason for not following that decision. We think therefore the Subordinate Judge is right and dismiss these appeals with costs.

S.N./R.K. Appeals dismissed.

(1) [1888] 11 Q. B. D. 464=52 L. J. Q. B. 355=31 W. R. 835.

A. I. R. 1914 Madras 370

SADASIVA AIYAR AND TYABJI, JJ.

Secy. of State—Petitioner.

v.

Sankara Pandiam Pillai—Respondent.

Civil Misc. Petn. No. 2122 of 1912,
Decided on 20th February 1914, for
extension of time.

(a) Criminal P. C. (1898), S. 195 (6)—High Court can extend time to institute complaint of perjury when more than six months have elapsed from order of sanction—Penal Code (1860), S. 193.

A High Court has power under S. 195, Cl. (6), to extend the time for the institution of a complaint of perjury when more than six months have elapsed from the date of the order according sanction : 26 *Mad.* 480, *Foll.*; 11 *I. C.* 246, *Diss. from.* [P 370 C 2]

(b) Criminal P. C. (1898), S. 195—When person against whom complaint had to be made is responsible for delay, he cannot object to extension of time.

Where delay in instituting a complaint under S. 193 is due to the act of the person against whom the complaint had to be made, it is not open to him to object to the extension of time when applied for.

Obiter.—It is not advisable in such criminal matters to delay the disposal of the case simply to wait the return of one of the two Judges to duty who ordered notice to issue to respondent to show cause against extension. [P 370 C 2]

Government Pleader—for Petitioner.

M. D. Devadoss—for Respondent.

Order.—The respondent's counsel contends that the High Court has no

power to extend the time for the institution of a complaint or sanction, if once the six months' period mentioned in S. 195, Cl. (6), Criminal P. C., has expired. He admits that the cases in *In re Muthukulam Pillai* (1) and *Karuppanna Servagaran v. Sinna Gounden* (2) are against his contention, but he relies on two Calcutta cases (the latter *Ananta Panda v. Mohant Bhagabin Ramanuja* (3) and the reasons given therein). We prefer to follow the two decisions of this Court, one of which was decided by two very learned Judges of this Court and the other by the learned Chief Justice : see also as to the probable intention of the legislature, S. 148, Civil P. C.

The next contention is that the respondent has had this threat of prosecution hanging over him for more than four years now and it is inadvisable to extend the time under these circumstances. It is the step which the respondent himself took in preferring an appeal and again a second appeal which caused most of the delay. The office also was responsible for much of the delay which has taken place after 6th December 1912.

In a criminal matter like the present it is not advisable to delay the disposal of the case simply for the return to duty of one of the two Judges who ordered the issue of the notice to the respondent to show cause against the extension of time.

We think that an accused should not escape a prosecution for perjury merely by reason of the delay caused in the disposal of the sanction proceedings, and though the complainant need not have waited till the disposal of the second appeal to institute his complaint, his so having waited was not so unreasonable as to justify the refusal of the petition for extension of time to institute his complaint, this petition having been filed very shortly after the respondent's second appeal to the High Court was dismissed. In the cases of *In re Muthukulam Pillai* (1) and *Karuppanna Servagaran v. Sinna Gounden* (2) also the fact that no complaint was made before the final order of the highest Court was passed was not treated as disentitling

(1) [1903] 26 *Mad.* 190=2 *Weir* 200.

(2) [1903] 23 *Mad.* 430=2 *Weir* 201.

(3) [1911] 11 *I. C.* 246=12 *Cr. L. J.* 332

the complainant to obtain an extension of time from the High Court.

In the result we extend the time for institution of the complaint till 20th March 1914.

S N./R.K.

Petition allowed.

* A. I. R. 1914 Madras 371

AYLING AND TYABJI, JJ.

Karuppan Ambalagaran and others —
Plaintiffs—Appellants.

v.

Muhammad Sakuth Levvai — Defendant—Respondent.

Second Appeal No. 678 of 1911, Decided on 14th October 1913, from decree of Sub-Judge, Nagapatam, in Appeal Suit No. 18 of 1910.

* (a) Contract Act (1872), S. 69—Collusive transferee without consideration paying off mortgage debt is not entitled to lien on mortgage property as against purchaser with valuable consideration.

A nominal and collusive transferee without consideration, who, being sued jointly with his ostensible transferor, by a person holding a mortgage on the property, pays off the mortgage debt in satisfaction of the decree passed in favour of the mortgagee, is not entitled as against a purchaser for value to have a lien on the mortgage property for the sum which he has so paid off. Such a person is neither under a legal obligation to make the payment nor has he any right of his own which it is necessary for him to protect. It cannot be held that he enjoys any interest in the property by reason of the nominal and collusive purchase: 4 I. C. 1077, *Dist.* [P 371 C 2, P 372 C 2]

(b) Transfer of Property Act (1882), S. 74—(Per Ayling, J.)—Doctrine of subrogation is not applied to mere stranger or volunteer.

Per Ayling, J.—The doctrine of subrogation is not applied for the mere stranger or volunteer who has paid the debt of another without any assignment or agreement for subrogation, being under no legal obligation to make the payment and not being compelled to do so for the preservation of any rights or properties of his own: 1 I. C. 913, *Ref.*; 21 *Mad.* 143 and 5 I. C. 33, *Dist.* [P 372 C 1]

(c) Transfer of Property Act (1882), S. 74—(Per Tyabji, J.)—Subrogation is substitution of one person in place of another whether as creditor or possessor of any rightful claim.

Per Tyabji, J.—Subrogation in its wider signification is a substitution, ordinarily the substitution of another person in the place of one creditor, so that the person in whose favour it is exercised succeeds to the rights of the creditor in relation to the debt. More broadly, it is the substitution of one person in the place of another, whether as creditor or as the possessor of any other rightful claim. The substitute is put in all respects in the place of the party to whose rights he is subrogated. The right does not necessarily rest on contract or privity, but upon principle of natural equity, and does not depend upon the act of the creditor, but may be

independent of him and also of the debtor. It is however a purely equitable right and subject to all the rules of equity. [P 374 C 1]

(d) Transfer of Property Act (1882), S. 74—In allowing subrogation regard should be had to recognized principles by which Courts of equity are guided.

In deciding whether in any particular case it would be equitable to allow the right of subrogation, it is not a certain or conclusive test to see whether the person claiming it is a stranger or volunteer. Regard should be had to the recognized principles by which Courts of equity are guided. The plaintiff must come to Court with clean hands. [P 374 C 2]

(e) Contract Act (1872), Ss. 69 and 70—Ss. 69 and 70 only contemplate personal liability.

Sections 69 and 70, Contract Act, do not refer to any charge or lien upon any property and seem to contemplate, at least primarily, only a personal liability. [P 373 C 2]

C. S. Venkatachariar—for Appellants.

K. S. Ganapathi Iyer—for Respondent.

Ayling, J.—The vakil for the appellants has not attempted to support the sale deed, Ex. A, before us; but has confined himself to arguing that the Subordinate Judge was wrong in refusing to allow his client a charge on the property to the extent of the money paid by him in satisfaction of the decree in Original Suit No. 56 of 1906, which was brought on a mortgage executed by the owner of the land (the appellant's brother) in favour of one Raman Ambalagaran prior to Ex. A.

The Subordinate Judge rejected this claim on two grounds: (1) that the prayer for the charge is not maintainable in this suit, brought primarily to enforce the sale under Ex. A, (2) that the plaintiff, being a mere "volunteer," cannot claim to be subrogated.

As regards the first, the Subordinate Judge depends on *Kutti Chettiar v Subramania Chettiar* (1). In the present case, the plaintiff has in his plaint sued in the alternative for a declaration of his charge, and has taken an issue on it in the original Court, while no objection was raised on the ground of misjoinder of causes of action. In such circumstances, the ruling quoted appears inapplicable.

The second point requires fuller consideration. The principles, on which the right of subrogation should be applied, have been discussed at length by a Bench of the Calcutta High Court in *Gurdeo Singh v. Chandrikah Singh and*

(1) [1909] 4 I. C. 1077=32 *Mad.* 485.

Chandrikah Singh v. Rashbehari Singh (2), and I cannot do better than quote the remarks of Mookerjee, J., who has thus tersely summarized the matter:

"The doctrine of subrogation is not applied for the mere stranger or volunteer who has paid the debt of another, without any assignment or agreement for subrogation, being under no legal obligation to make the payment, and not being compelled to do so for the preservation of any rights or properties of his own."

In the present case, there was no assignment or agreement and the only question is whether, in view of the facts of the case, the appellant can be deemed to have been under any legal obligation to discharge the decree in Original Suit No. 56 of 1906, or whether he was obliged to do so for the preservation of any right of his own. The facts are briefly these: On 19th September 1900, the owner of the property, Raman Ambalagaran, sold it to the plaintiff who was his brother, under Ex. A, for a nominal consideration of Rs. 400. Of this Rs. 41-8-0 is recited as paid in cash, the balance was represented by the debts, one by the vendor under a promissory note and two hypothecation deeds which the vendee was to discharge. The Subordinate Judge has found this sale to be collusive and voidable at the instance of the defendants. Possession did not pass under it and not a pie of consideration was paid under it at the time or till seven years later. So far as appears, it was a purely nominal transaction.

On 16th December 1900, the plaintiff's lands were attached by the defendant in execution of a decree against Raman Ambalagaran; but they were not brought to sale till 28th February 1908, when they were purchased by the defendant himself, the sale being confirmed on 30th March 1908.

Meantime, the mortgagees under one of the hypothecation deeds referred to in Ex. A, filed a suit (Original Suit No. 56 of 1906 on the file of the Negapatam District Munsif) for the recovery of the amount due on the deed; and the plaintiff was impleaded as a subsequent purchaser of the hypotheca. The result was a decree (Ex. 6) dated 19th March 1907. This directs the defendant in the suit to pay the plaintiffs in the same the amount

due under the suit hypothecation bond with interest and costs, failing which the hypotheca were to be brought to sale in the usual way. It was represented to us that this decree makes the present appellant personally liable for the amount due under the hypothecation deed; but a careful consideration of the document has convinced me that this is not the case. The decree is not drawn up in the form given in the schedule to the present Code of Civil Procedure; but I feel no doubt that it was intended and understood as simply a decree for the realization of the mortgage amount by the sale of the hypotheca. It is specifically recited that the present appellant was impleaded only as a subsequent purchaser; and it is obvious that, as such, he could not possibly have been held personally liable for the mortgage amount.

Subsequently, as appears from Exs. E and F, the decree-holders took steps to bring the property to sale. The sale was however stopped on payment of Rs. 100 by the appellant on 19th April 1907. The appellant made a subsequent payment of Rs. 50 and the decree was finally satisfied by a payment by the appellant of Rs. 205 on 13th March 1908. This latter date, it may be remarked, is 14 days after the Court's sale to the defendant, and 17 days before its confirmation. It is in respect of these payments that the plaintiff claims subrogation.

After careful consideration, I think the Subordinate Judge was right in disallowing it. The plaintiff was neither under a legal obligation to make the payments nor had he any right of his own which it was necessary for him to protect. It cannot be held that he enjoyed any interest in the property by reason of the nominal and collusive sale deed, Ex. A, executed seven years before, which had never been given effect to, and for which not a pie of consideration had ever passed. The appellant's *vakil* has relied on two cases, *Syamalarayudu v. Subbarayudu* (3) and *Palamalai Mudaliyar v. The South Indian Export Co., Ltd.* (4), as being cases similar to the present in which subrogation was allowed. But a perusal of the judgments in these cases shows that in each the person claiming subrogation was at the time of making:

(3) [1898] 21 Mad. 143.

(4) [1910] 5 I. C. 33=33 Mad. 334.

(2) [1909] 1 I. C. 913=36 Cal. 193.

payment a transferee of the property for valuable consideration. He may have been guilty of fraud or misconduct in connexion with the transfer which might render it voidable at the instance of another property; but he had paid consideration for the transfer and was possessed, at the time he discharged the mortgage, of a substantial interest on the property. The payments for which subrogation was claimed were necessary to protect that interest. This, as it seems to me, is a very real distinction between those cases and the present one.

I consider that the Subordinate Judge's decision was right; and would dismiss the appeal with costs.

Tyabji, J.—The defendant is in possession of property purchased in Court sale. The plaintiff claimed possession of the same property which he said had been sold to him prior to the Court sale on which the defendant relies. Alternatively, the plaintiff claimed a lien on the property for the moneys paid out by him (on the basis of his having been the valid purchaser of the property) in order to discharge a mortgage then subsisting on it. I agree that the case of *Kutti Chettiar v. Subramania Chettiar* (1) is distinguishable on the ground referred to by my learned brother. It has been found that the alleged purchase by the plaintiff was inoperative. The only question, therefore, is whether the plaintiff is entitled to a lien on the property for the sums so paid by him.

The alleged sale to the plaintiff was by Ex. A, executed on 19th September 1900. The consideration for that sale purported to be Rs. 400, made up of four items one of which was the payment off of the mortgage to which I have alluded and under which Rs. 190 were stated to be due on the property from the ostensible vendor of the plaintiff. It has been found that the plaintiff paid no portion of the consideration for the alleged sale at the time when Ex. A was executed. In 1906, however, the mortgagee instituted a suit against the plaintiff and his ostensible vendor on the basis of the mortgage. A decree was then passed for the sum due on the mortgage, and the plaintiff (who was defendant 2 in that suit) discharged the mortgage claim by paying Rs. 355, which included

Rs. 190 for the principal mortgage debt, about Rs. 45 for costs and the rest for interest on the said Rs. 190. I agree with my learned brother that, on the true construction of the decree, the plaintiff was not bound personally to pay the amount of the decree, but in the view that I take of this case, that question is not of much importance and it may be assumed that the construction suggested by the plaintiff is correct, and that the plaintiff permitted a decree to be passed against himself personally. It is argued on behalf of the plaintiff that he is entitled to a charge on the property for the said sum of Rs. 355 by operation of the doctrine of subrogation, or by operation of the principle laid down in, or forming the basis of S. 70, Contract Act. Hence, the question may shortly be stated to be whether under the circumstances of this case, a nominal and collusive transferee without consideration, who being sued jointly with his ostensible transferor by a person holding a mortgage on the property, pays off the mortgage debt in satisfaction of the decree passed in favour of the mortgagee, is entitled as against a subsequent purchaser for value to have a lien on the mortgaged property for the sum which he has so paid off.

It is necessary, in the first instance, to point out that the plaintiff here claims to fix a charge on the property and his claim is not merely personal as against those with whom he had dealings. Ss. 69 and 70, Contract Act, do not refer to any charge or lien upon any property, and seem to contemplate, at least primarily, only a personal liability. No legislative provision contained in any Act was cited to us directly covering the point, but there are decisions of this Court which seem to recognize the right of subrogation in the wider sense in which it is understood in the Courts of the United States. Some decisions of those Courts are referred to by Mookerjee, J., in *Gurdeo Singh v. Chandrikah Singh* and *Chandrikah Singh v. Rashbehary Singh* (1). It seems desirable to refer to the exposition of the law of subrogation based on those decisions owing to the absence of any statutory definition of that right, and inasmuch as the English authorities seem to contemplate mainly one form of subrogation, viz., the substitution

of the insurer to the rights of the assured. [see Smith's Mercantile Law 10th Edn., pp. 502, 503, and Encyclopaedia of Laws of England (Subrogation)]; though subrogation was a creation of the civil law, it seems never to have been recognized to its full extent by the Common law : See the Cyclopaedia of American Law and Procedure, Vol. 37, p. 365, citing *Durant v. Ennaco* (5).

Subrogation, in its wider signification, has been defined as "a substitution, ordinarily the substitution of another person in the place of one creditor, so that the person in whose favour it is exercised succeeds to the rights of the creditor in relation to the debt. More broadly, it is the substitution of one person in the place of another, whether as creditor or as the possessor of any other rightful claim. The substitute is put in all respects in the place of the party to whose rights he is subrogated:" see the Cyclopaedia of American Law and Procedure, Vol. 37, pp. 363 and 364, citing *Townsend v. Cleveland Fire Proofing Co.* (6). The right so defined "does not necessarily rest on contract or privity, but upon principles of natural equity, and does not depend upon the act of the creditor, but may be independent of him and also of the debtor." It is however a purely equitable right and "there must, in every case where the doctrine is invoked, in addition to the inherent justice of the case, concur therewith some principle of equity jurisprudence as recognized and enforced by Courts of equity. Where the rights of subrogation exist, it is subject to prior equities and all the rules of equity."

It has been pointed out that one mode in which the question may be considered, whether the right of subrogation may be claimed, is to determine whether the person claiming it is a mere volunteer or stranger; for if so, then the right cannot—at least in the great majority of cases—be claimed. As I understand the law, the rule is merely a test for the application of the general principles stated above, being one aspect of the wider question whether subrogation can be claimed in the particular circumstances of the case on principles of justice, equity and good conscience. That test may not in some cases be con-

clusive, nor the most convenient, or direct method of arriving at a decision. It may be that a person cannot be described as a stranger, and yet he may not be entitled to the right. There may be other cases (though these would be rare) where the right is given to a person who can be taken out of the category of a volunteer, if at all, only by subtleties and fictions. Hence the determination of the question, whether or not the persons claiming subrogation is a stranger, may often be a circuitous and uncertain means for arriving at a decision on the real point.

In deciding whether in any particular case it would be equitable to allow the right of subrogation, regard should, in my opinion, be had to Ss. 68 to 72, Contract Act, which illustrate how relations resembling those created by contract may arise; subrogation (when it does not arise out of contract) creates such a relation. Regard should also be had to the recognized principles by which Courts of equity are guided; one of such principles material to the present case is that the party seeking the assistance of the Court must come before it with clean hands. The application of this general statement of the law to the facts of the present case will be best considered in connexion with the decided cases in which the right of subrogation in the wider sense has been recognized.

Much reliance was placed on the case of *Syamalarayudu v. Subbarayudu* (3). There the owner of the property entered into two separate agreements to sell the property at different times with two persons. The latter agreement was antedated by an illegal act of the plaintiff so as to make it appear that his rights had priority. It is argued that this case shows that a valid charge may be made upon property even by reason of payments made by a person who has been guilty of an illegal act for the purpose of depriving another of his right to purchase that property; and that therefore payments made in satisfaction of a decree passed against a person who has taken a transfer of the property in his name (though without consideration) and who is subsequently sued on the basis of his being the transferee of the property, have a greater claim to be considered as a charge upon the property after it is transferred to a later pur-

(5) 65 N. Y. App. Div. 435.

(6) [1881] 18 I.A. 568=47 N.E. 707 at p. 709.

chaser. It seems to me however that one distinction between the case reported as *Syamalarayudu v. Subbarayudu* (3) and the present case is overlooked in this argument. In that case the liability of a rightful purchaser to pay the mortgage was established in the very suit in which the sale to him was upheld. When the rightful purchaser's rights in the property accrued, the property was still subject to the mortgage which was discharged by the nominal purchaser, though it is true that the object for so discharging the mortgage was to strengthen the colourable purchase. On the other hand, in the case with which we have now to deal, the person who is sought to be charged with the mortgage debt was not a party to the suit on the mortgage, and he has had no opportunity of contesting its validity or effect. Again, here the payment off of the mortgage debt, which was made long after the ostensible sale, was, in fact, a portion of the consideration for the sale. In the reported case, the liability had been discharged apart from (though in one sense as a sequel of) the transaction vitiated by fraud, and it was explicitly held that the act of discharging the existing liability on the property under the mortgage was an act lawful in itself and that it did not form part of the fraud. Here a liability was purported to be taken upon himself by a person for the purpose of defrauding creditors, and it was only by discharging or appearing to discharge that liability so taken upon himself that effect was given to the fraud; this is the only payment made for giving colour to the nominal sale which has been found to be fraudulent. Where an act is in itself lawful and is quite distinct from the original fraudulent transaction it may stand on a better footing than an act which forms part of the fraud, though the validity of acts of the former class may be impaired when their connexion with the fraud is so close as to make them indistinguishable from those acts which form integral portions of the fraud, the question being one of degree.

Finally, in *Syamalarayudu's* case (3), the purchaser had agreed to purchase subject to the mortgage, and he was not charged with a liability which he had not contracted to meet; the result of subrogation in that case was that a

liability which had existed between the rightful purchaser and the vendor was merely transferred in favour of a third party; and such transfer did not put the rightful purchaser in any worse position than when he had contracted to purchase.

The next case, on which reliance was placed, was *Palamalai Mudaliar v. The South Indian Export Co., Ltd.* (4). In that case also, prior to the transfer in question, there was a valid mortgage decree subsisting on the property (not a personal decree against the parties), and the sale, though it was held to be voidable at the instance of creditors, was not a mere nominal transaction without consideration but the transferee had satisfied that decree so as to make the satisfaction enure to the benefit of the mortgagor and of his creditors.

The Court held (not without some doubt) that the sale was voidable at the instance of the creditors, inasmuch as it had the effect of defeating or delaying them; it followed therefore almost as a corollary that in so far as the sale had not delayed or defeated the creditors, but was actually for their benefit, it should be upheld.

Another head of argument on behalf of the appellant was that, but for the payment off of the mortgage by the plaintiff, the defendant would have been liable to pay it off, that the defendant must be taken to have purchased the property subject to the mortgage, and that the plaintiff was entitled to claim from him the sum in respect of the liability for which the defendant was relieved by the acts of the plaintiff. But that does not seem to me to represent the true state of facts. The real question for us is whether when the defendant purchased the property, there was any charge subsisting in favour of the plaintiff or anyone else against the property. In considering the question, it is clear that the case of both parties was that the original mortgage had been discharged and the property was held discharged from the mortgage; the plaintiff claimed to hold the property so discharged himself, and the defendant claimed that it was held by his judgment-debtor. It may be that in the Court sale, in which the defendant purchased the property, the biddings were lower than they would have been had there not been these doubts whether the property did or did not belong to

the plaintiff; but there was no question that the mortgage had been discharged. It has been now held that it did not belong to the plaintiff. The fact that the value of the property was depreciated by a fraudulent transaction to which the plaintiff was a party seems to me to be no reason for assisting the plaintiff as against an innocent third party.

Considering the facts of this case broadly, it seems to me that as between the plaintiff and the defendant it would not be equitable to permit the plaintiff to have the charge that he claims and that to do so would be going beyond any decision to which our attention has been drawn.

I agree, therefore, that the appeal should be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

* A. I. R. 1914 Madras 376 (1)

SADASIVA AIYAR AND SPENCER, JJ.

C. M. Apparu Pillai—Plaintiff—Appellant.

v.

Amir Sahib and others—Defendants—Respondents.

Letters Patent Appeal No. 52 of 1913, Decided on 18th November 1913, from order of Bakewell, J., in Civil Revn. Petn. No. 661 of 1912.

* Civil P. C. (1908), O. 4, R. 1—Presentation of plaint out of office hours to civil officer authorized to receive only during office hours is not proper presentation unless ratified.

A presentation out of office hours, of a plaint to an officer of Court, authorized to receive plaints within office hours only, is not a presentation unless ratified by the Court on that very day. [P 376 C 1]

A. Sundaram—for Appellant.

Judgment.—Presentation of a plaint to head clerk after office hours, the head clerk being authorized to receive plaints only within office hours, cannot be treated as a proper institution of the suit in the Munsif's Court on that day, unless on that same day, the District Munsif ratified the receipt by the District Munsif himself.

We think that the order of the learned Judge of this Court (refusing to revise the Munsif's dismissal of the suit as barred) is correct, and we dismiss this Letters Patent Appeal. We make no order as to costs as respondents do not appear.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Madras 376 (2)

SADASIVA AIYAR, J.

In re Thiruvengada Mudali—Accused—Petitioner.

Criminal Revn. No. 57 of 1914 and Criminal Revn. Petn. No. 49 of 1914, Decided on 23rd January 1914, from judgment of Sess. Judge, Chingleput, in Criminal Appeal No. 25 of 1913.

Criminal P. C. (1898), S. 162—Accused cannot as of right get copies of statements made to police under S. 162 if Magistrate refuses to furnish him with such copies.

An accused person is not entitled as of right to be furnished with copies of statements made under S. 162 to the police, and if a Magistrate refuses to furnish him with copies of such statements, it is not necessary for him to say in so many words that he does not think it expedient in the interests of justice to grant the copies to the accused. [P 376 C 2]

Osborne and P.R. Narayanasami Aiyar—for Petitioner.

Order.—Though if the prosecution case is wholly true or the defence is wholly true, there could have been only one occurrence and either the occurrence now charged must be false or the counter case in which some of the prosecution witnesses in this case were convicted must have been false, the learned Sessions Judge's opinion that both the occurrences are true cannot be said to be an illegal finding, as each of the two contending parties would naturally try to make out that the only occurrence that took place was the only one in which their party received injuries.

As regards the statements made to the police, "the Court" under S. 162 (1), Criminal P. C., "may, if it thinks it expedient in the interests of justice, direct that the accused be furnished with a copy thereof." Here all that appears is that the Magistrate refused to furnish a copy of such statements to the accused. I must take it that he did not consider it expedient in the interests of justice to direct copies to be furnished. The accused is not entitled, as of right, to be furnished with any such copies and, as I understand S. 162, it is only if the Magistrate considers it expedient in the interests of justice to grant such copies that the accused can obtain or use such copies. I do not think that *Dadan Gazi v. Emperor* (1) or *Salt v. Emperor* (2) is against this view of mine, and I do not

(1) [1906] 33 Cal. 1023=10 C. W. N. 890=4 Cr. L. J. 79.

(2) [1909] 2 I.C. 591=36 Cal. 560=10 Cr. L. J. 88.

accept the argument that, unless the Magistrate says that it is not expedient in the interests of justice to grant copies to the accused, the accused is entitled to get such copies or use them as evidence. I reject this petition.

S.N./R.K.

Petition rejected.

**** A. I. R. 1914 Madras 377
Full Bench**

WHITE, C. J., AND SANKARAN NAIR
AND OLDFIELD, JJ.

*Manavikrama Zamorin Raja Avergal
of Calicut and another—Defendants—
Appellants.*

v.

*R. P. Achutha Menon—Plaintiff —
Respondent.*

Second Appeal No. 1972 of 1911. Decided on 15th January 1914, from decree of Sub-Judge, South Malabar, in Appeal Suit No. 997 of 1910.

**** Limitation Act (1908), Art. 131 —
Art. 131 applies to suits for recovery of sums
due under periodically recurring right whether or not there is prayer for declaration.**

Article 131, Sch. 1, applies to suits brought to recover sums due under a periodically recurring right: (a) whether there is a prayer for a declaration that the plaintiff is entitled to such right, and (b) whether there is no such prayer.

[P 378 C 2, P 379 C 1, 2]

*T. R. Krishnaswamy Aiyar for T. R.
Ramachandra Aiyar—for Appellant 2.*

J. L. Rosario—for Respondent.

Order of Reference.

Ayling, J.—This was a suit for recovery of arrears of adima allowance for a period of eight years with interest. The District Munsif decreed the claim for three years only, holding the rest of it to be barred by limitation, and gave interest at 10 per cent. from date of demand. The Subordinate Judge held that no part of the claim was time-barred and gave a decree for the allowance at the rate fixed by the District Munsif for the full period claimed, with interest at the same rate. Against this the defendant appeals.

The first point argued before us relates to the rate of allowance and the award of interest. In neither respect do we see reason to interfere. In our opinion the evidence on record, though meagre, in the absence of anything to contradict it, justifies the findings of the lower Courts as to the rate of allowance; and we are not disposed to interfere with the discretion of the lower Courts as to the award of interest or the rate thereof.

The only other point is that of limitation. The District Munsif held the suit to be governed by Art. 115, Sch. 1, Lim. Act, while the Subordinate Judge considers Art. 131 to be the one applicable. We may say at once that, in our opinion, Art. 115 (for compensation for breach of contract, etc.) certainly cannot be applied. The adima allowance is described in the plaint as due to the plaintiff's tarwad from time immemorial; and even if we accept appellant's contention that Ex. A is the original grant (which does not appear to be the case), it is still a case of grant, and not of contract. If Art. 131 does not apply the suit must be governed by Art. 120.

The real question is however whether Art. 131 applies; and on this point there appears to have been considerable difference of opinion in different Courts. The article runs thus:

131. To establish Twelve When the
a periodically years. plaintiff is
recurring right. first refused
the enjoyment of the
right.

In the present case it is not denied that the right to the adima allowance is a periodically recurring one, but Mr. Ramachandra Aiyar argues that this suit is not one for the 'establishment' of the right but for the recovery of amounts due under the right. He contends that the article only applies to suits brought for a declaration of a periodically recurring right; and points out that the plaint in this case contains no prayer for a declaration, but asks for a decree for payment of a specified amount, being the arrears of the adima allowance.

Our attention is invited to Arts. 123 and 129, where a distinction is drawn between a suit for a declaration of right to maintenance and a suit for arrears of maintenance. According to appellant's contention the phrase used in Art. 131 "to establish" is equivalent to that in Art. 129 "for a declaration of the right." Respondent argues that the phrase "to establish" is intended to cover both classes of suits. We should be more inclined to adopt this view for the words used had been "to enforce."

On a consideration of the various articles in the schedule we should be disposed to hold Art. 131 to be inapplicable, but our attention has been drawn

to a series of rulings of this Court in support of the contrary view: *Ramnad Zamindar v Dorasami* (1), *Alubi v. Kunhi Bi* (2) *Balakrishna v. The Secretary of State for India* (3) and *Ratnamasari v. Akilandammal* (4).

The first of these, *Ramnad Zamindar v. Dorasmi* (1), calls for little remark, inasmuch as the decree which was the subject of appeal before the Court was merely one declaring the Ramnad Zamin-dari liable for a certain periodical payment, and not for any consequential relief.

In the next case however *Alubi v. Kunhi Bi* (2), the suit was not for a declaration of a recurring right, but for recovery of the actual amount payable thereunder, and the learned Judges said: "We think the plaintiff is entitled to recover twelve years' rent or revenue up to date of suit under Art. 131 as a recurring right, and also under Art. 132 as money charged on land." This is a clear expression of opinion on the point now at issue, and all that can be said is, as there was a charge in that case, and Art. 132 applied, it was unnecessary for the decision of the case to consider whether Art. 131 also applied.

The next case is *Balakrishna v. The Secretary of State* (3). This was a suit not for recovery of money, but "to establish plaintiff's right to certain yearly remissions and to have it declared that Government is not entitled to levy full assessment without granting those remissions." The learned Judges held that Art. 120, and not Art. 131, applied. They said; "Art. 131 applies only to those suits in which a decree for consequential relief is asked for by virtue of the periodically recurring right, and in the present case no such relief has been asked, although the remission claimed has been refused from the year 1878. We must therefore hold that Art. 120 applies to this suit which was brought to obtain a merely declaratory decree."

This, again, is a distinct expression of opinion, though it appears to involve the somewhat surprising result that a man asking merely for a decree declaring his periodically recurring right must sue within six years under Art. 120, where-

as, if he asked for relief consequential on the said right, he could claim twelve years under Art. 131. The starting point for limitation would presumably be the same in each case.

The last case is *Ratnamasari v. Akilandammal* (4). The scope of Art. 131 was not in issue, but Bhashyam Aiyangar, J., in the course of his judgment appears to hold that Art. 131 is not confined to a declaratory suit, but may include one "for recovery of arrears due in respect of a periodically recurring right." This remark is simply made in illustration of the learned Judge's argument on another point.

Two of these cases, *Ramnad Zamin-dari v. Dorasami* (1) and *Ratnamasari v. Akilandammal* (4), were considered by the Allahabad High Court in *Lachmi Narain v. Turabunnissa* (5), and expressly dissented from, though apparently under some misapprehension, of the true effect of the earlier case. The learned Judges preferred to hold that the language of Art. 131 "to establish a periodically recurring right" could not be extended to cases in which the plaintiff seeks to recover specific sums of money due to him in respect of a periodically recurring right.

The Colcutta High Court appears to take the same view: vide *Kallar Roy v. Gango Pershad Singh* (6) in which they held that a suit for recovery of arrears of malikanas where plaintiff does not seek to enforce a charge is governed by Art. 115. It is to be noted however that Art. 131 is not specifically referred to in the judgment.

The Bombay High Court has held in *Sakharam Hari v. Laxmipriya Tirtha Swami* (7) that Art. 131 does apply to a suit for arrears due under a periodically recurring right if brought against the person originally liable to pay.

In this conflict of rulings, and inclining as we do to a view contrary to that taken in previous decisions of this Court, we feel constrained to refer the following question for the decision of a Full Bench:

"Does Art. 131, Sch. 1, Lim Act, apply to suits brought to recover sums due under a periodically recurring right (a) where there is a prayer for a declaration

(1) [1884] 7 Mad. 341.

(2) [1887] 10 Mad. 115.

(3) [1893] 16 Mad. 294=3 M. L. J. 98.

(4) [1903] 26 Mad. 291=13 M. L. J. 27.

(5) [1912] 14 I. C. 505=34 All. 246.

(6) [1906] 33 Cal. 938.

(7) [1910] 5 I. C. 869=34 Bom. 349

that the plaintiff is entitled to such a right and (b) where there is no such prayer?"

Tyabji, J.—I agree. Art 131, Lim. Act, seems to me to have been meant to apply only where in the words of the article "the plaintiff has been refused the enjoyment of a periodically recurring right" and he wishes to establish that such a right exists. The language of the article does not seem to me to be appropriate to a suit for recovering sums that have become due under, or as a consequence of, such a right. Speaking with reference to the facts of this case it seems to me that the article applies to this suit in so far as it has reference to the establishment of the right to the adima allowance; but that the article does not refer to the claim for payment of the allowance already due under the right so established. The two questions are quite distinct and apart from the decisions cited by my learned brother, I should be inclined to doubt whether both were intended to be included within words which as I have said seem to me to be appropriate to only one of them.

This second appeal coming on for hearing before the Full Bench on 5th January 1914, upon perusing the grounds of appeal, the judgment and decrees of the lower appellate Court and the Court of first instance and the material papers in the suit and the order of reference to a Full Bench and upon hearing the arguments of Mr. T. R. Krishnaswamy Aiyar, for Mr. T. R. Ramachandra Aiyar, vakil for appellant 2, and of Mr. J. L. Rosario, vakil for the respondent, and the case having stood over for consideration till this day, the Court expressed the following:

Opinion

White, C. J.—If this matter had been res integra I should have been disposed to hold that Art. 131 should be construed as applying to a suit brought for the purpose of obtaining an adjudication as to the existence of an alleged periodically recurring right, and not to a suit in which it was sought to recover moneys alleged to be due by reason of the alleged right. The question of the existence of the right is no doubt distinct from the question of the right to recover moneys if it is established that the right exists. It is however difficult to see why the period of limitation should not in both

cases be the same, as it is in the case of a suit for a declaration of a right to maintenance and in a suit for arrears of maintenance. If the contention of the appellant is well founded, there is no article which deals specifically with the period of limitation in the case of a suit to recover moneys due under an alleged periodically recurring right. There is force in the contention that the use of the word "establish" and the fact that there is only one article in the case of a suit with reference to a periodically recurring right, and not two as in the case of suits based on an alleged right to maintenance, see Arts. 128 and 129, indicate that the legislature intended to deal with both classes of suits in Art. 131. I am not prepared to dissent from the view indicated in the Madras cases referred to in the order of reference, a view which has also been adopted by the Bombay High Court; see *Sakharam Hari v. Laxmipriya Tirtha Swami* (7). I would answer the question which has been referred to us in the affirmative.

Sankaran Nair, J.—The question is not free from doubt. But I am not prepared to differ from the decisions of this Court and I would therefore answer the question in the affirmative.

Oldfield, J.—I agree with the learned Chief Justice for the reasons stated by him.

S.N./R.K.

Reference answered.

A. I. R. 1914 Madras 379

SADASIVA AIYAR, J.

In re, C. M. Ramasamier—Accused—Petitioner.

Criminal Revn. No. 675 of 1913, and Criminal Revn. Petn. No. 546 of 1913, Decided on 5th February 1914, from judgment of Joint Magistrate, Mallapuram, in Criminal Appeal No. 62 of 1913.

Penal Code (1860), S. 426—Mortgagee cutting trees on mortgaged land to repair another part of mortgaged premises is not guilty of mischief.

A mortgagee openly cutting a few trees on the land mortgaged to him in order to repair another part of the mortgaged premises is not guilty of mischief. [P 380 C 1]

C. V. Ananthakrishna Aiyar and T. K. Govinda Aiyar— for Petitioner.

Public Prosecutor—for the Crown.

Order.—When the mortgagor has got the security of the mortgage money to compensate him for any damage caused by the mortgagees committing small

wastes, it would require very strong evidence to justify the conclusion that a mortgagee openly cutting a few trees from the mortgaged premises to repair a house on another portion of the same premises was guilty of an intent to cause wrongful loss and damage to the mortgagor when he so cut them down or that he knew it to be likely that such loss will be caused.

The conviction for mischief cannot be supported and I set it aside and order the fine to be refunded if levied.

S.N./R.K. *Conviction set aside.*

A. I. R. 1914 Madras 380 (1)

SADASIVA AIYAR AND SESHAGIRI
AIYAR, JJ.

Karia Kownden and others — Appellants.

v.

Raghava Reddi and others — Respondents.

Second Appeal No. 227 of 1912. Decided on 11th March 1914, from decree of Dist. Judge, South Arcot, in Appeal Suit No. 169 of 1910.

(a) **Jurisdiction** — Contravention of rules of guidance by Divisional Officer does not affect his jurisdiction to cancel grant of Tahsildar.

The fact that a Divisional Officer contravened certain rules framed for his guidance does not affect his jurisdiction to cancel a grant made by a Tahsildar. [P 380 C 1, 2]

(b) **Adverse Possession** — Trespasser's adverse possession restricted to particular portions in possession — Presumption that person with title has possession over whole land if he exercises ownership over portion, is inapplicable.

The ordinary presumption that a person having title has possession over the whole if he exercises acts of ownership only over a portion leaving the rest as waste does not arise in the case of a trespasser whose adverse possession will be restricted to the particular portions in his possession. [P 380 C 2]

T. R. Ramchandra Aiyar and *T. R. Krishnaswami Aiyar* — for Appellants.

Government Pleader and *Jagannatha Aiyar* — for Respondents.

Judgment. — The Sub-Collector, on appeal from the Tahsildar's order granting the plaint lands to the appellants, had jurisdiction to cancel that grant.

The fact that the Sub-Collector contravened some rules laid down for his guidance in some Standing Order No. 15 when he disposed of the appeal (assuming that he so contravened them), has nothing to do with his jurisdiction to quash on appeal the grant made by the

Tahsildar. The first contention in appeal therefore fails.

While there is a presumption in the case of a person having title that possession of the whole is in him even if he exercises acts of ownership only over a portion leaving the rest waste, there is no such presumption in the case of a trespasser whose adverse possession will be restricted to the particular portions in his actual possession. On the finding of the District Judge that the defendants never were in possession of any portion of the plaint lands for twelve years continuously, the contention as to limitation fails.

The defendants on the facts found could have had no honest belief (we do not exclude an honest belief entertained through negligence) that they were owners of the lands, and their claim for improvements was rightly disallowed.

The appeal fails and is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

* A. I. R. 1914 Madras 380 (2)

AYLING AND TYABJI, JJ.

In re. Kshatri Siva Singh — Accused — Petitioner.

Criminal Misc. Petn. No. 351 of 1913, Decided on 19th December 1913, from order of First Class Deputy Magistrate, Ellore, in Misc. Case No. 7 of 1913.

* Criminal P. C. (1898), S. 476 — Magistrate taking steps five months after trial without explanation for delay acts without jurisdiction.

Where a Magistrate acts under S. 476 five months after the close of the trial, and there is no explanation for the delay, the Magistrate acts without jurisdiction: 1 I. C. 597 (F. B.), *Foll.* [P 380 C 2]

A. Venkatarayaliah — for Petitioner.

Public Prosecutor — for the Crown.

Order. — The case against the petitioner closed on 28th December 1912; but the order under S. 476, Criminal P. C., was only passed on 7th June 1913 and the notice to the petitioner to show cause against the passing of such an order only issued on 3rd May 1913. There is no satisfactory explanation for the delay.

Following the Full Bench ruling in *Aiyakannu Palli v. Emperor* (1) we must set aside the Magistrate's order as one passed without jurisdiction.

S.N./R.K. *Order set aside.*

(1) [1909] 1 I. C. 597 = 32 Mad. 49 (F. B.).

A. I. R. 1914 Madras 381 (1)

WALLIS AND SADASIVA AIYAR, JJ.

Alagappa Chettiari—Plaintiff—Appellant.

v.

Subramania Pandia Thevan and others—Defendants—Respondents.

Appeal No. 213 of 1909, Decided on 31st March 1914, from decree of Sub-Judge, Tinnevely, in Original Suit No. 14 of 1908.

Limitation Act (1908), S. 20—Mortgagee authorized to pay debt due by mortgagor to third person is not mortgagor's agent duly authorized within S. 20.

A mortgagee authorized to pay off a debt due by the mortgagor to third person is not "an agent" of the mortgagor "duly authorized" within the meaning of S. 20 so as to keep alive debt by payment of interest on such debt.

[P 380 C 1]

K. Srinivasa Aiyangar—for Appellant.*S. Srinivasa Aiyangar*—for Respondents.

Judgment.—In this case, defendants 1 and 2 executed a mortgage in favour of defendant 3 for Rs. 26,000. Part of the consideration was made up of Rs. 10,920 to be paid by the mortgagee to the assignor of the present plaintiff on two bonds. The mortgagee did not pay the Rs. 10,920, but nearly two years later paid the interest due on the plaintiff bond up to that date and made no further payment on the plaintiff bond. The words on the mortgage are: "The sum received by us in the matter of our having given you permission to pay off the said bonds and obtain the return of the same is Rs. 10,920." The Subordinate Judge was of opinion that the mortgagee was not an agent authorized to make any payment for the mortgagors because in his opinion it was optional for him to do so. Even if it was optional and not obligatory still he would nonetheless be authorized to pay. The question, however, arises whether nearly two years after the date of the mortgage he was authorized to pay the interest on the bond up to that date so as to keep alive the mortgagor's liability to their creditor. We think that though the mortgagee had authority to pay off the debt in full, he had no authority to make a pure payment of interest as such, so as to bring the case within S. 20, Lim. Act. We think that in this case, as in *Linsell v. Bonser* (1), the agent exceeded his

(1) 2 Beng. (N. C.) 241=2 Scott 399=1 Hodges 305=5 L. J. C. P. 40=132 E. R. 95.

authority. This appeal is dismissed with costs.

S.N./R.K.

*Appeal dismissed.***A. I. R. 1914 Madras 381 (2)**

TYABJI AND SPENCER, JJ.

Penamacha Anandaraju—Plaintiff—Appellant.

v.

Nadimpalli Venkataraju and others—Defendants—Respondents

Second Appeal No. 2006 of 1912, Decided on 1st April 1914, from decree of Dist. Judge, Kistna, in Appeal Suit No. 540 of 1911.

Civil P. C. (1908), O. 9, R. 3—Parties agreeing to accept decision according to decision in another suit—Failure of parties to appear on adjourned date—Proper order is to proceed with suit under O. 17, R. 3, and not to dismiss under O. 9, R. 3—Civil P. C. (1908), O. 17, R. 3.

Where the parties to a suit agreed that the decision in that suit should follow the decision of the appellate Court in another suit, and after producing a copy of that decision, both parties absented themselves on the adjourned date.

Held: that the proper course for the Court was to proceed to decide the suit under O. 17, R. 3, and not to dismiss it under O. 9, R. 3.

[P 382 C 1]

P. Nagabushanam—for Appellant.

Judgment.—There were two suits for rent between the same parties. The first suit was in respect of Fasli 1313 to 1315 and the second in respect of Fasli 1316 to 1318.

The suit out of which this appeal arises is the second one. It was posted for hearing on 19th September 1910. Then the parties appeared and asked for an adjournment which was granted till 14th October 1910, on which day the defendants applied for stay pending the decision of their appeal in the first suit. The suit which is now under appeal was consequently adjourned to 24th March 1911, on the basis of an agreement between the parties that the decision in the present suit should follow the decision in the other suit. Accordingly on 24th March 1911, the plaintiff appeared producing a copy of the appeal decree in the other suit which was in his favour and petitioned that a decree should be passed in the present suit in his favour. On this the defendant put in an application dated 19th April 1911 for an adjournment and on 29th April 1911 the hearing was adjourned for 15 days to permit the defendant to appeal to the High Court from the appellate decree in the other

suit. The hearing was then adjourned to 17th May 1911 to permit the defendant to produce evidence of his having appealed to the High Court. On that day neither party appeared. In the result the revenue Court dismissed the suit and the dismissal was upheld by the District Court.

We think that the forms of procedure have been misapplied by the lower Courts. The dismissal was apparently made under O. 17, R. 2, and O. 9, R. 3, Civil P. C., 1908. In our opinion the rule applicable was O. 17, R. 3, Civil P. C. The Court should have proceeded to decide the suit and it would seem from the contention of the appellant that the plaintiff's claim to a decree could not have been resisted.

It is suggested to us that the plaintiff is entitled to a decree now. We are unable to grant him a decree without having the agreement before us on which the adjournment referred to in the plaintiff's petition of 24th March 1911 was granted, and without knowing the result of the second appeal in the other suit.

We set aside the order of dismissal. The Deputy Collector must restore the suit to his file and dispose of it in accordance with law. Costs will abide the result.

S.N./R.K.

Appeal allowed.

A. I. R. 1914 Madras 382 (1)

SADASIVA AIYAR, J.

Parvataneni Kamayya and others—
Accused—Petitioners.

v.

Kasinaduni Tripurantakam—
Complainant—Respondent.

Criminal Revn. No. 562 of 1913, and Criminal Revn. Petn. No. 455 of 1913, Decided on 23rd January 1914, from judgment of First Class Joint Magistrate, Bezwada, in Calendar Case No. 122 of 1912.

Penal Code (1860), S. 499—Statement by villager casting imputation on co-villager in complaint is privileged only if imputation is true and made in good faith.

A statement made by villager casting imputation on the character of a co-villager in a complaint to the higher authorities is privileged only if the imputation is substantially true and made in good faith : 3 All. 815, *Foll.* [P 382 C 2]

*T. Richmond—*for Petitioners.

*V. Ramesam—*for Respondent.

Order.—I am naturally not inclined to put any discouragement in the way

of villagers courageously representing in their own names (and not anonymously or pseudonymously) to the proper authorities their views and grievances in connexion with their village politics even if such representation involves imputations against a co-villager. I am also inclined to agree with *Abdul Hakim v. Tej Chandar Mukarji* (1), that a person may be held to have acted "in good faith for the protection of his interests" even if he has not established "that every word he has spoken or written is literally true," provided his imputation is substantially true. But, in the present case, the learned Magistrate in a very carefully considered judgement has found that the imputations were not substantially true and also he found absence in the accused of good faith (that is, absence of due care, attention and caution) having regard to the previous conduct of the village faction to which they belong, and I am not satisfied that interference in revision with that finding of fact is called for.

I, therefore, dismiss the petition.

S.N./R.K.

Petition dismissed.

(1) [1881] 3 All. 815=(1881) A. W. N. 81.

A. I. R. 1914 Madras 382 (2)

SADASIVA AIYAR AND 'SPENCER, JJ.

Devata Sri Ramamurthi and others—
Appellants.

v.

*Sri Kunchavarthy Venkata Sitaramachandra Row Garu and another—*Respondents.

Letters Patent Appeal No. 45 of 1913, Decided on 2nd December 1913, from judgment of Sankaran Nair, J., in Civil Revn. Petn. No. 402 of 1912.

(a) Civil P. C. (5 of 1908), S. 115—Question of title involved in suit under Specific Relief Act, S. 9—Suit dismissed—Interference under S. 115 is uncalled for—Specific Relief Act, S. 9.

Where a suit instituted under S. 9, Specific Relief Act, has been dismissed on the ground that the trial involved a decision on a question of title to the site, interference under S. 115, Civil P. C., is uncalled for, as the aggrieved party has a more effective remedy by a suit to get rid of the summary decision. [P 384 C 1]

(b) Specific Relief Act, S. 9—Scope.

In a suit under S. 9, Specific Relief Act, the Court must confine itself to the question whether the plaintiff was in actual peaceable possession and was forcibly dispossessed within six months before suit. [P 383 C 1]

*B. Narasimha Rao—*for Appellant.

*G. Venkataramiah—*for Respondents.

Facts.—The suit, was by two worshippers to recover possession of a Bhajana Mantapam under S. 9, Specific Relief Act. The first Court, following *Padmanabha Chettiar v. Williams* (1), held that the plaintiffs have no right to maintain the suit and dismissed it. On revision, His Lordship Sankaran Nair, J., held that the District Munsif had merely a right to decide in whose possession the mantapam was and accordingly reversed his order and sent the case back for re-trial. Against that order of the Judge the present Letters Patent appeal was filed.

Judgment.—In *Rudrappa v. Narasinga Rao* (2), it was held that, when a Subordinate Judge in a suit under S. 9, Specific Relief Act, tried a wrong issue instead of the right issue, "there was a material irregularity by the Subordinate Judge in the exercise of his jurisdiction" and that an application under S. 622 would lie to the High Court.

If we arrive at the conclusion in this case, (with the learned Judge from whose decision this Letters Patent appeal has arisen) (a) that the District Munsif tried and decided a wrong issue, and if we further hold with the Judges who decided *Rudrappa v. Narasing Rao* (2) (b) that the dismissal of the suit on the decision of a wrong issue is a material irregularity in the exercise of jurisdiction; and, lastly, if we hold (c) that this is a fit case for exercising the High Court's discretionary power to interfere under S. 115, Civil P. C., then, this appeal under the Letters Patent against the decision of the learned Judge of this Court (which set aside the Munsif's decision) will have to be dismissed. But if however, even one of these three conditions is not fulfilled, the District Munsif's decision will have to be restored.

We are not prepared to differ from the view of the learned Judge of this Court that the District Munsif placed before himself the wrong issue for decision, namely, whether the Bhaktas, on whose behalf the suit was brought in the Munsif's Court, under S. 9, Specific Relief Act had or had not the legal right to claim possession. He ought (as pointed out by our learned brother) to have confined himself to the question whether they were in actual peaceable possession and

were forcibly dispossessed within six months before suit.

As regards the second question, the case of *Rudrappa v. Narasing Rao* (2) is, undoubtedly, in the respondents' favour. There has been however wide divergence of view on the question whether any particular error committed by a lower Court in deciding a case will come under any of Cls. (a), (b) and (c), S. 115, Civil P. C., or whether that error was merely a wrong view of a legal question leading to a wrong decision which cannot justify interference under S. 115. We do not therefore think it necessary to pronounce a final opinion in this case whether *Rudrappa v. Narasing Rao* (2) was rightly decided as the decision of the present appeal can be based on the third question formulated by us: (see as to the wide divergence of judicial opinion the authorities, most of which are collected in the referring judgments of the Divisional Bench and the final judgment of the Full Bench in the case of *Vuppuluri Atchayya v. Sir Kanchumarti Venkata Sektaram Chandra Rao* (3): see also *Civil Revision Petition No. 68 of 1912*, in which Sankaran Nair, J., refused to interfere with a patently wrong order of the lower Court refusing to allow the amendment of a plaint the learned Judge having evidently been of opinion that that error was not an error affecting the Court's jurisdiction and cannot come under the phrase "acting in the exercise of jurisdiction with material irregularity."

Coming to that third and last question, the majority of the decisions of this Court under S. 115 have settled the definite practice of this Court not to interfere under S. 115, (old S. 622), Civil P. C., (except in very rare and exceptional cases), where the person aggrieved by a decision against which no appeal lies has got an equally effective remedy provided by the law to get rid of the summary decision or to obtain the relief refused to him by the summary decision. We need refer only to *Chidambaram Chetty v. Nagappa Chetty* (4) and to a very recent case of *Penumarti Vasantarayudu v. Subbamma* (5), which we decided only a week ago and in which we referred to and followed the above settled

(1) [1900] 23 Mad. 239.

(2) [1905] 23 B. N. 213.

(3) [1913] 18 I. C. 555.

(4) [1912] 16 I. C. 820.

(5) A. I. R. 1914 Mad. 17=22 I. C. 39.

practice. The practice of the Court is the law of the Court. In the present case, the plaintiffs had their remedy by a regular suit to establish the right of the Bhaktas to the use of the plaint premises and plaintiff 1 alone (if he is the trustee as alleged by him) could recover possession of the property by a regular suit. The cases *Ramkishan Das v. Jai Kishan Das* (6) and *Jwala v. Ganga Prasad* (7), are clear authorities for the proposition and it is not advisable to interfere under S. 115, Civil P. C., in favour of a person who has lost his suit brought under S. 9, Specific Relief Act, and his proper course is to pursue his remedy by a regular suit.

We therefore set aside the order of the learned Judge of this Court and restore the Munsif's decision. The parties will bear their respective costs in this Court.

S.N./R.K.

Order set aside.

(6) [1911] 11 L. C. 814=33 All. 647.

(7) [1908] 30 All. 331.

A. I. R. 1914 Madras 384

SADASIVA AIYER AND SPENCER, JJ.

Abdul Kadir Rowther and another—
Judgment-debtor—Petitioners.

v.

Krishna Malamal Nair Karnavan—
Decree-holder—Respondent.

Appeal No 5 of 1913, Decided on 19th December 1913, from appellate order of District Judge, South Malabar.

Limitation Act (1877), Art. 179—Adjournment application by decree-holder to produce encumbrance certificate regarding attached property to further execution proceedings is step-in-aid of execution within Art. 179 (5)—Limitation Act (1908), Art. 182 (5).

An application by a decree-holder for an adjournment to enable him to produce an encumbrance certificate in respect of attached property is made to further the execution proceedings with effect and is a step-in-aid of execution within the meaning of Art. 179 (5) (Art. 182 (5) of the present Act), of Sch. 2, Lim. Act, 1877: 3 All. 139 and 15 Bom. 405 *Foll.*; 27 Cal. 285, *Diss. from.* [P 385 C 1]

K. Narain Rao—for Appellant.

T. R. Ramachandra Aiyar and N. A. Krishna Aiyar—for Respondent.

Sadasiva Aiyar, J.—Unless the oral application for an adjournment of the hearing of a previous execution petition made by the decree-holder on 7th August 1908 is held to be an application to take a step-in-aid of execution, the present execution application of 3rd July 1911 is clearly barred by limitation.

The question is not free from difficulty. In *Kartich Nath Pandey v. Juggernath Ram Marwari* (1) there is an obiter dictum showing that an application for adjournment to enable the decree-holder to conduct his petition further with effect, is not an application to take a step-in-aid of execution.

A different view was taken in *Narsingh Dayal Singh v. Kali Charan Singh* (2) where the point directly arose.

The learned vakil for the judgment-debtors (appellants before us) sought to distinguish *Narsingh Dayal Singh v. Kali Charan Singh* (2) from the present case on two grounds: (a) That the application for adjournment relied on in *Narsingh Dayal Singh v. Kali Charan Singh* (2) was in writing and not oral; (b) that the application in that case was an application for an adjournment to enable the decree-holder to produce an affidavit as evidence to carry on those execution proceedings further, whereas it was not so in the present case.

I think that neither of these contentions is sound. There is nothing in Art. 179, Lim. Act, which requires the application to take some step-in-aid of execution to be in writing. *Amar Singh v. Tika* (3) and *Maneklal Jagjivan v. Nasia Raddha* (4) are direct authorities to the contrary, and I am prepared to follow them.

Then as regards the other distinction sought to be made, I am unable to see that the application for an adjournment to enable the decree-holder to produce affidavit evidence in aid of further proceedings [which was the application in *Narsingh Dayal Singh v. Kali Charan Singh* (2)] stands on a better footing than an application for an adjournment to enable the decree-holder to produce an encumbrance certificate in respect of the attached property in aid of further proceedings in execution.

Then reliance is placed by the appellants's vakil on the reason given in the obiter dictum in *Kartich Nath Pandey v. Juggernath Ram Marwari* (1). That reason is that an application for adjournment is in retardation of the execution proceedings and not in the aid of the execution proceedings. I think that there

(1) [1900] 27 Cal. 285.

(2) [1910] 5 L. C. 147.

(3) [1881] 3 All. 139.

(4) [1891] 15 Bom. 405 at p. 407.

is a fallacy in this reasoning. When an application for an adjournment is made by the judgment-debtor it is almost invariably to retard the execution proceedings. As regards an application by the decree-holder it may be one of three things: (a) it may be to get an order in aid; or (b) it may be to get an order in retardation; or (c) it may be to get an order which is neither.

An application by the decree-holder to give time to the judgment-debtor merely as a matter of grace is a step in retardation. An application for an adjournment to enable the decree-holder to produce records or evidence necessary to effectively conduct the execution proceedings further will be an application to get an order in aid: *Sheshdasacharya v. Bhimacharya* (5), *Haridas Nanabhai v. Vithaldas Kisandas* (6), *Pitam Singh v. Tota Singh* (7) and *Kunhi v. Seshagiri Bhakthan* (8).

An application by the decree-holder to draw money deposited in Court or to obtain copies of sale lists (without anything to indicate that they were necessary to aid further execution) will be application neither in aid nor in retardation.

In the present case I think that the application for an adjournment was for an order in aid.

I think that the legislature is a little harsh on decree-holders in fixing the date of applying for execution as one of the starting points for limitation for calculating the three years' period for the next subsequent application in execution, instead of the date on which the proceedings in the previous application for execution terminated, and I should be glad if the Limitation Act is amended so as to fix the latter date. But the harshness is mitigated to some extent by allowing the date of applying to take a step-in-aid to be also a starting point, and I think that if even an oral application is really for an order which will be a step-in-aid (and not merely for an order which will be indifferent or retarding) a liberal interpretation should be put on Art. 179 so as to enable a decree-holder to obtain the fruits of his decree.

In the result I would dismiss the appeal with costs.

Spencer, J.—I concur.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 385

WALLIS AND SADASIYA AIYAR, JJ.

Chathapuram Gramam Vaidyanath Aiyar—Petitioner—Appellant.

v.

P. S. Ramasami Aiyar—Respondent.

Appeal No. 88 of 1913, Decided on 20th March 1914, against order of Dist. Judge, South Malabar, in Civil Miscellaneous Petition No. 606 of 1912.

Insolvency—Purchaser of debt due by insolvent—Creditor can have his name entered in creditor's schedule.

A purchaser of a debt due by an insolvent creditor is entitled to have his name entered in the schedule of the creditors of the insolvent.

[P 385 C 2]

C. V. Ananthakrishna Aiyar—for Appellant.

A. Narayan Sarma—for Respondent.

Judgment.—The petitioner claims to have acquired the debt due by the insolvent by purchase at a Court auction in a suit in which the insolvent's creditor was the judgment-debtor. If this be so, he is entitled to an order from the Court giving leave to the receiver to substitute his name in the schedule of the creditors' names in respect of the debt due to the creditor in substitution for the creditors' name: *In re Frost and Frost; Ex parte The Official Receiver and Frost* (1). We do not consider that the question whether, on the facts of the case the receiver is entitled to set off any debt due by the creditor to the insolvent, has been satisfactorily dealt with. In this connexion it will have to be considered whether, as represented to us, the debt was so brought to sale in a suit by the second mortgagee—the insolvent being only the third mortgagee and was sold and purchased by the petitioner free of all the mortgages.

We accordingly set aside the order and remand the case to the lower Court for disposal according to law. The costs will be costs in the cause.

S.N./R.K.

Case remanded.

(5) [1912] 17 I. C. 969=37 Bom. 317.

(6) [1912] 17 I. C. 80=36 Bom. 638.

(7) [1907] 29 All. 301=4 A. L. J. 184=(1904) A. W. N. 74.

(8) [1882] 5 Mad. 141.

(1) [1899] 2 Q. B. 50=68 L. J. Q. B. 663=80 L. T. 36=47 W. R. 512=6 Manson 194.

A. I. R. 1914 Madras 386

MILLER AND TYABJI, JJ.

Acharath Parakkat Kunhammad and others—Defendants—Appellants.

v.

Acharath Bappan Karanavan—Respondent.

Appeals Nos. 128 and 210 of 1911, Decided on 21st January 1914, from decree of Sub-Judge, North Malabar, in Original Suit No. 8 of 1911.

Civil P. C. (1908), O. 41, R. 9—Order of admission—Court excusing delay in payment of deficient court-fees on appeal is made subject to objection before Court hearing appeal and its decision—Practice.

An order of the admission Court excusing delay in the payment of deficient court-fees on an appeal is, according to the practice of the Court made subject to objection before the Court hearing the appeal and the decision thereon.

[P 386 C 1]

T. R. Ramachandra Iyer—for Appellants.

J. L. Rosario—for Respondent.

Miller, J.—Before we heard the appeal, objection was raised on behalf of the defendants that Appeal No. 210 ought to be dismissed as barred by limitation. The order of the admission Court is, "Delay excused." Mr. Rosario contended that the Court ought not to have excused the delay. The question was raised whether we have power to set aside the order of the admission Court excusing delay. For my part, so far as my knowledge of the practice of the Court goes, what is done, and what I have done, sitting in the admission Court, is to make the order, sometimes expressly subject to objection, always with the knowledge that should objection be raised it would be dealt with by the Court hearing the appeal to make the order, that is to say, on such *prima facie* evidence as may be offered by the appellant, and leave it to the Court hearing the appeal, should that order be challenged, to decide the question. I do not know whether this practice is a desirable one to follow, but I understand that to be the practice of the Court.

In the present case, to my mind, it is unnecessary to decide whether we have power to deal with the order of the admission Court, because I came to the conclusion yesterday that there is no really good ground for saying that the delay ought not to have been excused.

Now, as regards the appeals, the learned Subordinate Judge has dismissed the suit in respect of all the items, except

items 7 and 11, and with regard to one of them, item 4, he has held the suit is premature. I do not think it necessary to discuss the evidence or the nature of the suit. I think it is sufficient to say that in no case do I find sufficient reason for differing from the conclusion arrived at by the Subordinate Judge. It may be desirable to make it clear in the decree as regards shop No. 295, that is the property which the tarwad is entitled to recover on the expiration of the lease, Ex. 76. Apart from that I see no reason to interfere with the decree of the Subordinate Judge. I would dismiss both the appeals with costs.

One of Mr. Rosario's contentions was that the lower Court was wrong in calculating the proportionate costs payable to the plaintiff and has given him too much. He was unable to show us, if a mistake has been committed, how it has been admitted, and therefore I do not see how we can interfere with the order of the lower Court as to the amount of costs payable. It seems to me that he should have applied or should, if that course is open, still apply, to the Court below to amend the decree if it is arithmetically wrong or calculated on a wrong basis, but he has not shown us what, if anything, is wrong with it.

As regards the items claimed by Mr. Rosario in Appeal No. 128, I am unable to agree with his argument that in regard to item 7 there is enough to show that the ladies were entitled to retain the house in their possession and the site on which the house is built; and as regards compensation I think, in the circumstances, the amount of compensation awarded by the Subordinate Judge was justified. It was not a case of an ordinary tenancy, no rent was paid, and the Subordinate Judge was justified, in the circumstances, in awarding only the amount of the cost price of the house and not its value, if indeed its value be more than Rs. 1,300, which does not seem to be clearly found. We cannot interfere with the decision of the Subordinate Judge with regard to item 7.

As regards item 11 there is really no evidence on which we could say that the grant was different from what the Subordinate Judge finds it to be. So that in the result, as I have said, I would dismiss both the appeals.

Tyabji, J.—I agree.

As regards the preliminary objection, the interpretation put on the order excusing delay by my learned brother is based on his experience of the practice of the Court, and, of course, I accept his interpretation. I therefore understand the order to mean that in that admission Court no final order was made with reference to the application. But the applying party was allowed to go on with the appeal, on the understanding that the question would really be decided and an order finally passed with reference to it by the Court hearing the appeal. I assume that an order of that kind can validly be made, and if so, of course, the Court hearing the appeal would have finally to adjudicate upon it. In that case the facts would be very different from those with which we had to deal in Second Appeal No. 1045 of 1907 where there was an order setting aside the abatement of the suit under O. 22, R. 9. I have nothing to add to what my learned brother has said with reference to the merits of the appeals and I agree that the appeal should be dismissed with costs.

S.N./R.K. *Appeals dismissed.*

A. I. R. 1914 Madras 387 (1)

SANKARAN NAIR AND AYLING, JJ.

S. Paramananda Nadar—Complainant—Petitioner.

v.

Karunakara Doss and another — Accused—Respondents.

Criminal Revn. No. 305 of 1913 and Criminal Revn. Petn. No. 253 of 1913, Decided on 19th February 1914, from order of Second Class Magistrate, Palamcottah, in Criminal Case No. 49 of 1913.

Madras District Municipalities Act (1884), Ss. 10-A, 39-A, 268 and 280—Complaint instituted by Municipal Secretary cannot be withdrawn by Municipal Council—Criminal P. C. (1898), S. 248.

It is not open to a Municipal Council to withdraw a complaint duly instituted by the Secretary of the Municipality under S. 248.

[P 387 C 2]

V. K. Venkatarama Aiyar — for Petitioner.

M. D. Devadoss—for Respondents.

Public Prosecutor—for the Crown.

Facts.—This is a complaint against a voter at an election for being guilty of illegal practices. The Secretary instituted the complaint under S. 280 of the Act. The Municipal Council, by a resolution, subsequently passed, withdrew the complaint and the Magistrate passed

an order acquitting the accused. The present appeal is against the order in acquittal.

Order.—The complaint in this case was preferred by the present petitioner purporting to act in virtue of an express authorization by the Municipal Secretary to whom the powers of the Chairman under S. 280, District Municipalities Act, are said to have been delegated under S. 39-A. It is clearly not competent for the Municipal Council to withdraw the complaint and the complainant has not withdrawn it.

We set aside the order of acquittal passed under S. 248, Criminal P. C., and direct the Magistrate to restore the case to his file and dispose of it according to law.

S.N./R.K. *Prosecution ordered.*

A. I. R. 1914 Madras 387 (2)

SESHAGIRI IYER, J.

K. Ramanadhan Pattar—Petitioner.

v.

Achuta Varier and others—Respondents.

Civil Revn. Petn. No. 994 of 1912, Decided on 24th February 1914.

Limitation Act (1908), Art. 116—Suit for rent is governed by Art. 116.

A suit for rent under a registered document is governed by Art 116 : 3 *Mad.* 76; 19 *Mad.* 52; 18 *I. C.* 64 and 6 *I. C.* 760, *Foll.*

C. V. Anantakrishna Iyer—for Petitioner.

C. Madhavan Nair—for Respondents.

Judgment.—Whatever may be my own view regarding the applicability of Art. 116, Lim. Act, to suits for rent under a registered document, I am bound by the course of decisions in this Presidency commencing with *Vythilinga Pillai v. Thet Chanamurti Pillai* (1). This same principle has been applied to cases reported in *Ambalavana Pandaram v. Vaguran* (2) and in *Ramakrishna Chetty v. Subbaraya Iyar* (3) and has been expressly followed in *Chengiah v. Thimma Nayanam* (4). On these authorities the suit is not barred by limitation. I reverse the decision of the Subordinate Judge and direct him to re-place the suit on his file and to dispose of it according to law.

Costs will abide the result.

S.N./R.K. *Petition allowed.*

(1) [1881] 3 *Mad.* 76.

(2) [1896] 19 *Mad.* 52=5 *M. L. J.* 228.

(3) [1913] 18 *I. C.* 64.

(4) [1910] 6 *I. C.* 760.

A. I. R. 1914 Madras 388

WALLIS, J.

K. Seetharam Naidu and others—Plaintiffs.

v.

K. Balakrishna Naidu and others—Defendants.

Original Civil Suit No. 363 of 1911,
Decided on 21st November 1913.

(a) **Hindu Law—Joint family—Alienation—Suit by sons to set aside alienation by father—Alienee must prove antecedent debt or necessity.**

Where an alienation of ancestral property by a father is sought to be set aside by his sons, the onus is on the alienee to prove that there was an antecedent debt or a justifying necessity for the transaction : 29 *Mad.* 200 ; 1 *I. C.* 479 and 21 *I. C.* 96, 17 *I. C.* 729 ; *Ref.* [P 390 C 1]

(b) **Hindu Law—Joint family—Alienation—Alienation not binding on sons—Alienee gets alienor's interest at date of alienation.**

Where the alienation is not binding on the sons, the alienee acquires the quantum of interest of the alienor at the date of the alienation and it is not subject to increase or diminution by virtue of subsequent change in the joint family : 9 *I. C.* 596, (*F.B.*) *Foll*

[P 391 C 1, 2]

(c) **Hindu Law—Joint family—Alienation—Part consideration found to be binding on son—Decree should declare charge in favour of alienee to the extent of consideration found to be for binding purpose.**

Where only a part of the consideration for the alienation is found to be for a purpose binding on the son, the proper decree to be passed is to give the father's share in the property absolutely to the alienee and to declare a charge in favour of the alienee on the son's shares to the extent of their share of the consideration found to have been for a binding purpose : 16 *I. C.* 835, *Foll.* ; 23 *Mad.* 89, *not Foll.* [P 392 C 1]

(d) **Hindu Law — Widow — Alienation—Alienation by widow, guardian or dharmakarta—Alienation could be set aside on payment to alienee of amount found to be binding on inheritance.**

If the alienation were by a widow or guardian or dharmakarta, it would be set aside on payment to the alienee of the amount found to be binding on the inheritance. [P 391 C 2]

Venkatasubba Rao and Radhakrishnaiya—for Plaintiffs.

V. V. Srinivasa Iyengar—for Defendants 2, 11, 13 and 14.

C. K. Mahadeva Iyer—for Defendants 7 and 8.

M. N. Doraiswami Iyengar—for Defendant 17.

Judgment.—This suit is brought by the plaintiffs who are the sons of defendant 1 to set aside alienations made by defendant 1 and for partition. The properties in question are alleged by the plaintiff to have descended to defen-

dant 1, Balakrishna, from his father Venkatasawmy. Venkatasawmy was the son of one Gantalamma, who according to the defendants, was a dancing-woman and the evidence is that the whole family were known as Gantala people, that is to say, as a descendant. One of the chief alienations attacked is a partition deed, Ex. C, entered into in 1893, shortly after Venkatasawmy's death, between defendant 1 and his sisters through whom some of the alienee defendants claim. That deed shows that defendant 1, Balakrishna, and his sisters who, according to the undisputed evidence, still continue to follow the profession of dancing-women were all residing together in one house ; and it recites that this woman Gantalamma, Venkatasawmy's mother, had effected a partition with her sisters, who according to the evidence were themselves dancing-women, as far back as 1874. It also recites that she enjoyed the properties included in the deed with her daughters and intended to leave half of them to her son Venkatasawmy and half of them to her daughters, who were dancing-girls, that the daughters pre-deceased her and she decided to leave half the property to her son and half of the property to the daughters of the son who had according to the evidence adopted the profession of dancing-women. It also recites that she died in 1882 and that since that time Venkatasawmy, her son, had been managing and improving the properties.

The evidence is that all these properties, whether acquired during Gantalamma's lifetime or after her death, stood in the name of Venkatasawmy and that some of the more valuable properties were acquired after her death. There is also evidence that Venkatasawmy kept a small drug store, but not such a business as is likely to enable him to become the possessor of these properties. The cession by Balakrishna of half of these properties to his sisters is attacked as an alienation of the joint family property of himself and his son at that time, he had one son—on the ground it was not made for any antecedent debt or beneficial purpose. On the other hand, it is supported on somewhat inconsistent grounds. Mr. V. V. Srinivasa Iyengar for some of the defendants contended that it should be supported as a family ar-

rangement because these dancing-girls' sisters had certain claims upon him for maintenance and otherwise. On the other hand, Mr. Mahadeva Iyer, for some of the other defendants took a bolder line; he contended that the proper inference was that all these properties had been acquired by these three generations of dancing-women as the fruits of prostitution and that under the Hindu law, as recognized in this presidency, they formed a joint family who took by survivorship and that, consequently, all these properties, though they stood in the name of Venkatasawmy, were really the property of the female members of the family and that Venkatasawmy did a very good thing for himself when he acquired one-half of them under Ex. C and that, therefore, this acquisition was to be taken to have been a self-acquisition of his with which he was at perfect liberty to deal.

As regards this last contention the first thing to be said is that it is nowhere set up in the pleadings, nor was it a question on which the parties came to trial. Mr. Mahadeva Iyer's answer to that is that these alienees did not know and it was only during the course of the case that the real circumstance of the family came to light. But, in my opinion, this contention has not been established. Admittedly the daughters of Gantalamma predeceased her and, though the daughters of Venkatasawmy, the sisters of Balakrishna, engaged in prostitution yet there is no evidence that they were adopted by Gantalamma. If they had been, the question would have to be considered whether any such adoption could at the present day be considered as giving rise to any right to the property, but I find it is not proved that they were adopted. On the other hand, I am not disposed to accept as literal truth recitations in Ex. C; the conclusion which I am constrained to draw from the evidence is that these people were carrying on, males and females, a sort of joint family business in which this man, Venkatasawmy, acted as a sort of managing member. No doubt, he went so far on the way to respectability as to get married, but he seems to have stopped there. He brought up his daughters to prostitution and his son to live with them in the same house; I am not able to say whether such a state of things is common in this part of India,

but I see in *Ghasiti v. Umrao Jan* (1) the facts were of a similar description.

I find then, there was no adoption of Balakrishna's sisters by Gantalamma. Therefore it seems to me that, on Gantalamma's death, Venkatasawmy was her heir and was entitled to inherit the properties which she had obtained on partition. But it is perfectly clear to my mind that a large portion of these properties was afterwards acquired by Balakrishna's sisters. Therefore, they had at any rate a better right to those gains than any male member of the family who had been aiding and abetting them and it seems to me that although in Ex. C they did not like to state a number of unpleasant truths, which it was nobody's business to state in Ex. C, it repeats the story of Gantalamma's intention which is simply put in there to make some sort of colourable story—that is the inference I have come to. But I think that these properties were really largely acquired by the sisters of Balakrishna as the earnings of prostitution and that therefore they had a well founded claim to part of the property which stood in the name of Venkatasawmy after his death and that, therefore in any case there was more than sufficient to support a bona fide compromise by Venkatasawmy as head of the joint family of himself and his son. I find that the alienation under Ex. C cannot be attacked. That disposes of the case of defendants 2 and 3.

The next question is as to the character of the property Balakrishna took. Mr. Mahadeva Iyer, as I said, contended that it must be taken to have been self-acquired property. I cannot agree. It was taken by him under the deed as in the right of his father Venkatasawmy. I think it must be taken to have been ancestral property which descended to him from his father who is proved to have been married and therefore Balakrishna took the share which he got under Ex. C with all the incidents of joint family property.

Coming now to the other alienations the question with which I have had to deal is the question of onus. It was contended for the plaintiff that the onus was on the defendants alienees to show that the alienations were made by the father Balakrishna for some antecedent debts or

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WALLIS, J.

K. Seetharam Naidu and others—Plaintiffs.

v.

K. Balakrishna Naidu and others—Defendants.

Original Civil Suit No. 363 of 1911,
Decided on 21st November 1913.

(a) **Hindu Law—Joint family—Alienation—Suit by sons to set aside alienation by father—Alienee must prove antecedent debt or necessity.**

Where an alienation of ancestral property by a father is sought to be set aside by his sons, the onus is on the alienee to prove that there was an antecedent debt or a justifying necessity for the transaction : 29 *Mad.* 200 ; 1 *I. C.* 479 and 21 *I. C.* 96, 17 *I. C.* 729 ; *Ref.* [P 290 C 1]

(b) **Hindu Law—Joint family—Alienation—Alienation not binding on sons—Alienee gets alienor's interest at date of alienation.**

Where the alienation is not binding on the sons, the alienee acquires the quantum of interest of the alienor at the date of the alienation and it is not subject to increase or diminution by virtue of subsequent change in the joint family : 9 *I. C.* 596, (*F.B.*) *Foll*

[P 391 C 1, 2]

(c) **Hindu Law—Joint family—Alienation—Part consideration found to be binding on son—Decree should declare charge in favour of alienee to the extent of consideration found to be for binding purpose.**

Where only a part of the consideration for the alienation is found to be for a purpose binding on the son, the proper decree to be passed is to give the father's share in the property absolutely to the alienee and to declare a charge in favour of the alienee on the son's shares to the extent of their share of the consideration found to have been for a binding purpose : 16 *I. C.* 835, *Foll.* ; 23 *Mad.* 89, *not Foll.* [P 392 C 1]

(d) **Hindu Law — Widow — Alienation—Alienation by widow, guardian or dharmakarta—Alienation could be set aside on payment to alienee of amount found to be binding on inheritance.**

If the alienation were by a widow or guardian or dharmakarta, it would be set aside on payment to the alienee of the amount found to be binding on the inheritance. [P 391 C 2]

Venkatasubba Rao and Radhakrishnaiya—for Plaintiffs.

V. V. Srinivasa Iyengar—for Defendants 2, 11, 13 and 14.

C. K. Mahadeva Iyer—for Defendants 7 and 8.

M. N. Doraiswami Iyengar—for Defendant 17.

Judgment.—This suit is brought by the plaintiffs who are the sons of defendant 1 to set aside alienations made by defendant 1 and for partition. The properties in question are alleged by the plaintiff to have descended to defen-

dant 1, Balakrishna, from his father Venkatasawmy. Venkatasawmy was the son of one Gantalamma, who according to the defendants, was a dancing-woman and the evidence is that the whole family were known as Gantala people, that is to say, as a descendant. One of the chief alienations attacked is a partition deed, Ex. C, entered into in 1893, shortly after Venkatasawmy's death, between defendant 1 and his sisters through whom some of the alienee defendants claim. That deed shows that defendant 1, Balakrishna, and his sisters who, according to the undisputed evidence, still continue to follow the profession of dancing-women were all residing together in one house ; and it recites that this woman Gantalamma, Venkatasawmy's mother, had effected a partition with her sisters, who according to the evidence were themselves dancing-women, as far back as 1874. It also recites that she enjoyed the properties included in the deed with her daughters and intended to leave half of them to her son Venkatasawmy and half of them to her daughters, who were dancing-girls, that the daughters pre-deceased her and she decided to leave half the property to her son and half of the property to the daughters of the son who had according to the evidence adopted the profession of dancing-women. It also recites that she died in 1882 and that since that time Venkatasawmy, her son, had been managing and improving the properties.

The evidence is that all these properties, whether acquired during Gantalamma's lifetime or after her death, stood in the name of Venkatasawmy and that some of the more valuable properties were acquired after her death. There is also evidence that Venkatasawmy kept a small drug store, but not such a business as is likely to enable him to become the possessor of these properties. The cession by Balakrishna of half of these properties to his sisters is attacked as an alienation of the joint family property of himself and his son at that time, he had one son—on the ground it was not made for any antecedent debt or beneficial purpose. On the other hand, it is supported on somewhat inconsistent grounds. Mr. V. V. Srinivasa Iyengar for some of the defendants contended that it should be supported as a family ar-

rangement because these dancing-girls' sisters had certain claims upon him for maintenance and otherwise. On the other hand, Mr. Mahadeva Iyer, for some of the other defendants took a bolder line; he contended that the proper inference was that all these properties had been acquired by these three generations of dancing-women as the fruits of prostitution and that under the Hindu law, as recognized in this presidency, they formed a joint family who took by survivorship and that, consequently, all these properties, though they stood in the name of Venkatasawmy, were really the property of the female members of the family and that Venkatasawmy did a very good thing for himself when he acquired one-half of them under Ex. C and that, therefore, this acquisition was to be taken to have been a self-acquisition of his with which he was at perfect liberty to deal.

As regards this last contention the first thing to be said is that it is nowhere set up in the pleadings, nor was it a question on which the parties came to trial. Mr. Mahadeva Iyer's answer to that is that these alienees did not know and it was only during the course of the case that the real circumstance of the family came to light. But, in my opinion, this contention has not been established. Admittedly the daughters of Gantalamma predeceased her and, though the daughters of Venkatasawmy, the sisters of Balakrishna, engaged in prostitution yet there is no evidence that they were adopted by Gantalamma. If they had been, the question would have to be considered whether any such adoption could at the present day be considered as giving rise to any right to the property, but I find it is not proved that they were adopted. On the other hand, I am not disposed to accept as literal truth recitations in Ex. C; the conclusion which I am constrained to draw from the evidence is that these people were carrying on, males and females, a sort of joint family business in which this man, Venkatasawmy, acted as a sort of managing member. No doubt, he went so far on the way to respectability as to get married, but he seems to have stopped there. He brought up his daughters to prostitution and his son to live with them in the same house; I am not able to say whether such a state of things is common in this part of India,

but I see in *Ghasiti v. Umrao Jan* (1) the facts were of a similar description.

I find then, there was no adoption of Balakrishna's sisters by Gantalamma. Therefore it seems to me that, on Gantalamma's death, Venkatasawmy was her heir and was entitled to inherit the properties which she had obtained on partition. But it is perfectly clear to my mind that a large portion of these properties was afterwards acquired by Balakrishna's sisters. Therefore, they had at any rate a better right to those gains than any male member of the family who had been aiding and abetting them and it seems to me that although in Ex. C they did not like to state a number of unpleasant truths, which it was nobody's business to state in Ex. C, it repeats the story of Gantalamma's intention which is simply put in there to make some sort of colourable story—that is the inference I have come to. But I think that these properties were really largely acquired by the sisters of Balakrishna as the earnings of prostitution and that therefore they had a well founded claim to part of the property which stood in the name of Venkatasawmy after his death and that, therefore in any case there was more than sufficient to support a bona fide compromise by Venkatasawmy as head of the joint family of himself and his son. I find that the alienation under Ex. C cannot be attacked. That disposes of the case of defendants 2 and 3.

The next question is as to the character of the property Balakrishna took. Mr. Mahadeva Iyer, as I said, contended that it must be taken to have been self-acquired property. I cannot agree. It was taken by him under the deed as in the right of his father Venkatasawmy. I think it must be taken to have been ancestral property which descended to him from his father who is proved to have been married and therefore Balakrishna took the share which he got under Ex. C with all the incidents of joint family property.

Coming now to the other alienations the question with which I have had to deal is the question of onus. It was contended for the plaintiff that the onus was on the defendants alienees to show that the alienations were made by the father Balakrishna for some antecedent debts or

for a purpose beneficial to the family. The only issue relating to that is "whether the alienations are illegal or immoral and therefore not binding." That does not seem to me to cover the issue whether the alienations were for an antecedent debt or for a purpose beneficial to the family and when the very recent decision of *Ruthna Gramany v. Veerabhadra Iyer* (2) was cited at a later stage of the case to show that the plaintiffs must be taken to have accepted the onus showing that these alienations were not made for antecedent debt which was held to be the case there, I came to the conclusion on a perusal of the pleadings and the issues in this case that the plaintiffs had never undertaken any such burden and I have framed the further issue as to whether these alienations were for antecedent debts or for a purpose beneficial to the family as both the pleadings and the evidence were directed to such an issue. That, of course, is quite an independent issue from the issue whether the antecedent debts, if such they were, were incurred for illegal or immoral purposes. Now, as regards the issue whether the alienations were made for an antecedent debt or for a beneficial purpose, I am clearly of opinion that in this as in other cases the onus is on him who asserts. Anyone who asserts that the alienation was made for an antecedent debt or for a beneficial purpose is bound to prove it. The difference of opinion, which took place in the Allahabad High Court in the case of *Chandra Deo Singh v. Mata Prasad* (3), appears on a perusal of the judgments, on the one side, of Stanley, C. J., and on the other of Banerji, J., to have proceeded entirely upon the difference of opinion as to whether in order to support such an alienation as this, it was necessary to show the existence of an antecedent debt.

Stanley, C. J., held it was, Banerji, J., it was not. If Banerji, J., had held that an antecedent debt must be shown, I take it he must have held that the onus lay upon the person who asserted it. In this Court there is a decision of the Full Bench that the existence of an antecedent debt must be shown—I mean in the absence of any beneficial purpose—that is in *Venkataramanayya Pantulu v. Venkataramanad Doss Pan-*

tulu (4). The recent decision of the Privy Council reported as *Sri Narain v Lala Raghubans Rai* (5) was referred to. That is a very short judgment merely affirming the judgment of the Court below. It can only be understood, in my opinion, on a perusal of the judgment of the Court below, which was not before me at the trial. But now I am informed as I believed it must be the case, that no question of the existence of antecedent debts arose there, because it was admitted. I think we should be very slow to construe a judgment of their Lordships as dealing with a question of the first importance in India without assigning reasons. As to the case of *Ruthna Gramany v. Veerabhadra Iyer* (2) though the question is discussed there yet the Court deliberately refrained from expressing any final opinion such as would be binding on me. I therefore hold that the onus is upon the other defendants to support those alienations and they have very largely failed to discharge it.

I have disposed of Ex. C. The next item 4 was alienated on 20th February 1893 to defendant 6. The allegation is family necessity but there is no real proof of that. Defendant 1's evidence is altogether unworthy of credit; he pretended he was drunk when he executed these deeds and they were all for the purposes of dissipation and he actually included the alienees among his boon companions and several very respectable looking Hindus came into the box as alienees and they by no means corresponded to his description of them as boon companions. The whole thing is a fiction. The next alienation is item 8—taking them in order of time—on 21st February 1894. Ex. 9, an alienation to defendant 10 is a sale of the lands of a village just outside Madras because the rents were difficult to collect. The village is just beyond Perambur, the houses are, some of them, tenanted by people in the Railway Workshop and the whole suggestion is absurd. The alienation is not proved to have been made for an antecedent debt or for a beneficial purpose. Item 9 was alienated on 18th April 1894 to defendant 11 for Rs. 130. It was alleged that this was to pay taxes.

(2) [1913] 21 I. C. 96.

(3) [1909] 1 I. C. 479=31 All. 176 (F. B.).

(4) [1906] 29 Mad. 200=16 M. L. J. 69=1 M. L. T. 28 (F. B.).

(5) [1913] 17 I. C. 729.

That I am constrained to find is not proved.

On 24th October 1895 is the alienation to defendant 8 (Ex. F) of item 6 for Rs. 200. No evidence was offered as to this alienation which I hold to be not binding.

Then we come to a mortgage of 8th July 1897 of items 5 and 12 for a sum of Rs. 350 followed by the sale of item 5 on 18th November 1897 four months later, for Rs. 850 to discharge the previous mortgage with interest viz., Rs. 364 and certain taxes, Rs. 50, making Rs. 414 and leaving unaccounted a balance of Rs. 430 which was alleged to have been borrowed for the repairs of item 12. I am prepared to allow the alienation to the extent of Rs. 414 which I think is quite ample to cover any repairs which were at all likely to have been done to either or both of these houses. Besides, it constituted an antecedent debt at the time of the sale, and I allow also the taxes which are mentioned in the sale deed, but still that leaves Rs. 436 unaccounted for.

Then we come to item 10 which was alienated on 21st August 1901 by Ex. M to defendant 12 for Rs. 200, as to which there was no evidence and I therefore hold it not binding.

The last is item 11 a mortgage for Rs. 280 to defendants 13 and 14. Rs. 105 of that is admitted to have been an antecedent debt paid to some koravas. It appears that the mortgage of item 12 was paid off under Ex. E-1. Item 12 itself was afterwards alienated and part of it was sold by the alienee to the Municipality at a very handsome price and the evidence is that he allowed defendant 1 to buy back the remainder at a low rate. The balance Rs. 175 of this mortgage of Rs. 280 is said to have been applied in that way. It is not suggested it was applied in any other way and I do not see any reason to doubt that. I am therefore prepared to uphold this alienation in toto.

With regard to the effect of the alienations which I hold to be not binding it is admitted here that under the decision of the Full Bench the alienee at any rate acquired the quantum of interest of the alienors, defendant 1 at the time of the alienation and consequently that in respect of all the alienations when there was only one son, plaintiff 1 the alienee,

will be entitled to one-half. In regard to the alienations as to item 4 the alienation will be set aside to the extent of one-half. Similarly as regards items 6, 8 and 9.

Item 10 is binding to the extent of $\frac{1}{4}$ th. Item 11 is upheld altogether. The only one I have partially allowed and partially disallowed is as to item 5. Question as to item 5 reserved for further argument.

The 2nd, 13th and 14th are entitled to proportionate costs, 2nd one set; 13th and 14th one set

[The case was adjourned to next day for argument as to the form of the decree to be passed in cases where alienations have been held to be partly binding and his Lordship delivered the following judgment.]

I have now had the advantage of hearing further argument as to the manner in which I should deal with the alienation by defendant 1 of item 5 which I held to be binding on the whole of the joint family to the extent of Rs. 414. If the alienation were by a widow or guardian or dharmakarta, in the circumstances of the present case this alienation to a much greater extent than was necessary would be set aside on payment to the alienee of the amount which was held binding. It is however contended that this is not the proper way to deal with an alienation by a coparcener where that alienation is only partially binding because according to the law now established in this Presidency such an alienation is in any event binding to the extent of the coparcener's share as it existed at the date of the alienation without any liability to increase or diminution by virtue of subsequent changes in the joint family. Consequently, it is contended that the alienees in this case acquired a one-third share in the property alienated independently altogether of the sum of Rs. 414 which was held to have been advanced by him for purposes binding on the joint family. As regards this sum there is a decision of *Marappa Goundan v. Rungasami Goundan* (6) [before the decision in *Chinnu Pillay v. Kali Muthu Chetti* (7)] that the alienee is only entitled to the share of his alienor and has no further claim on the shares of the other coparceners in respect of the sum for

(6) [1900] 23 Mad. 89.

(7) [1911] 9 I. C. 596=35 Mad. 47.

which the alienation was rightly made. This view has been dissented from by Sundara Iyer and Sadasiva Iyer, JJ., in a very recent case of *Vaidivalam Pillay v. Natesam Pillay* (8) and does not so far as I can judge appear to rest on any sound principle. It appears to me that the right way to look at it is thus: the alienee acquired by the alienation the third share of defendant 1 in this case. That one-third share must, of course, be burthened with a one-third of the joint liability of the family for Rs. 414; but there is no reason so far I can see why the shares of the other coparceners should not similarly be burthened with their proportionate share of the liability and therefore I hold it is binding on them to the extent of 2/3rds of Rs. 414, and in the result that the alienee is entitled to the one-third share plus 2/3rds of Rs. 414 as a charge upon the shares of the other coparceners. I need only allude to the contention which was put forward by Mr. Mahadeva Iyer that the proportion of the alienee was liable to be affected by subsequent additions to the family. It seems to me that that is inconsistent with the principles laid down in *Chinnu Pillay v. Kalimutha Chetti* (7). The effect of my decision is this: that the alienees have a one-third share, plus a charge of Rs. 276 on the shares of the other coparceners and this can be worked out as in an ordinary partition. As regards the defendants other than defendants 2, 13 and 14 they must be directed to pay the costs of the plaintiffs to be distributed among the defendants proportionately to the properties concerned.

S.N./R.K. *Order accordingly.*

(8) [1912] 16 I. C. 835.

* A. I. R. 1914 Madras 392

SADASIVA AIYAR AND SPENCER, JJ.

Doki Khodalo Patro and others—
Counter-Petitioners—Appellants.

v.

Lingarapi Vidya Bhushano — Petitioner—Respondent.

Appeal No. 4 of 1913, Decided on 15th December 1913, against appellate order of Dist. Judge, Ganjam, in Appeal Suit No. 134 of 1912.

* (a) Civil P. C. (1908), O. 34, Rr. 7 and 8—
Passing of final decree being duty of Court, no period of limitation is provided.

There is no period of limitation provided for the passing of a final decree in a suit for re-

demption, the passing of such a decree being the duty of the Court. [P 392 C 2, P 393 1]

A final decree for redemption was passed under S. 92, T. P. Act. The date fixed for payment of the money as finally amended in appeal was 20th October 1909. In November 1911, the plaintiff made an application for a final decree under O. 34, R. 8, for the passing of a final decree:

Held: that the application was not time-barred. [P 392 C 2, P 393 C 1]

(b) Limitation Act, Art. 182—Application for execution filed within three years of amendment of decree is competent.

An application for execution of a decree filed within three years from the date of its amendment is within time. [P 393 C 1]

P. Nagabushanam—for Appellant.

C. S. Venkata Chariar—for Respondent.

Sadasiva Aiyar, J.—A final decree for redemption, was passed under the now repealed S. 92, T. P. Act, before the new Civil Procedure Code came into force. A decree passed under O. 34, R. 7, of the new Civil P. C., though the rule is in the same terms as S. 99, Act 4 of 1882, treats the decree passed under that rule as only a preliminary decree to be followed by a final decree under O. 34, R. 8.

The plaintiff got a decree for redemption under S. 92, Act 4 of 1882, in 1905. That was a decree which he was entitled to execute within three years from the date (20th October 1909) fixed in the decree as finally amended in appeal (20th September 1909)

Instead of applying for execution, that is, for the issue of a process of delivery of the mortgaged property, the plaintiff treated the final decree which he got in 1905 as if it was only a preliminary decree passed under O. 34, R. 7, and he applied in November 1911 for the passing of a final decree for delivery of possession under O. 34, R. 8, of the new Code. He can have such a final decree only if a preliminary decree had been passed under O. 34, R. 7, of the new Code. The old decree of 1905 was not such a decree and hence it is very doubtful if this application for a final decree under the new Code should not have been dismissed as superfluous. But the objection that the plaintiff applied for a superfluous decree has not been taken in the memorandum of second appeal and as the appellant has no merits on his side, I do not think that we should allow him to take it.

The only ground on which the application is attacked, namely, that it is

barred, is useless as there is no period of limitation provided for the passing of a final decree in a suit, the passing of such a final decree being the duty of the Court.

The appeal is dismissed with costs.

Spencer, J.—It is contended that the plaintiff's application presented on 2nd November 1911 was out of time as not being within three years of 18th January 1906, when the regular appeal against the original Court's decree was decided.

The plaintiff obtained a decree on 5th September 1905 for redemption of his lands usufructually mortgaged. There was not only an appeal against this decree, but also an appeal against an order allowing an extension of time for making payment so that the rights of the parties with regard to the matters in controversy in the suit were not conclusively determined till 20th September 1909. Whether Art. 181 or Art. 182, Lim. Act, be applicable in this case, the plaintiff's present application is within three years of his rights to apply accruing (assuming that it was under S. 93, T. P. Act, necessary to make an application of this sort), and it is also under Art. 182, Cl. 4, within three years of the amendment of the decree.

In defendant's counter-petition in the District Munsif's Court the objection was taken that the petition was not maintainable.

Assuming that the Transfer of Property Act did not make it necessary for a plaintiff to apply for a final decree in a suit for redemption, this point has not been taken in the appellant's second appeal memorandum to this Court and therefore I do not find any necessity to deal with it.

The appeal is dismissed with costs.
S.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Madras 393

SANKARAN NAIR AND AYLING, JJ.

Sukira Nainar and others—Defendants
—Appellants.

v.

Viraswami Pillai—Plaintiff—Respondent.

Second Appeal No. 2149 of 1910, Decided on 3rd February 1914, from decree of Dist. Judge, South Arcot, in Appeal Suit No. 15 of 1910.

Evidence Act (1872), S. 101—Plaintiff must to prove title in ejectment suit—If title-deed

is produced, onus to prove that deed does not present true state of facts shifts to defendant.

In an ejectment suit the plaintiff must prove the title, but when he produces a title-deed which prima facie proves his title, the onus shifts to the defendant to show that the title-deed does not represent the true state of facts of the case: 8 Cal. 759 and 2 C. L. R. 48, *Trist*.

[1304 C 2]

T. Narsimha Aiyangar—for Appellants.

K. B. Ranganatha Aiyar—for Respondent.

Facts.—The facts of the case are fully set out in the judgment of the District Munsif. They are briefly as follows: The case put forward by defendants 1 to 5 is that the suit land as alleged by defendants 1 to 5 was originally purchased under Ex. C out of their family funds and the sale deed was taken in the names of defendant 6 and Ramasami Nainar jointly. It is alleged by defendant 1 that the latter never had any beneficial interest in the land; the land purchased could only be irrigated from the Valandai canal, but that was not a source from which the owners of the land were entitled to claim water as of right, but as Ramasami Nainar owned 10 cawnies of land in Valandai, for which he was entitled to get water from the Valandai canal, and he was an influential man in Valandai, his name was, therefore, inserted in the sale deed as one of the purchasers so that he might use his influence to help defendant 1 to 6's family in taking water from the Valandai canal to irrigate the land purchased under Ex. C without disputes being raised by the other persons entitled to get water from that canal for the irrigation of their lands.

At the time the sale deed (Ex. C) was executed, Ramasmi Nainar was on friendly terms with defendant 1 to 6's family.

Ramasami Nainar never got any beneficial interest under the document, Ex. C. And none of the lands covered by it were divided at the time of the partition between himself and his brothers.

It is further admitted that the daughter of Ramasmi Nainar was married to defendant 4 and has been put away by him. And further defendant 6 has fallen out with defendants 1 and 4.

In the partition lists 3 and 3a, which were drawn up when the members of defendants' family divided their property and which were all signed by

defendant 6, the whole of the property purchased under Ex. C is treated as belonging to the family of defendants 1 to 6.

Ramasami Nainar never paid any kist for any of the lands purchased under Ex. C. Ramasami Nainar now sold the land purchased under Ex. C to plaintiff under Ex. A by leasing it for varam.

The plaintiff brought a suit for ejectment which was dismissed by the District Munsif but decreed by the District Judge. The defendants appealed to the High Court.

The High Court remanded the suit to the District Judge for fresh findings with the following order:

"I entirely concur in the District Munsif's finding on the various issues, and I find, firstly, that Ramasami Nainar was never the owner of any portion of the properties conveyed under Ex. C; secondly, that the plaintiff never had any title to the suit land at any time, as his vendor Ramasami Nainar never had a title to the same."

(This second appeal and the memorandum of objections coming for on hearing on Tuesday, 12th November 1912 the Court (Benson and Sundara Aiyar, JJ.) delivered the following):

Judgment. — The District Munsif found that Ramasami Nainar was only a benamidar and that the real purchaser under Ex. C, was defendant 6. In arriving at that conclusion he took into consideration the conduct of the parties showing that the property was not treated as belonging to Ramasami and that, on the other hand, it was treated as belonging to defendants 1 to 6. He relied also on Ramasami's own evidence showing that he did not assert his alleged right under Ex. C, by taking possession. Paras. 10 and 11 of the District Munsif's judgment refer to these important circumstances. The Judge was wrong in considering that these circumstances were irrelevant. The question being whether defendant 6 had any title to the properties which he could validly convey, everything, showing that both he and defendants 1 to 6 regarded them as belonging solely to the latter, must be important. With regard to the payment of the price of the properties the District Munsif refers to circumstances showing that the endorsements on Exs. D and E are suspicious. The Judge has not referred to them. It is argued that as the defendants

are in possession, the onus of proving his vendor's title should have been thrown on the plaintiff and *Hari Ram v. Raj Coomar Opadhya* (1) and *Mookto Keshee Debee v. Anundo Chunder Chattopadhya* (2) are relied on. It is, no doubt, true, as pointed out in these cases, that a plaintiff suing in ejectment on the ground that he was dispossessed must prove his title. But when he produces a title-deed which prima facie proves his title we cannot say that the Judge was wrong in holding that it would then lie on the defendant to prove that the title-deed did not represent the true state of the facts of the case. The fact that the apparent purchaser did not care to assert his title or to obtain possession for a long time would support the plea that the title did not really pass to him. As evidence has been adduced by both sides in this case, the lower Court will have no difficulty in arriving at the right conclusion independently of the question of onus. We must ask the District Judge to submit revised findings on the evidence on record on the questions whether Ramasami was the owner of the whole or any portion of the properties at the date of Ex. A and whether plaintiff had a subsisting title at the date of suit. One month will be allowed for the submission of the findings and seven days for filing objections.

(This second appeal and the memorandum of objections coming on for final hearing after the receipt of the finding from the lower appellate Court upon the issues referred by this Court for trial, the Court delivered the following):

Judgment. — We accept the finding and accordingly reversing the decree of the lower appellate Court restore that of the District Munsif with costs in this and the lower appellate Court.

The memorandum of objections is dismissed.

S.N./R.K.

Decree reversed.

(1) [1882] 8 Cal. 759.

(2) [1878] 2 C. L. R. 48.

A. I. R. 1914 Madras 395 (1)

SADASIVA AIYAR AND SESHAGIRI
AIYAR, JJ.

Chellakkutti Udayan — Plaintiff — Appellant.

v.

Sir Ghulam Muhammad Ali Khan — Defendant — Respondent.

Second Appeal No. 1482 of 1912, Decided on 5th March 1914, from decree of Dist. Judge, Trichinopoly, in Appeal Suits Nos. 73 and 95 of 1911.

(a) Madras Estates Land Act (1908), S. 40 (3)—Commutation of grain rent—In fixing cash rent Collector need not confine to considerations in S. 40 (3).

In fixing cash rent in commutation of grain rent the Collector need not confine himself to the considerations set out in Cl. (3), S. 40.

[P 395 C 1]

(b) Madras Estates Land Act (1908), S. 30 (1) (b) and 40—Limit in S. 30 for enhancement of rent does not apply to commutation fixed under S. 40.

The limit prescribed in S. 30, Cl. (1) (b), for enhancement of rent does not apply to the commutation of rent fixed under S. 40 of that Act.

[P 395 C 1]

C. V. Ananthakrishna Aiyar — for Appellant.

H. Balakrishna Rao — for Respondent.

Judgment.—Section 40, Cl. (3), Estates Land Act, implies that some discretion and latitude have to be allowed to the Collector (and of course, to the District Court on appeal) in fixing the rent in cash in commutation of grain rent. Three considerations are mentioned in Cl. (3) itself, but the Collector is not confined to those three considerations though he should take into account those three considerations also.

The limit of the enhancement of the rent to two annas in the rupee imposed by Cl. (1) (b), S. 30, cannot apply to the commutation rent fixed under S. 40 which deals with a different state of facts altogether.

We are not satisfied that the District Judge fixed the commutation rate arbitrarily or unfairly to either plaintiff or defendant in this case and we dismiss both the second appeal and the memorandum of objections with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 395 (2)

SADASIVA AIYAR, J.

T. S. Ramasami Aiyangar—Petitioner.
v.

Pavadai Chetty and others—Respondents.

Civil Revn. Petns. Nos. 161 to 163 of 1912, Decided on 9th February 1914, from orders of Sub-Judge, Negapatam, in Insolvency Appeal Nos. 1097, 1099 and 1098 of 1911 respectively.

Civil P. C. (1908), O. 22, R. 8—Adjudicated insolvent cannot sue to recover debts vested in receiver nor can receiver continue such suit under R. 8.

After a person has been adjudicated an insolvent he has no right to institute a suit for recovery of debts which had become legally vested in the receiver nor can the receiver continue such a suit under O. 22, R. 8.

[P 395 C 2]

T. Narasimha Aiyangar — for Petitioner.

S. Muthiah Mudaliar—for Respondents.

Judgment.—The lower Court rightly held that the receiver's petition under O. 1, R. 10, should not be allowed as the suit would have been barred if instituted on the date of his application: *Subbaraya Iyer v. Vaithinatha Iyer* (1).

I am asked to treat the receiver's petition as one filed under O. 22, R. 8, that is, as a petition expressing the consent of the receiver to continue the suit filed by the insolvent's authorized agent.

But the insolvent was not legally entitled after he had been adjudicated an insolvent (and after a receiver had been appointed for his properties including the debts due to him) to bring a suit for recovery of one of those debts which had become legally vested in the receiver and divested from the plaintiff. Such a suit brought by a man who had no right of suit cannot be continued by the receiver under O. 22, R. 8, and it is only a suit brought by a person who had a right of suit when he brought it that could be continued by the receiver on the plaintiff's becoming insolvent afterwards.

I dismiss this petition with costs. Similar orders are passed in Civil Revn. Petns. Nos. 162 and 163 of 1912, except that there will be no order as to costs as respondents do not appear.

S.N./R.K.

Petitions dismissed.

A I. R 1914 Madras 396

SANKARAN NAIR, J.

Alamelumanga Thayarammah—Plaintiff.

v.

Namberumal Chetty and another—Defendants.

Civil Suit Nos. 418 of 1912 and 126 of 1913, Decided on 11th March 1914.

(a) **Hindu Law—Reunion—Reunion depends on intention of parties as well as on properties being constituted into joint family property—Subsequent interest of members in reunited family depends on properties brought in common stock and in subsequent partition share will be proportionate to properties originally united.**

Reunion depends upon the intention of the parties as well as on the properties being constituted into joint family property. After a reunion the subsequent interest of the members in the reunited family would not be the same as if they had originally remained undivided. It would depend upon the properties which they bring into the common stock and in a subsequent partition the shares will be proportionate to the properties originally united. [P 397 C 1]

(b) **Hindu Law — Reunion — Difference between joint Hindu family and reunited family pointed out.**

The position of the members who reunite is not the same as that of the members of a joint Hindu family. In the one case it is coparcenary; they are joint tenants. In the other case they are tenants-in-common. Before partition the property goes by survivorship. After reunion the case is one of succession, though the persons who might take the property as heirs after re-union are not the same as those who would take if they were divided and there had been no reunion. [P 397 C 2]

(c) **Hindu Law—Reunion—Burden of proving reunion is on persons setting up reunion.**

The burden of proving reunion is on the persons who set up reunion. [P 397 C 1]

(d) **Hindu Law — Joint family — Jewels made from family funds for lady who alone used them—Other ladies coming into family had similar jewels made for separate use—Such jewels form their separate property in absence of rebutting evidence.**

When it is found in a Hindu family that jewels were made from family funds for the use of a lady and it is also found that she alone has been using them and it is further proved that when other ladies came into the family, they had similar jewels made for their use and they have been using those particular jewels such jewels form their separate property and are not the family property.

In the absence of rebutting evidence, the presumption is that the jewels belonged to the ladies who alone have been using them. [P 398 C 1]

C. Venkatasubramiah and *C.P. Ramaswamy Iyer*—for Plaintiff.

V. Masilamani Pillai—for Defendants.

Judgment.—The dispute is between *Alamelumanga Thayarammah*, the widow of *Seshachelam Chetty*, and *Namberu-*

mal Chetty and *Vedavalli Thayaramma*, the brother and the sister of the deceased. It relates to certain jewels some of which are now in the possession of *Alamelumanga Thayarammah*, and the others are in the possession of *Vedavalli Thayarammah*. *Alamelumanga Thayarammah*'s case is that both these sets of jewels are her stridhanam and belong to her. She says that all of them were in her possession and two days before her husband's death some of them were secretly removed by *Vedavalli Thayarammah* in collusion with *Namberumal Chetty* and she seeks to recover possession of them in Civil Suit No. 418 of 1912 filed by her. As to the other jewels *Namberumal Chetty* says that they, along with the other jewels, for the recovery of which *Alamelumanga Thayarammah* sues, were made out of family funds and formed the family property and that on the death of *Seshachelam Chetty* he became solely entitled to them and he seeks to recover their possession from *Alamelumanga Thayarammah*.

Before proceeding to discuss the evidence of title, I shall briefly refer to the question whether *Seshachelam Chetty* and *Namberumal Chetty* were divided or undivided. It forms the subject of an issue in the suit filed by *Namberumal Chetty*. In 1881 the family consisted of *Seshachelam Chetty*, his three brothers, *Kanna Chetty*, who is a witness in this case, *Chella Pillay Chetty*, *Namberumal Chetty*, and their father. The father and *Seshachelam Chetty*, who alone among the sons had attained the age of majority sold a house which formed the only family property. They received from the vendee Rs. 1,120 which formed their 2/5ths share and the vendee retained in his hands the balance of Rs. 1,680 which he undertook to pay to the three minor sons on their attaining majority. Each of them was to be paid his separate share. Pending that payment the vendee was to pay interest on that amount into the hands of the father for the maintenance of these minor sons. It is also proved that each son, as he attained his majority, received his share of Rs. 560. *Kanna Chetty* on attaining majority left the family, if there was a family. It is not suggested that he is or was at any time a member of the family. These facts are consistent only with partition among the members of the family and

their subsequent conduct confirms that view. The further question is raised whether there was a reunion afterwards, at any rate, so far as Chella Pillai Chetty Namberumal Chetti and Seshachelam Chetty are concerned. The father and Seshachelam Chetty seem to have carried on a shroff's business. When Chella Pillai Chetty attained majority and received his share he seems to have paid over that money to his brother and helped him in carrying on the business. Namberumal Chetty too on receipt of his share paid it into the business. All the time Namberumal Chetty and Chella Pillai Chetty were minors, there could be no reunion, because reunion depends upon the intention of the parties as well as on the properties being constituted into joint family property. What Seshachelam Chetty's properties amounted to at the time Namberumal Chetty put his money into the business does not appear, because after a reunion, if there was one, the subsequent interest of the members in the reunited family would not be the same as if they had originally remained undivided. It would depend upon the properties which they bring into a common stock and in a subsequent partition the shares will be proportionate to the properties originally united. Seshachelam must have increased his share by that time, because subsequent events show that the business was comparatively a prospering one.

The accounts themselves do not show that it must have been a joint family business as distinguished from a partnership. It is quite as consistent with the one as with the other. If therefore I have to decide the question whether there was a reunion I should be inclined to hold that the evidence does not show that there must have been a reunion, and the burden of proof is of course, on the persons who set up a re-union. I shall only add a few words as to the accounts that are put in. I am satisfied that all the accounts have not been put in because the accounts put in certainly seem to indicate that these transactions must find place in other books and I am not therefore disposed to rely very much on these accounts. I shall not dwell upon it further, because I do not think it necessary to come to a final decision on the question whether there was a reunion or not, because the question to be

determined has reference to the ownership of the jewels, and all that was argued was that if there was a reunion, then there would be a presumption that these jewels must have been made out of common funds and that they therefore form joint family property. Of course, as I said before, the position of the members who reunite is not the same as that of the members of a joint Hindu family. In the one case it is coparcenary. They are, if I may say so, joint tenants. In other cases they are tenants-in-common. Before partition the property goes by survivorship. After reunion the case is one of succession, though the persons who might take the property as heirs after reunion are not the same as those who would take if they were divided and there had been no reunion. I am not aware that the question has been decided that in the case of a family composed of members who are reunited, the same presumption as to family ownership applies as in the case of a coparcenary. However, I do not think it necessary to come to any conclusion on that point.

[The learned Judge dealt with the question as to the possession of jewels and their removal and gave the following]

Finding.—"I have very little doubt that Alamelumanga Thayarammah was in possession of all these jewels at the time of her husband's death. * * * * * I have no hesitation in accepting Alamelumanga Thayaramma's evidence as to the way in which she lost possession of these jewels]."

Whether the jewels that are in dispute in Civil Suit No. 418 of 1912 as well as the jewels in Civil Suit No. 126 of 1913 were in law in the possession of Alamelumanga Thayarammah or of the family, she had been undoubtedly using them. With reference to one of the jewels, vanki No. 6 in Civil Suit No. 418 of 1912, there is the evidence of Namberumal Chetty that his wife also had been using it; but with reference to the other jewels he does not give similar evidence. There is the evidence of the sister no doubt that she as well as Namberumal Chetty's wife had been using these jewels; but I am not prepared to believe that evidence, because Namberumal Chetty's wife had other jewels. Whether they belonged to her solely or whether they belonged to the family makes no differ-

ence, so far as this question is concerned. She had other jewels for her own use and it is not likely therefore that she would have used the plaint jewels, and the fact that Namberumal Chetty does not give evidence on that point against the plaintiff's case with reference to the use of the jewels, is almost conclusive. I therefore have no hesitation in holding that the plaintiff had been using them. I am equally satisfied that they were made for the use of the plaintiff, because at the time they were made there was no other lady in the family who was in need of them. Namberumal Chetty married his wife only after most, if not all, of the jewels in question were made. We have therefore these facts about which I feel no doubt that the jewels were made for the use of Alamelumanga Thayarammah and that Alamelumanga Thayarammah alone had been wearing them. There is also the fact proved that Namberumal Chetty's wife, the only other lady in the family, had other jewels of about the same value for her use. Namberumal Chetty states no doubt that some of these jewels were given to her by her own mother. That stands only on his own testimony unsupported by any other evidence, and I am not disposed to accept that evidence; but even if it is true, I do not think it would make much difference.

When we find in a Hindu family jewels made—I will assume for this purpose from family funds—for the use of a lady, and when we find that she alone has been using them, and it is also proved that when other ladies came into the family, they had similar jewels made for their use and they have been using those particular jewels, then the law is, that such jewels form their separate property and they are not family property. If there should be some evidence to show that the same jewels which were being used by one lady were also used by the other lady, or they were kept in the possession of one person in the family for the benefit of and for being handed over to the others for using them, the presumption arising from use and possession will be rebutted. In the absence of such rebutting evidence, the presumption certainly is that the jewels belonged to the ladies who alone have been using them. There are many cases to that effect decided by Benson, J., and myself on the appellate side on appeals from this side of the High Court.

In this case the only evidence adduced on behalf of Namberumal Chetty and Vedavalli Thayaramma is that they were made some time after the marriage and could not have been therefore given to Alamelumanga Thayarammah at the time of her marriage. Assuming that it is so, that would make no difference, because it is conceded that there was one, and that a very valuable jewel—the diamond kammal—which was made some years after the marriage and given to her, and that was admittedly her stridhanam. The fact that some of these jewels were made subsequently, in my opinion, makes no difference, even if it is proved; but, as I said, I am not satisfied that the accounts can be relied upon in order to show that these were the jewels which were made on the occasions referred to in the accounts. As to the actual gift itself of the jewels to the plaintiff, there is a conflict of evidence as to whether these jewels or any of them were given to her at her marriage. Many of the jewels that are spoken to are jewels which are likely to be given to a woman at the time of her marriage and plaintiff's evidence appears to me to be more reliable than the evidence of Namberumal Chetty and his witnesses.

On the whole I come to the conclusion therefore that these jewels formed Alamelumanga Thayaramma's stridhanam property, and I accordingly pass a decree in her favour in Civil Suit No. 418 of 1912, as prayed for, with costs. I dismiss Civil Suit No. 126 of 1913 with costs.

S.N./R.K.

Order accordingly.

A. I. R. 1914 Madras 398

TYABJI, J.

In re Sivanupandia Thevan—Accused—Petitioner.

Criminal Revn. No. 98 of 1914, and Criminal Revn. Petn. No. 86 of 1914, Decided on 25th March 1914, from judgment of Sub-Divl. Mag., Koilpatti, in Criminal Appeal No. 68 of 1913.

Madras Estates Land Act (1908), Ss. 73 and 212—Penal provisions in Act are in addition to those in Penal Code—Offence not punishable under Act but punishable under Penal Code can be so punished—Penal Code (1860), S. 424.

The penal provisions of the Act are in addition to, and not in substitution for, those contained in the Penal Code. Where therefore an act is an offence under the Penal Code, but not

punishable under the Estates Land Act, the accused can be tried for it. [P 399 C 1]

G. S. Ramachandra Aiyar—for Petitioner.

Judgment.—It is argued that Ss. 73 and 212, Estates Land Act, prevent the applicability of S. 424, I. P. C., because, it is argued, the Estates Land Act must be construed as a complete Code relating to offences between landlord and tenant in cases where the latter Act applies. I am unable to accede to the contention. It seems to me that the proper construction of these sections is that certain acts which might not come within the definition of any offence referred to in the Indian Penal Code are also made punishable; and that the penal provisions of the Estates Land Act leave the provisions of the Indian Penal Code intact. I am of opinion therefore that this case must be dismissed.

S.N./R.K. *Petition dismissed.*

A. I. R. 1914 Madras 399 (1)

WALLIS AND SADASIVA AIYAR, JJ.
Desikachari and another—Petitioner.
v.

Emperor—Opposite Party

Criminal Revn. Nos. 741 and 742 of 1914, Decided on 17th April 1914, from judgment of Presidency Magistrate, Egmore.

Madras City Police Act (1888), Ss. 43, 46 and 47—Gaming materials found on premises of house—House strongly presumed to be gaming house in absence of rebutting evidence.

The presence of cards, counters, and so-called hundi boxes on the premises is a strong presumption that it is used as a common gaming house and the owner of it when he makes a profit out of it is presumed to keep a common gaming house and the persons present on the spot are guilty of gaming, in the absence of rebutting evidence. [P 399 C 1, 2]

V. N. Kuppu Rao, R. Sadagopa Chariar and C. Narasimhachariar — for Petitioner.

Order.—The fact that cards and counters and so-called hundi boxes were found on the premises raises a presumption under S. 43, City Police Act, that the premises were used as a common gaming house and the evidence of habitual gaming going on there strongly supports this presumption. As regards the charge under S. 45 against accused 1 of keeping a common gaming house there is evidence that accused 1 derived a profit from the gaming that went on there. The accused says the

collections were credited to the club, but there are no accounts to support this for a long time before the visit of the police. As regards the other accused who are charged under S. 46, a presumption of guilt arises from their presence under S. 43, but we think this is sufficiently rebutted in the case of accused 3. In these circumstances, we acquit accused 3 and decline to interfere in revision with the conviction of the other accused. We however reduce the fines of the accused other than 1 and 2 from Rs. 30 to Rs. 10 each. The balance, if recovered will be refunded.

S.N./R.K. *Order accordingly.*

*** A. I. R. 1914 Madras 399 (2)**

Full Bench

WALLIS, SUNDARA AIYAR AND
SADASIVA AIYAR, JJ.

Bommidi Bayyan Naidu—Appellant.

v.

Bommidi Suryanarayana — Respondent.

Letters Patent Appeal No. 32 of 1911, Decided on 9th September 1912, from decree of Munro and Sankaran Nair, JJ., in Second Appeal No. 640 of 1909.

*** Civil P. C. (5 of 1908), S. 11—Taking of plea of excess land being included in patta in previous suit for rent bars the plea that the patta was incorrect in suit for subsequent year's rent—Doctrine of res judicata discussed.**

In a suit by a landlord against a tenant for rent for a certain fasli under the Madras Rent Recovery Act, the defendant pleaded that the patta tendered was not proper and that the extent of defendant's jeroiyati land had been very much overstated. The Court found that the terms of the patta did not contain any objectionable matter and that the patta was a proper one. In a suit for rent by the same plaintiff against the defendant for a subsequent fasli, the defendant pleaded that the extent of the land referred to in the patta was incorrect.

Held: that the question of the extent of the defendant's holding was res judicata by reason of the decision in the previous suit as to the propriety of the patta, as it was an available ground of attack in the previous suit, and the judgment in the previous suit must be taken to be an adjudication that the terms of the patta were correct in every respect. [P 414 C 1]

Scope of S. 11, Civil P. C. (1908), and the doctrine of res judicata discussed: (*Case law referred*). [P 414 C 1]

T. V. Seshagiri Aiyar — for Appellant.

S. Swaminathan—for Respondent.

Wallis, J.—I agree with Munro, J., that the extent of the defendant's holding under the plaintiff is res judicata by reason of the decision in Original Suit

No. 430 of 1906. In that case, the present plaintiff who held a five years' lease of the village from the registered landholders, sued the present defendant to recover rent for Faslis 1314 and 1315, in the shape of rajabagam, or landholders' share of the produce, of certain jeroyati lands in the village in the occupation of the defendant. To enable the plaintiff to succeed, it was necessary for him to show, under S. 7, Rent Recovery Act, 1865, that he had tendered a proper patta to the defendant for each fasli, or that it had been agreed to dispense with the tender. Under S. 4, the patta had to contain the local description and extent of the land. The plaintiff pleaded that he has tendered a proper patta for each fasli. The defendant denied the tenders and pleaded further that the pattas alleged to have been tendered were not proper, instancing certain payments claimed. He pleaded further that "the extent of the defendant's jeroyati land (that is, of the land in respect of which the plaintiff claimed rent) has been very much overstated." I think that must be taken as referring to the extent in patta as well as to the extent in the plaint, which would merely reproduce it, and I think that the District Munsif who tried the case so understood it, as in his careful summary of the written statement he makes no express mention of the plea as to the extent of the land and evidently treats it as part of the plea that the pattas tendered were improper, and I think it was also covered by the issue "whether the pattas so tendered are proper" and by the terms of the judgment in that issue, which is as follows: "The terms of the pattas, Ex. F, do not contain any objectionable matter." If this view of the pleadings is correct, there is an end of the case, because the question of the extent of the defendant's jeroyati holding was directly and substantially in issue in the previous suit and must be taken to have been heard and finally decided in the plaintiff's favour, as such a decision is necessarily involved in the decree passed in the plaintiff's favour, seeing that if the decision had been the other way, it would, under the Rent Recovery Act, have been fatal to his suit which must have been dismissed on the ground that the patta was not a proper one.

In his judgment, Sankaran Nair, J.,

observes that a decree for rent does not necessarily involve the decision that a proper patta has been tendered, as the parties may dispense with them, but whereas here tender of a proper patta is alleged on the one side and denied on the other and there is no suggestion that tender has been dispensed with, it seems to me that the decree for rent does involve the decision that a proper patta has been tendered.

Apart from any question as to the terms of the patta, it seems to me that the extent of the defendant's holding of jeroyati land in the village was a matter directly and substantially in issue in the suit, as it was in respect of this extent that the plaintiff was claiming rajabagam or landholder's share of the produce, from the defendant; and that it was necessary for him to prove this extent to enable a decree to be given in his favour, even if there had been no plea in the written statement, as there was, that the extent had been over-estimated. In these circumstances, I think the decision on issue 6 that the plaintiff was entitled to the rajabagam claimed in the plaint necessarily involved a decision that the extent of the defendant's jeroyati land in the village was as alleged in the plaint, because what he claimed was the rajabagam of this extent, and that this point must be taken to have been decided in the plaintiff's favour.

In either view, the question of the extent of the defendant's holding of jeroyati land in the village having been directly and substantially in issue and having been, as we must take it, heard and determined because essential to the decision of the suit, cannot be raised again in the present suit for the rent of Fasli 1316 by the defendant's setting up that he was all along in occupation of only 5 acres of jeroyati land in the village and not of the extent all along claimed by the plaintiff.

But, even assuming that the propriety of the patta was not questioned in the former suit on the ground that the extent of the lands was wrongly shown and that the extent was not otherwise questioned by the defendant, I think that these being good grounds of defence to the suit might and ought to have been raised, and must be deemed to have been matters expressly and substantially in issue in the former suit by virtue of Expl. 4,

1914 BAYYAN NAIDU v. SURYANARAYANA (FB) (Sundara Aiyar, J.) Madras, 401

S. 11, Civil P. C. It seems to me that any ground of attack or defence which by virtue of the explanation is deemed to have been directly and substantially in issue in a suit must also be deemed to have been heard and finally decided adversely to the party who failed to raise it. The proposition that failure to raise grounds of attack or defence, which might and ought to have been raised, does not make such grounds res judicata unless there is an express decision by the Court upon them, appears to me to be wholly untenable. Courts of justice are not in the habit of deciding points not raised before them; and to say that the explanation only takes effect when they happen to do so appears to me to defeat the policy of the section and to render the explanation senseless, as held by the Allahabad High Court in *Sri Gopal v. Pirthi Singh* (1), a decision confirmed on appeal in *Sri Gopal v. Pirthi Singh* (2) by their Lordships of the Judicial Committee, who thought it sufficient to say that the judgment of the High Court was clearly right and that the appeal on this point was unarguable. I do not therefore consider it necessary to refer to the earlier decisions of the Calcutta High Court on which Sankaran Nair, J., relied, and it is the more unnecessary to do so as they are very fully examined in the judgment of Sundara Aiyar, J. The appeal must be allowed, the decrees of this Court and the lower appellate Court reversed, and the case remanded to the District Judge for disposal according to law. Costs will abide the event.

Sundara Aiyar, J.—This is an appeal under S. 15, Letters Patent, arising out of Second Appeal No. 640 of 1909. The original suit which led to the second appeal was instituted by a landlord for the recovery of rent from the defendants, his ryots, for the fasli year 1316. According to the plaintiff's case, the defendants were in possession of about 14 acres of jeroyati lands under him liable to pay waram or rent in kind. Defendant 1, the undivided father of defendant 2, contended that he held only five acres of jeroyati lands and that he held in addition 10 acres of inam and three acres of cash-rent-paying lands and denied that any patta was tendered to him for the

fasli in question as alleged by the plaintiff. The correctness of the patta alleged to have been tendered was also denied. Issue 7 framed by the Munsif raised the question "whether the alleged tendered patta was valid and binding on the defendant." Issue 8 was "whether the whole of the 14 acres of land mentioned in the plaint is defendant's jeroyati as alleged by the plaintiff, or only five acres jeroyati and the rest inam and cash-rent-paying land as alleged by the defendants." At the hearing a further question was raised whether the question of the propriety of the patta tendered was res judicata in consequence of the decision of the Court in Original Suit No. 430 of 1905, which related to a suit for rent instituted by the plaintiff against the defendants for fasli 1314. The District Munsif held that the matter was not res judicata because the points in dispute were not raised in the previous suit, these points being the inclusion of inams and of money-rent-paying lands as waram-paying lands, and the erroneous description of the lands for which the plaintiff is entitled to claim rent.

On the merits he held that the patta tendered was not a proper one. He was of opinion that part of the lands included in the patta was inam and was wrongly claimed by the plaintiff as jeroyati. He did not decide the question whether cash-rent and not rent in kind was payable for part of the land. He apparently thought that the patta must be held to be incorrect in stating that waram was payable while cash rent was received till the end of Fasli 1313. The mistake complained of with regard to the description of the land was that the eastern boundary was described as the service inam of the defendant, while in the patta for Faslis 1313 and 1314, it was described merely as defendants' inam. This was held by the Munsif to be improper although he did not decide the question whether the description of the boundary of the defendants' land as service inam was in fact correct or not. He dismissed the plaintiff's suit. His judgment was confirmed on appeal by the District Judge, who upheld the Munsif's view on the question of res judicata. The Judge observed on the question of the correctness of the patta as follows: "Appellant does not seriously argue that the patta was a proper one." The plaintiff pre-

(1) [1898] 20 All. 110.

(2) [1903] 24 All. 429=29 I.A. 118=4 Bom. L. R. 827=6 C.W.N. 889 (P.O.).

ferred a second appeal to this Court. The question argued in second appeal was that the propriety of the patta was res judicata by the judgment in Original Suit No. 430 of 1906. The appeal came on for hearing before Munro and Sankaran Nair, JJ. The learned Judges differed in their views; Munro, J., being of opinion that the plea of res judicata must be upheld, while Sankaran Nair, J., agreed with the opinion of the lower Courts that it should not be maintained.

In the result, the second appeal was dismissed in accordance with the provisions of S. 98 (2), Civil P. C. The present appeal is therefore substantially against the judgment of Sankaran Nair, J. In the previous suit, Original Suit No. 430 of 1906, issue 1 was: "Whether the plaintiff tendered pattas to defendant 1 for Faslis 1314 and 1315 and whether the pattas tendered are proper." The tender of patta was held to be proved. The finding on the question of its propriety was in these terms: "The terms of the pattas, Exs. E and F, do not contain any objectionable matter. I accordingly find issue 1 in the affirmative." In the written statement in that suit, marked as Ex. C in the present suit, paras. 8 and 9 took objection to the correctness of the patta. Para. 8 stated: "The pattas alleged to have been tendered are not proper. The terms in para. 3 of the plaint are not mamool terms." The terms referred to related apparently to the giving of firewood, the payment of interest and the amount of road cess payable by the ryot. Para. 9 stated: "The extent of defendants' jeroyati land has been very much over-estimated by the plaintiff." So far as the written statement was concerned the details of the over-statement of the extent of the jeroyati land were not stated and no specific objection was taken to the statement that some portion of the lands was wrongly mentioned as liable to pay waram instead of cash rent. The objection in the present suit with regard to the description of the eastern boundary may be left out of account as it cannot be held to affect the plaintiff's right to the land in question. It is immaterial whether the defendant's land which forms the eastern boundary was his service inam or an inam of a different character so far as the relations between the plaintiff and the defendants with re-

gard to the plaint land are concerned. The District Munsif did not find that the description of it as service inam was incorrect. It does not appear to what points the evidence let in by the parties in the previous suit related with respect to the correctness of the patta, and the Munsif's finding throws no further light as it is expressed in general words: "The terms do not contain any objectionable matter." The appellant's contention is that the defendants, who set up that a proper patta had not been tendered, were bound to raise all objections that they could to the propriety of the patta, and that the judgment in the previous suit must be taken to be an adjudication that the terms of the patta were correct in every respect and that therefore they cannot raise any objection to the propriety of the patta in this suit which they might have failed to urge in the previous suit. Except in the matter of the difference in the description of the eastern boundary which, in my opinion, may be neglected, it is not stated that the terms of the patta tendered for Fasli 1316 were not similar to the patta for Fasli 1314, which was held to be a proper one in the previous suit. The District Munsif observes that the patta in question was virtually the same as that which was tendered for Fasli 1314. The correctness of this statement is not seriously disputed. Munro, J., observes: "Had the issue in the previous suit relating to the correctness of the patta been found in the negative, the plaintiff's suit must have been dismissed. The finding in the previous suit that the pattas were proper, i. e., that they were such as the defendants were bound to accept, was a finding that the relationship of landlord and tenant subsisted between the plaintiff and the defendants in respect of the land entered in the pattas and I do not think that the defendants can again be allowed to put the plaintiff to proof of his title."

Sankaran Nair, J., held, having regard to the general language of the District Munsif's finding in the previous suit, that there was no explicit adjudication there of the questions now raised, viz. whether a portion of the lands was inam or jeroyati and whether another portion was liable to pay cash rent or waram. The learned Judge was further of opinion that as the suit related only to the

rent for a particular year (Fasli 1316), it did not necessarily require a decision as to the terms of the patta or the extent of the land for which rent was payable, and that these questions are therefore not *res judicata*.

The decision of the question depends on the interpretation to be placed on S. 11, Civil P.C., which embodies the rule of *res judicata*. According to the section the Court is forbidden to try "any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties." The rule applies subject to the other provisions of the section not only to a suit tried before but to an issue decided in a previous suit provided the matter directly and substantially in issue in the latter suit was raised in the previous suit or in a substantial and direct issue in the previous suit. Explan. 3 lays down: "The matter above referred to must in the former suit have been alleged by one party and either denied or admitted expressly or impliedly by the other." An implied denial is as effective as an express one. Explan. 4 says: "Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

The appellant contends that with respect to any issue in the former suit, the parties were bound to put forward all grounds of attack or defence material for the decision of the issue and will be deemed to have done so even if they failed to do so in fact; that the propriety of the patta was directly and substantially in issue in the previous suit, and that both the plaintiff and the defendants were bound to put forward every matter involved in the question of the correctness of the patta and that the decision that the patta was a proper one must be taken to be a decision that there was no valid objection of any sort to it; and that the defendant cannot now be permitted to raise any matter relating to the propriety of the patta which he might have failed to raise before. I am of opinion that these contentions must be upheld. The learned counsel for the respondent rested himself on the arguments contained in the judgment of Sankaran Nair, J., and did not elucidate

the points any further. It becomes, therefore necessary to examine the arguments contained in the judgment of that learned Judge. He lays down the following propositions, as I understand his judgment:

(1) The scope of the rule of *res judicata*, as limited by the word "directly and substantially in issue," is not confined to the relief granted by the former suit or to the property which was the subject-matter therein.

(2) The decision on a matter not essential for the relief finally granted in the former case, or which did not form one of the grounds for the decision itself, cannot be said to have been directly and substantially in issue; but where the decision on a question was essential to the relief granted or the decree passed, or where it formed the groundwork of the decision, then the matter must be deemed to have been directly and substantially in issue in the suit.

The difference between issues "collateral" and "direct" depends upon whether it was possible to pass the decree without any finding upon the particular issue.

(3) With regard to the relief granted in a suit, the decree may render it necessary to imply a decision on a question not expressly decided, but with regard to issues, no implication is necessary, but we ought to have a clear decision to create a bar. (The application of the latter part of the rule would of course, be to cases where the subject matter of the two suits is different.)

(4) Explanation 4 does not dispense with the necessity of finding upon a matter which might and ought to have been made a ground of defence or attack in the former suit unless that matter must be taken to have been involved in the actual decree passed in the case.

(5) It is not enough to make the matter of an issue *res judicata* that the decision of it in a different manner would be inconsistent with the decree in the previous case as such determination would not affect the actual decree passed in that case for the rent for fasli 1314.

(6) A decree for rent does not necessarily involve the decision that a proper patta has been tendered.

If, therefore, as a fact, that question was not decided in the previous suit, we

are not bound to imply that it was so decided.

Now, S. 11, Civil P. C., requires that the matter or issue should have been heard and finally decided by such Court. It does not say that it should have been decided in explicit terms. It cannot be doubted that if an adjudication on a matter is necessarily involved in the decision in a prior suit, the section must be understood to lay down that it must be taken to have been heard and finally decided. Sankaran Nair, J., admits that the principle of an implied decision must be adopted so far as whatever is required by decree in the previous suit is concerned. But he lays down that it is not applicable with regard to issues. He does not say how then the judgment in a suit is to be understood. No such distinction is warranted by the language of the section. The suit and an issue put forward for trial in the second suit are treated on exactly the same footing in the section, and the test of *res judicata* with regard to each is whether the matter directly and substantially in issue in the later suit was the matter directly and substantially in issue in the suit or in an issue in the earlier suit.

The word "issue" in the expression "suit or issue" must be distinguished from the use of the words "in issue" in the expression "the matter directly and substantially in issue." The latter expression, as already stated is made applicable to both the later suit and an issue raised in it. "Directly and substantially in issue" obviously means "directly and substantially in question, which would include everything necessarily involved," whether that expression is applied to the suit itself or an issue in it. This has to be borne in mind in interpreting Explan. 4 also. It speaks of "any matter which might and ought to have been made ground of defence or attack in the former suit." The phrase "matter directly and substantially in issue" in the principal clause of the section is spoken of with reference to both suit and issue. Clearly, therefore, what ought to have been made ground of defence or attack with respect to any issue in the earlier suit must be taken to have been a matter directly and substantially in issue therein when the question is whether an issue in the earlier suit can be tried again in the later suit.

Again, in deciding whether any matter is *res judicata*, the question is what is necessarily involved in the actual judgment of the Court in the earlier suit, not what relief was granted by the decree, because it is the matter decided (expressly or by necessary implication) that becomes *res judicata*. It is desirable to illustrate by a concrete example. Suppose a suit is instituted for one of the instalments payable according to the terms of a bond. The defendant denies its genuineness and pleads also absence of consideration, and issues are framed on both points. The Court passes a decree for the instalment but records no explicit finding on either of the issues. A suit is subsequently instituted in the same Court for a second instalment and the defendant raises the same pleas as in the earlier suit. The subject matter of the two suits is not the same and the dismissal of the second suit would not affect the actual decree passed in the earlier suit. Can it be contended that the issues may be tried again in the second suit?

According to the learned Judge apparently, they should be tried again. The executant of the bond, according to him, though he cannot seek to recover back the amount decreed against him in the earlier suit, may resist the second suit for the later instalment. The difference between issues "collateral" and "direct," according to the learned Judge, depends upon "whether it was possible to pass the decree without any finding upon the particular issue." I am unable to accept his position that though a finding might be necessary to pass the judgment in the previous suit, the issues should not be taken to have been decided (unless explicitly decided) if the result of the second suit would not be to re-open the actual decree in the previous suit. The result of such a position would be that the same issues may be re-opened again and again in the same Court though such re-opening would be inconsistent with the decree and judgment in every one of the previous suits. According to the learned Judge, such inconsistency is immaterial. The decision of the Privy Council in *Amanat Bibi v. Imdad Hosain* (3) is referred to in support of this position. There were two earlier proceedings;

(3) [1888] 15 Cal. 800=15 I. A. 106 (P.C.).

one a suit to establish a sub-proprietary right as against a talukdar, the other, a proceeding to recover the same property from the talukdar under the terms of a certain Revenue Circular on repaying to the talukdar the arrears of revenue which he had paid to the Government.

The third proceeding, in which the plea of *res judicata* was raised, was a suit to redeem a mortgage granted by the person who was plaintiff in the earlier proceeding. The Privy Council held that the third suit was not barred as *res judicata* because the cause of action was different. Their Lordships held that the cause of action to establish a sub-proprietary right was obviously different from that in a suit for redemption, though the property sought to be recovered was the same. The question in issue, said their Lordships, was quite different in the two suits; and they interpreted the provisions in S. 7, Act 8 of 1859, which enacted that "every suit shall include the whole of the claim arising out of the cause of action," as not requiring that "every suit shall include every cause of action or every claim which the party has, but only that every suit should include the whole of the claim arising out of the action on which the suit is brought." It is now a well-established proposition that, though the subject matter of the litigation and the relief claimed may be the same, different suits may be maintained by a plaintiff if the cause of action in each suit be different. There were two stages in the second of the earlier proceedings. The first originated in an application by the plaintiff under a Revenue Circular to recover the property. The settlement officer who made the inquiry found that the plaintiff had conveyed the property to the taluqdar by a conditional sale which had become absolute in 1853, and that the plaintiff was further not entitled to recover the property as he had not repaid to the taluqdar certain arrears of revenue paid by the latter which he was bound to repay before claiming to recover the property. Their Lordships held that this order under the Special Circular could not be treated as judicial proceedings at all. The plaintiff then had recourse to fresh proceedings on the ground that the payment of arrears by the talukdar must be treated as having been

made on his account. The Settlement Officer then again decided that the property had been transferred to the talukdar by a conditional sale of the year 1853 which had become absolute. Their Lordships held that the question in those fresh proceedings must be taken to have been merely "whether the plaintiff was entitled to recover the property which had been transferred by the Government to the talukdar on repaying to the taluqdar the arrears of revenue which he had paid to Government," that being according to their Lordships, the cause of action on which the plaintiff then claimed to recover. The matter in issue in the suit before their Lordships, they said, was "the respondent's right to redemption under the mortgage deed of 1854."

Their Lordships then observed: "It may be difficult to reconcile the position of the talukdar as mortgagee in 1854 with his position as absolute owner in 1853 under purchase from the mortgagor. But, if it be established that the respondent was a mortgagor in 1854 with the right of redemption, why should he be barred merely because at an earlier date he may have had no right to the property at all?" This is the passage relied on by the learned Judge for the proposition that the decision of an issue in the earlier suit inconsistent with an issue in the later suit will not make the suit or issue in the later suit *res judicata*. I can find no such proposition laid down by the Privy Council. They did not regard the later suit as inconsistent with the decision in the former suit that there was a conditional mortgage of 1853 which, if it was in operation, had become absolute in 1853. Proceeding on the basis that the conditional mortgage had been established to be true, if the talukdar chose to take a mortgage in 1853 from the plaintiff and his subsequent holding was under that mortgage, their Lordships held that the mortgage of 1853 would furnish the plaintiff with a fresh cause of action, and a plaintiff need not combine in the same suit all his causes of action, though both suits might be for the recovery of the same property. They did not say that in the later suit the execution of the conditional sale of 1853 or its having become absolute could be denied. The observation that it may be difficult to reconcile the position of the

talukdar as mortgagee in 1854 with his position as absolute owner in 1853 under a purchase from the mortgagor, meant no more than that it might appear to be improbable that a person who was absolute owner in 1853 would take a mortgage in 1854 ; but a mortgagee cannot deny the title of his mortgagor, and if the talukdar chose to take a mortgage from the plaintiff in 1854, he could not say that the plaintiff did not obtain a fresh cause of action for redemption of that mortgage. On the other hand, in *Pahalwan Singh v. Maharaja Maheshur Buksh Singh Bahadur* (4), the Privy Council applied the rule of an implied decision of an issue by a former adjudication although the property in the two suits was different. The learned Judge seems to have been under the impression that in that case the decree in the later suit would re-open the decree in the earlier suit, but that was not the case, as the property in dispute in the two suits was different. It is, of course, necessary that in order that an issue may be res judicata the decision in the former suit must necessarily involve an adjudication in a particular way on the issue raised in the later suit and its adjudication in a contrary way in the later suit must be inconsistent with the adjudication which must be implied in the earlier suit. In one part of his judgment the learned Judge observes that, where the decision on a question was essential to the relief granted or where it formed the groundwork of the decision, then the matter must be deemed to have been directly and substantially in issue in the suit, but he afterwards restricts the scope of the second test cases where the question was explicitly decided. For this restriction I can find no warrant either in principle or in the language of the section.

The statement that a decision on a matter not essential for the relief finally granted cannot be said to have been directly and substantially in issue is unworkable in practice, where a suit is dismissed without any relief being granted. The test should really be whether the matter was essential for the decision in the earlier suit, not for the relief granted. The decision of a Court proceeds on the matters put in contest by

the parties and its adjudication cannot be understood without regard to the actual contest. It is impossible to understand it merely with regard to the decree.

Suppose a suit for an instalment on a bond is dismissed, the defendant's plea being that the bond is not genuine and that it is not supported by any consideration. The Court does not record any explicit finding on these points, either of which would lead to the dismissal of the suit. Suppose the plaintiff afterwards institutes a suit for another instalment and the defendant raises the same pleas. Can the plaintiff be permitted to say that the points should be tried again and he should be given a decree if both points are found in his favour? Sankaran Nair, J., concedes that the granting of the relief may be taken to involve the decision of whatever point is necessary to support the decree. But what points are to be taken as involved in the decree in the instance just put? How is it possible to decide a question of res judicata by a consideration of the relief alone which is granted and without a consideration of the judgment in the case, and how is it possible to understand what the Court decides in the judgment without seeing what the contest between the parties was? The result of doing so would be to confine the doctrine of res judicata to the scope of the rule transit in rem judicatum (except where a matter directly and substantially decided by the judgment in a former suit.) Suppose, in the illustration already put of a defendant denying both the genuineness and consideration of an instalment-bond, and the defendant in the second case admits the genuineness of the bond, but denies only the passing of consideration for it. If it is open to the Court in the later suit to proceed on the footing of the genuineness of the bond the question would arise whether the matter as to consideration is res judicata by the former judgment. As no explicit findings on the points in contest were recorded in the judgment, the decision might have proceeded either on the ground that the bond was not genuine or that it was not supported by consideration, or on both grounds. It might be proper in such a case to hold that the previous judgment did not necessarily imply a decision on the question of con-

(4) [1874] 12 B. L. R. 391=18 W. R. 182 (P. C.).

sideration. Certainty is essential for the application of the rule of res judicata, and the Court would not prevent the re-agitation of a matter where it is not certain that the previous decision proceeded on a particular ground: see *Vythilinga Mudaliar v. Ramachendra Naicker* (5). If a suit for an instalment is dismissed for default, no matter would be res judicata in a claim for another instalment. If it is decreed ex parte, the genuineness of the bond and all question as to its enforceability, so far as to justify a decree for the instalment, would be res judicata in a suit for another instalment.

The learned Judge apparently proceeds on the view that for some reason the scope of the rule of res judicata with regard to issues should be restricted as far as possible and refers to the opinion of Stuart, C. J., in *Babulal v. Ishri Parsad Narain Singh* (6) and *Muhammad Ismail v. Chattar Singh* (7), who regretted the application in this country of the principle of res judicata to the trial of issues, and not merely to the subject matter in previous suits. It is necessary to consider whether there are good grounds for such regret. The rule was well established by the decisions of the Privy Council: see *Krishna Behari Roy v. Bunwaree Lall Roy* (8); *Pahlwan Singh v. Maharaja Muheshur Buksh Singh Bahadur* (4); *Soorjomonee Dayee v. Suldandund Mohapatter* (9); *Pittapur Raja v. Buchi Sitayya* (10). S. 13, Act 10 of 1877 and S. 11 of present Code made the expression "matter directly and substantially in issue" applicable both to suit and issue in a suit.

The learned Judge holds that the proper terms of the patta to be tendered by the land holder to the ryot could not be regarded as having necessarily been directly and substantially in issue in a suit for rent. Two decisions of the Privy Council are referred to in support of this position. The first of them is *Misir Raghobardial v. Sheo Baksh Singh* (11). In that case the plaintiff had previously instituted a suit for Rs. 1,665, the balance

of interest due on a bond for Rs. 12,000 in a Court not competent to try suits exceeding Rs. 5,000 in value. The defendant had pleaded that the bond was supported by consideration only to the extent of Rs. 4,790, and that the amount already paid by him for interest exceeded the interest due on the actual consideration that had passed. The defendant's plea was upheld. The plaintiff subsequently instituted a suit for the principal and interest due on the bond in a Court competent to try a suit of that value. The question was whether the decision in the previous suit as to the amount of consideration that had passed for the bond was res judicata in the subsequent suit. Their Lordships held that it was not. The point was decided on the ground that the Court that decided the previous suit was incompetent to try the later suit for principal and interest.

The rule as to the necessity for the Court trying the previous suit having concurrent jurisdiction to try the later suit had also been laid down by the decisions of the Privy Council under Act 8 of 1859 although the language of S. 2 of that Act did not in terms refer to that requisite. Sir Richard Couch in pointing out that the rule already applied by the Privy Council while Act 8 of 1859 was in force was embodied in explicit terms in Act 10 of 1877, went on to observe that the issue as to consideration "was a collateral rather than a direct issue in the suit." He said: "The plaintiff might have succeeded without having a finding upon it if he had proved an admission by the defendant that the sum claimed was due for interest or had shown that the Rs. 2,175 (the sum alleged to have been paid for interest) had been expressly paid on account of the larger sum which he said the defendant owed for interest." This is immediately followed by the sentence: "If the decision of the Assistant Commissioner is conclusive, he will, although he could not have, tried the question in a suit on the bond have bound the plaintiff as effectually as if he had jurisdiction to try that suit. Their Lordships think that this was not intended and that by Court of competent jurisdiction Act 10 of 1877 means a Court which has jurisdiction over the matter in the subsequent suit in which the decision is used as conclusive, or in other words a Court of concurrent juris-

(5) [1904] 14 M. L. J. 379.

(6) [1978-80] 2 All. 582.

(7) [1882] 4 All. 69 (1831) A. W. N. 116.

(8) [1875-76] 2 I. A. 233=1 Cal. 144=25 W. R. 1 (P. C.).

(9) [1872] 12 B. L. R. 304=20 W. R. 377=I. A. Sup. Vol. 212 (P. C.).

(10) [1875] 8 Mad. 219.

(11) [1888] 9 Cal. 439=12 C. L. R. 520=9 I. A. 197 (P. C.).

diction." It is clear to my mind that his Lordship in making the observation contained in previous sentence was only dealing with the question of the necessity of concurrent jurisdiction in the Court which tried the earlier suit, and he used the expression collateral in the sense of not referring to the subject-matter of the previous suit and that he did not mean that it was not necessary for the decision of the suit on the issues raised between the parties on the pleadings in the case. The observation was made with reference to the principle that the judgment of a Court not having jurisdiction to try the later suit would not be res judicata on any issue in the earlier suit but only with respect to the actual subject matter of the previous suit.

In *Run Bahadur Singh v. Lucho Koer* (12), the decision in *Misir Raghobardial v. Sheo Baksh Singh* (11) was treated as an authority only on the question that the adjudication of a Court not having concurrent jurisdiction with that trying the later suit would not make the decision of an issue res judicata. Both *Misir Raghobardial v. Sheo Baksh Singh* (11) and *Run Bahadur Singh v. Lucho Koer* (12), on the other hand proceed on the assumption that if there had been concurrence of jurisdiction in the two Courts the finding on an issue in the earlier suit would have given rise to a successful plea of res judicata. It would appear that in the *Duchess of Kingston's* case (13), which was referred to by Sir Richard Couch in the judgment in *Misir Raghobardial v. Sheo Baksh Singh* (11), the expression "direct issue" as opposed to a collateral one was used in the sense of an issue directly determining the subject-matter of the previous proceedings and not in the sense in which it is obviously used in the Indian statute. There is in my opinion no foundation at all for making a distinction between an explicit decision and an implied decision of an issue in the application of the doctrine of res judicata provided the matter raised in the issue was directly and substantially in issue in the earlier suit. If the decision was not sufficiently explicit that would no doubt, furnish the party affected by it in the earlier suit, a good ground for appeal against the decision just as any other error or imperfection would do but the

defect in the finding is not one that can be collaterally attacked in the later suit.

The same observation would apply even if an issue regarding a matter directly and substantially in issue in the former suit was not clearly raised or not raised at all provided the matter is such that it must be taken to have been decided in the earlier suit, that is, provided the judgment would not be sustainable unless the matter be taken to have been decided. Sankaran Nair, J., holds that Explan. 4, which states that "any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit" does not qualify the statement in the principal clause that the matter in issue should have been heard and finally decided by such Court. It is of course true that the matter should have been decided in contemplation of law, but if as the learned Judge concedes it is sufficient if the matter must be taken to have been decided by necessary implication so far as the subject-matter of the suit and anything involved in the decree itself are concerned, what reason is there for putting a different construction on the same words as applied to the decision of an issue? And in so far as what is involved in the decree is concerned, any matter, which might and ought to have been made ground of defence or attack must be taken to have been decided there, is in my opinion equally no reason for not applying the same principle with respect to a matter directly and substantially in issue in an issue in the previous suit.

As I have already observed, the language of Explan. 4 is equally applicable both to the previous suit itself and to an issue in the suit. What use is there in enacting that what ought to have been made ground of defence or attack in the former suit shall be deemed to have been a matter directly and substantially in issue in that suit if the matter is not also to be taken to have been decided in the previous suit? What was not made ground of defence or attack could not have been expressly decided. The explanation would therefore be objectless if a decision also is not to be implied and made the ground of estoppel with respect to what is impliedly to be regarded

(12) [1885] 11 Cal. 301=12 I. A. 23.

(13) 2 Smith's L. C. 778.

as having been directly and substantially in issue. At any rate the logical result of the respondent's position must be to make an explicit decision equally necessary with respect to a ground of attack or defence not having been urged with regard to a matter involved in the decree itself in the previous suit. The learned Judge's position is, no doubt, supported by several decisions in the Calcutta High Court, *Kailash Mondul v. Baroda Sundari Dasi* (14), *Woomesh Chandra Maitra v. Barada Das Maitra* (15) but, in my opinion, these decisions are absolutely unsupportable and quite inconsistent with the decisions of the Privy Council in *Pahalwan Singh v. Maharaja Muheshur Buksh Singh Bahadur* (4) and *Mahomed Ibrahim Hossein Khan v. Ambika Prashad Singh* (16), even if the decision of the same tribunal in *Sri Gopal v. Pirthi Singh* (2) could be distinguished, as stated by Sankaran Nair, J., on the ground that the implication of a decision on an issue, which ought to have been raised in the previous suit, was justifiable in that case as the decree passed in the earlier suit would itself be affected otherwise. The Calcutta High Court however did not consider *Sri Gopal v. Pirthi Singh* (2) distinguishable on that ground. Gurudas Banerjee, J., who was a party to the decision in *Kailash Mondal v. Baroda Sundari Dasi* (14), observed, in *Rajendra Nath Ghose v. Tarangini Dasi* (17), that the position adopted by him in the previous case would require to be reconsidered in consequence of the decision in *Sri Gopal v. Pirthi Singh* (2).

The same view was taken by the Calcutta High Court in *Kailash Chandra Mandal v. Ram Narain Giri* (18), *Jamadar Singh v. Serajuddin Ahmed Chowdhuri* (19) and *Mohim Chandra Sarkar v. Anil Bandhu Adhikary* (20), although *Jamadar Singh v. Serajuddin Ahmed Chowdhuri* (19) might be explicable if the distinction adopted by Sankaran Nair, J., be correct. This Court also has held that a ground of attack or defence,

(14) [1897] 24 Cal. 711=1 C. W. N. 566.

(15) [1905] 28 Cal. 17.

(16) [1912] 14 I. C. 496=39 Cal. 527=39 I. A. 68 (P.C.).

(17) [1905] 1 C. L. J. 248.

(18) [1907] 4 C. L. J. 211.

(19) [1908] 85 Cal. 979=8 C.L.J. 82=12 C.W. N. 862.

(20) [1909] 1 I. C. 66.

which a party omitted to bring forward in an earlier suit, must be taken to have been decided in the suit : see *Arunachalam Chetty v. Meyyappa Chetty* (21) and *Masilamani Pillai v. Tiruvengadam Pillai* (22). The point seems to me to be so obviously clear that it does not deserve further consideration.

According to the respondent's argument, although a matter not necessary to sustain the actual decree in an earlier suit will not be res judicata in a later suit if the decision on it is only by way of implication, yet it would be res judicata if it expressly decided it. That an express decision would constitute an estoppel was regarded by Sankaran Nair, J., as concluded by the decision of the Privy Council in *Pittapur Baja v. Buchi Sitayya* (10), to which might be added several other rulings : see *Gobind Chunder Koondoo v. Taruck Chunder Bose* (23), *Soorjomonee Dayee v. Suddanund Mohapatter* (9) and *Krishna Behari Roy v. Brojezwari Chowdranee* (8). But the test laid down in these cases was not whether the decision was explicit but whether the issue was one on which the judgment in the previous suit was based, quite apart from the question whether the decree itself would be affected by the matter being re-opened in the later suit. If the judgment was not based on the issue, then the decision of the issue, whether express or implied, cannot constitute the matter res judicata in the later suit.

These are the general principles which, in my opinion, must guide the Court in determining whether the question of the correctness of the patta is res judicata by the decision in the previous suit for the rent of Fasli 1314. The point is: Was the question of the propriety of the patta directly in issue in the previous suit and was it decided expressly or by implication? In my opinion, the question whether a decree for rent involves a decision that a proper patta had been tendered is one which must be decided with reference to the facts of each case. It is perfectly true, as pointed out by Sankaran Nair, J., that the tender of a patta is not essential to a landlord to recover rent and that the parties may dispense with it. It may be right to go farther and say that a ryot may, if he

(21) [1898] 21 Mad. 91.

(22) [1908] 31 Mad. 385.

(23) [1877-78] 3 Cal. 145=1 C.L.R. 35.

chose, not insist on the tender of a proper patta before he pays rent for any particular year and that this will not affect his right to require a proper patta in any subsequent year and resisting a suit for rent on the ground that a proper patta has not been tendered. It may be open therefore to a defendant to raise no plea at all about the correctness of a patta in a suit instituted for the rent of a particular year; this may not estop him from resisting a subsequent suit for rent for another year on the ground that the patta alleged to be tendered is not correct. This may possibly apply even in cases where the plaintiff alleged in the earlier suit that he tendered a patta containing proper terms. But the effect of a decision depends in large measure on the actual contest between the parties.

A party may not be bound to raise a particular plea, but if he does raise a plea, which would be an effective answer to the suit, then the same plea cannot be raised again in a later suit between him and his opponent. It may be that the actual decree alone in the previous suit, with respect to its subject matter would not lead to an implication of the decision of a particular matter, but if the matter is put in contest and the result of the contest would be that the judgment in the case must depend on the decision of the matter, then it is clear to my mind that the decision would constitute it *res judicata* in a subsequent suit and it is absolutely immaterial whether the decision be express or implied. Of course, it is open to the parties to show that the contest on any matter was subsequently waived or that the Court refused to decide the matter, but if neither of these events took place, a decision by the Court on the matter must necessarily be implied if it was not expressly decided. In the case before us, we have a decree for rent. It is said this did not necessarily require a decision as to the terms of the patta or the extent of the land for which the rent was decreed. Is this correct, when the terms of the patta or the specification of the extent of the land were impugned? When these questions were raised by the defendant, could the Court pass a judgment for rent in the plaintiff's favour without determining them? The learned Judge seems to proceed on the footing

that the question, what is necessary to be decided in a suit is to be settled without reference to the pleas raised by the defendant. With all deference, this seems to be an altogether indefensible position.

In *Pahalwan Singh v. Maharaja Muleshur Buksh Singh Bahadur* (4), a suit was instituted in the Shahabad Court for recovering certain land as an accretion to the estate of the plaintiff in that suit in the District of Shahabad. The defendant in the suit claimed the land as an accretion to his own estate in the District of Ghazipur. The Courts decided that the land was an accretion to the plaintiff's estate in Shahabad and not to the defendant's estate in Ghazipur. The defendant subsequently instituted a suit in the Ghazipur Court for the land to which the subject of the former suit was found to be an accretion. The Privy Council held that the finding in the earlier suit necessarily decided that the land claimed by the plaintiff in the later suit was in the District of Shahabad and that the Court of Ghazipur had no jurisdiction. It will be noted that the property in the two suits was different. Any plea as to the district, in which the property in the later suit was situated, was not a necessary one, the immediate question in the earlier suit being merely whether the land was an accretion to the property of the plaintiff or of the defendant in the suit; but the parties went to trial on the question whether the land was an accretion to the plaintiff's estate in Shahabad or the defendant's estate in Ghazipur and the issue which arose on their contest was regarded as determining the question in which district the property in dispute in the later suit was situate. Their Lordships observed :

"Now, no doubt, it might be possible to suppose cases in which the decision as to the accretion might not necessarily be a decision that the land to which it was accreted was within the local jurisdiction of the Court which had dealt with it. But all these questions must be tried with respect to the subject-matter in the particular suit; and it seems to their Lordships impossible, in construing the section with reference to what was in issue in the former suit, to come to any other conclusion than that the decision did, by necessary implication, find that the green land was within the settled

estate of the Maharaja in Shahabad. He came as plaintiff into Court; he claimed the whole of the land as an accretion to his settled estate in Shahabad. From the map and the evidence it is obvious that, if an accretion to his land, it could be an accretion to nothing but the green land. The accretion was found to be an accretion to his land in the settled estate of Shahabad, and that proposition necessarily implied that the green land was a part of the settled estate of Shahabad."

In *Soorjomonee Dayee v. Suddanund Mohapatter* (9), the Privy Council held that if the right to certain property is contested on a ground equally applicable to that and other property, then the decision of the matter will be res judicata not only with regard to that, property but with regard to all other property embraced by the ground on which the contest is based and that the pleadings must be referred to to decide what matter was contested between the parties. Their Lordships observe: "In their Lordships' opinion, the effect of the pleadings is that the plaintiff sought, inter alia, to set aside the will on the ground that the testator had not the power to make any of the devises of reality that it contained, inasmuch as he could not devise ancestral real property, and all his real property was in point of law ancestral consisting of such as he had inherited from his father, and such as he had bought out of the income of it If both parties invoked the opinion of the Court upon this question, if it was raised by the pleadings and argued, their Lordships are unable to come to the conclusion that, merely because an issue was not framed which, strictly construed, embraced the whole of it, therefore, the judgment upon it was ultra vires. To so hold would appear scarcely consistent with the case of *Mt. Mitna v. Syad Fuzl Rub* (24), wherein it was held that in a case where there had been no issues at all, but where, nevertheless, it plainly appeared what the question was which was raised by the parties in their pleadings, and was actually submitted by them to the Court, the judgment upon it was valid." This was a decision under Act 8 of 1859, which did not expressly lay down the

rule of res judicata with regard to an issue in a suit. In *Tirubhuvan Bahadur Singh v. Rameshar Baksh Singh* (25), it was laid down by the Privy Council that the conduct of the parties must be considered in deciding whether an issue was material for the decision in the earlier suit. In *Aghore Nath Mookerjee v. Kamuni Debi* (26), Mookerjee and Teunon, JJ., held that if a person, who has no present interest in the bequests contained in a will, is made a party to a suit which asked for the construction of the will and the determination of all rights created by it and he takes an active part in the contest relating to the construction, the decision of the Court on the construction would be res judicata against him. It is true that it is not always easy to decide what was directly and substantially in issue in a former suit. Issues are often framed by Courts not only on points which are essential for the determination of the actual matter in controversy between the parties but also on subsidiary questions having more or less bearing on the essential points. A decision on such subsidiary questions need not necessarily make the matter raised by them res judicata in a subsequent suit where they became material for the decision of the matter then brought under contest. Again, a decision on one of two questions may be enough to determine a contest, but both the questions might be adjudicated on and made the basis of the judgment. In such a case, the matter raised in both the questions would be res judicata although if the judgment had been based on one of them alone, the other would not be res judicata. Again, suppose a suit is instituted for the recovery of certain properties, the defendant might merely deny the plaintiff's title to those properties and the issues might relate only to the particular properties claimed. In such a case, a pronouncement on points involving both the properties under litigation and other properties might not lead to estoppel by res judicata. But suppose the defendant rests his defence on a ground which admittedly covers both the properties claimed by the plaintiff in the suit and other properties as for instance by claiming them all under a will and the issue

(24) [1867-70] 13 M. I. A. 573=15 W. R. 15 (P.C.).

(25) [1906] 23 All. 727=33 I. A. 156=9 O. C. 377 (P.C.).

(26) [1910] 6 I. C. 554.

as to the will is decided against him, then in that case if the plaintiff subsequently claims other properties under the will, the question as to the will would obviously be res judicata. Suppose, again a plaintiff claims on the basis of his right under a will some of the properties comprised in it and the defendant contests the genuineness of the will; the decision of the Court that the will is or is not genuine will certainly bind both the plaintiff and the defendant in any litigation between the parties with reference to other properties in the will.

In a suit for rent for a particular year, it may often not be easy to determine whether any particular question raised relates only to the claim made for the year or is one which would affect the right to rent for other years also. The Court has in each case to decide whether the issue covers the plaintiff's right to rent except for the year for which it is claimed. In *Vythilinga Mudaliar v. Ramachandra Naicker* (5), cited by Dr. Swaminathan for the respondent, the question raised in the earlier suit for rent was whether the defendant was in possession of all the lands for which rent was claimed. This Court held that any finding on the question would not be res judicata in a suit for rent for a subsequent year as the land of which the defendant was in possession might not have been the same in both the years. Subramania Aiyar, J., whose judgment was concurred in by Sankaran Nair, observed, however, that a decision on a point which would affect the right to rent for both the years could not be disputed in the later suit. He observed pp. 383: "No doubt, had the decision in the previous suit been to the effect that certain specific parcels constituted part of the inam, the choultry in the present suit could not, if it admitted the possession during the period in question here of those parcels, seek to make out that the parcels were not inam." *Nil Madhub Sarkar v. Brojo Nath Singha* (27) is probably supportable on similar grounds, although some of the observations in the judgment seem to be open to exception. In a very recent case, *Kali Kumar v. Bidhu Bhushan* (28), Mookerjee and Teunon, JJ., held that an issue raised on

the disputed point in a suit for rent and decided by a Court would operate as res judicata in a subsequent suit for rent. Mookerjee, J., considers the point as settled beyond all controversy and refers to *Ekabar Sheikh v. Hara Bewah* (29) and *Hara Chandra Bairagi v. Bepin Behari Das* (30) in support of his statement. The same view was taken by another Bench of the Calcutta High Court in *Maharani Beni Parshad Koeri v. Raia Kumar Chowbey* (31). Sometimes, in a suit for rent by a landlord against his tenant, a third party intervenes and claims the land as his own and it becomes difficult to decide whether a decision in the suit as to the plaintiff's right to rent would be res judicata in a subsequent suit regarding the title between the plaintiff in the previous suit and the intervenor. The questions material for deciding a right to rent as against a particular tenant are, of course, very different from the considerations that will arise in a suit for title between rival landlords. If the suit was in fact, expressly or impliedly, allowed to be expanded in character and was regarded also as one for the declaration of the landlord's title as against the intervenor and a decision as to title was arrived at, the finding might be res judicata in any subsequent proceedings between the two rival landlords. But a mere decree for rent against a tenant need not amount to any decision in a contest about title. This was the ground on which the decision of the Privy Council in *Run Bahadur Singh v. Lucho Koer* (12) proceeded, though estoppel by res judicata was avoided in that case on the ground also of the absence of concurrent jurisdiction in the Court that decided the previous suit. In the present case, the question raised in the previous suit, Original Suit No. 430 of 1906, was whether the patta tendered was proper.

The terms in question did not relate to any incidents special for the year Fasli 1314 but to the relationship between the plaintiff and the defendants generally as the owners of melvaram and the kudi-varam interests in the land respectively. S. 4, Rent Recovery Act 8 of 1865, required that the rent payable and all

(27) [1894] 21 Cal. 236.

(28) [1911] 10 I. C. 382.

(29) [1910] 8 I.C. 650.

(30) [1910] 6 I.C. 860.

(31) [1912] 17 I.C. 111.

other material incidents of the tenancy should be stated in the patta to be tendered to the tenant and according to S. 7 of the Act no suit was maintainable unless the landlord had previously tendered to the tenant such a patta as he was bound to accept. The defendants were not bound to accept a patta which was incorrect in any particular. If the extent was wrongly stated or the rent was stated to be payable in kind while any portion of it was not, they could refuse to accept the patta. The plea raised by them in substance was that there were defects in the patta which entitled them not to accept it and that the suit should therefore be dismissed. The question therefore was whether there were any such defects in the patta. The trial would, of course, proceed on the defects which the defendants insisted on. With regard to the issue whether the patta was proper or not, the defendants were bound to raise all objections that they could to the contents of the patta, and if they failed to do so, they must be taken to have raised them and all points that they could have raised must be taken to have been impliedly decided against them. Suppose the defence in this case was that the plaintiff was not the holder at all of the plaint lands. Suppose that though the defendants raised that defence in the previous suit, the matter was not explicitly decided, or suppose they did not raise the defence at all. The question being one which related not merely to the rent for the particular year 1317 but to the plaintiff's right to claim rent for any year, the matter must be regarded as *res judicata*.

It has been established by the cases in this Court that a decision with regard to the proper terms of patta to be tendered by a landholder to his ryot for any one year is *res judicata* with regard to subsequent years, unless the terms related specially to the particular year or there was a change in the terms of the tenancy: *Sree Venkatachallapati v. Krishna* (32), *Sellappa Chetty v. Velahutha Tevan* (33). In the latter case, the tenant did not object in the earlier suit to some of the stipulations in the patta. It was held by Bensen and Wallis, JJ., that estoppel by *res judicata* was

nevertheless applicable to the case. Sankaran Nair, J., distinguishes it from the present case on the ground that in both, the suits were to enforce acceptance of pattas and not for rent and that the decision that the patta is proper would necessarily involve a finding that the lands referred to in the patta belong to the plaintiff. But the question raised related to some of the terms of the patta only and not to the ownership of the land. The trial of the question as to the ownership of the land in the later suit would not affect the decree in the earlier suit—the cause of action was different. The objections taken in the later suit were not expressly decided in the earlier suit. According to the tests adopted by the learned Judge, *Sellappa Chetty v. Velayutha Tevan* (33) must be regarded as wrongly decided.

I am of opinion that the principle of that decision is clearly applicable to the present case. In both the question raised bore on the relationship of the parties, not for the particular year in question in the earlier suit, but subsisting between them during future years also. The defendant raised questions relating to the permanent relationship between the parties. He was entitled to raise them and his pleas if successful, would be an effective answer to the plaintiff's suit. These are the tests for deciding whether the rule of *res judicata* is applicable: see *Netesa Gramani v. Venkatarama Reddi* (34). Assuming therefore that the specific objections to the patta raised in this suit were not expressly decided in the previous suit, that point is immaterial. It is by no means clear however that one at least of the points was not decided. The finding was that the terms of the patta "did not contain any objectionable matter." The question as to the extent was certainly raised in the previous suit. There is nothing to show that the Court did not decide everything that was comprised in the written statement of the defendants. The question as to whether the rent was not payable in kind for a portion of the lands was not raised in the written statement. Whether evidence was led with regard to it it is impossible to say, but the Court was entitled to try the issue as to the correctness of the patta on the

(32) [1890] 13 M.d. 287.

(33) [1907] 30 M.d. 498=17 M. L. J. 483=8 M. L. T. 17.

(34) [1907] 30 M.d. 510=17 M. L. J. 518=2 M. L. T. 455.

pleadings in the case, and if any matter of attack with reference to the patta was not raised by the defendant he must be taken to have raised it, for any successful attack of the terms would be a complete defence to the suit for rent. I am of opinion therefore that the issue on the question of *res judicata* must be decided in the plaintiff's favour. I cannot agree with the respondent's contention that as the suit for rent related only to the year 1314 the defendant who resisted the suit on the ground that the terms of the tenancy were not properly embodied in the patta tendered by the plaintiff was entitled to keep back any objections on the ground that it would be profitable to him to do so with respect to that particular year. As the appellate Court has not disposed of all the questions in the case, the case cannot be finally disposed of here. The decree of this Court in Second Appeal No. 640 of 1909, and the decree of the lower appellate Court must be reversed and the appeal remanded for fresh disposal according to law. All costs in this Court must abide the result.

Sadasiva Aiyar, J.—The question for decision in this appeal is whether the defendants, who are tenants under plaintiff (a landholder) are barred by *res judicata* owing to the decision in a previous suit brought by the plaintiff against them to recover rent for two previous faslis (1314 and 1315) from setting up the contention that the patta tendered for the plaintiff Fasli (1316) contained improper terms as to the extent of the lands in defendants' holding and as to defendants' liability to pay *waram* rent for a portion of their holding and that hence they (the defendants) are not liable for the rent of Fasli 1316, the present suit having been brought to recover such rent.

The former suit brought for the rent of Faslis 1314 and 1315 is Original Suit No. 430 of 1906. The pattas tendered for those faslis contained practically the same entries as are found in the disputed patta for Fasli 1316. The defendants contended then (see Ex. C), among other defences, that:

(a) "The pattas alleged to have been tendered are not proper" and (b) "the extent of defendant's *jeroyati* land has been very much overstated by plaintiff."

In the present suit also they put forward the same defences though they gave more details, viz.,

(a-1) that 3 acres are "cash-rent-paying lands" and (b-1) that the extent of the lands liable to pay rent is 5 acres plus 3 acres (and not about 14 acres entered in the patta).

In the former suit, the very first issue raised the question "whether the pattas tendered are proper" and the finding of the Court was as follows:

"The terms of the pattas, Exs. E and F, do not contain any objectionable matter. I accordingly find issue 1 in the affirmative." According to S. 4, Rent Recovery Act 8 of 1865, "the patta shall contain the local description and extent of the land; the amount and nature of the rent according as the same is payable in money or in kind or by a share of the produce, etc." Thus, when the Court in the former suit found no objectionable matter in the pattas for Faslis 1314 and 1315 and when it found issue 1 in that case (*viz.*, whether the pattas tendered were proper) in the affirmative, it clearly found: (a-2) that the nature of the rent payable for the entire lands is *waram* share of the produce as entered in the pattas, and (b-2) that the extent of the lands liable to pay rent is 14 acres as found in the pattas.

The Court, undoubtedly overruled defendants' contention that the extent was not 14 acres and that the pattas were also otherwise improper. It is not clear whether defendants, at the trial of that suit, prominently put forward the contention that 3 acres of the lands were liable to pay only cash rent and not *waram* produce, but it cannot, in my opinion, be denied that when they attacked the pattas as containing improper terms, they were bound to put forward all the grounds on which they attacked the pattas as improper and could not be allowed to put forward some grounds of attack alone for one fasli and other grounds for other faslis. As has been decided in *Vythilinga Mudaliar v. Ramchandra Naicker* (5), *Sellappa Chetty v. Velayutha Tevan* (33) and *Natesa Gramani v Venkatarama Reddi* (34), a decision as to the standing terms of a patta between a landlord and tenant for one fasli is *res judicata* in respect of such terms for all subsequent faslis, though, of course, the tenant might prove in a subsequent fasli that by the act of God or anything which has subsequently hap-

pened (i. e., by proper relinquishment of a portion of the holding etc.) and which gives him a legal right to have the terms modified, the conditions and terms of the tenancy have been altered.

The pattas for Faslis 1314 and 1315 having been expressly found to be proper pattas (that is, to contain the proper extent of land in defendants holding and proper rates and kinds of rent) in the former suit, the defendants are in my opinion clearly barred by res judicata from contending that a similar patta tendered for plaint Fasli (1361) was not a proper patta. The learned Judge, whose judgment is under appeal before this Full Bench, held (if I understand rightly his observations in pp. 5 to 8 of his judgment) :

(a) that the question as to the extent of the lands to be entered in the annual patta and the kind of rent leviable on 3 acres of the holding was not "directly and substantially in issue" in the former suit, because a decision on the above question was "not essential for the decree that was passed in Original Suit No. 430 of 1906" and was "not essential for the relief finally granted in the former case" as "a decree for rent does not necessarily involve" or "require a decision as to the terms of the patta or the extent of the land for which the rent has to be paid;"

(b) that assuming that a decision on that question was essential in the former suit, and assuming therefore that "the question must be deemed to have been directly and substantially in issue under Explan. 4, S. 11, Civil P. C., even though the parties did not raise that question as they were bound to raise it," it did not follow that the question must be deemed to have been "as a matter of fact" "heard and decided;"

(c) That in the former suit, the question in the present suit was not "heard and decided" expressly and "we are not bound to imply" that it was so decided ;

(d) that the "causes of action" and the "subject-matters" of the two suits are different ;

(e) that it "is not enough" that "a determination" in the present suit

(about the extent of lands and rate of rent) "would be inconsistent with the decision in the previous case that the patta then tendered was proper" to prevent such determination in the present suit by the bar of res judicata; and

(f) that on all the above grounds the question in the present suit whether the patta for Fasli 1316 is a proper one is not concluded by the decision in the former suit.

A decree for rent between an ordinary landlord and an ordinary tenant may not necessarily involve a decision as to the terms of the lease or as to the extent of land comprised in the lease. But a decision under the Rent Recovery Act 8 of 1865, where the landlord sued for rent on the allegation that the standing terms of the tenancy were contained in the patta tendered by him mentioning particular terms and the particular extent of the holding does, in my opinion, involve and require a decision as to whether the terms of the lease are proper and the extent of land covered by the holding is as alleged in the patta tendered by the landlord and hence the reason (a) given by the learned Judge seems to me to fail. The case in *Nil Madhub Sarkar v. Brojo Nath Singha* (27), quoted by the learned Judge, is therefore not applicable and the earlier case in *Gobind Chunder Koondoo v. Taruck Chundr Bose* (23) and the cases in *Venkatachalapathi v. Krishna* (32), *Natesa Gramani v. Venkatarama Reddi* (34), *Pittapur Raja v. Buchi Sitayya* (10) and *Sellappa Chetti v. Velayutha Tevan* (33), also quoted by the learned Judge, and referred to by him with approval, seem to me to clearly govern this case.

I shall next deal with the argument that even though the question was directly and substantially in issue because the decision involved the finding on that issue it must also have been heard and decided before it can be deemed res judicata. There are no doubt observations in *Kailash Mandul v. Baroda Sundari Dasi* (14), *Woomesh Chandra Maitra v. Barada Das Maitra* (15), and *Rajendranath Ghose v. Tarangini Dasi* (17) to the above effect, but, as pointed out by Subramania Iyer, J., in *Arunachalam Chetti v. Meyyappa Chetti* (21), if a Court is bound, by Explan. 11 to S. 13 of the old Civil P. C., (corresponding to Explan. 4 to

S. 11 of the new Code), to adopt and act upon the fiction that a matter which might and ought to have been made a ground of defence or attack in the former suit, should be deemed to have been a matter directly and substantially in issue in such suit, that same explanation necessarily imposes the duty of acting upon the further fiction that that matter was also heard and decided and adjudicated upon in the former suit. Expln. 2, S. 13 would be meaningless, as pointed out by the Allahabad High Court in *Sri Gopal v. Pirthi Singh* (1), if it were necessary in cases which were covered by it that the matter should have been, as a matter of fact, heard and finally decided in the previous suit. That case in *Sri Gopal v. Pirthi Singh* (1) follows the Privy Council cases in *Mahatir Pershad Singh v. Macnaghten* (35) and *Kameswar Pershad v. Rajkumari Ruttan Koer* (36), and the interpretation of S. 13 by the Allahabad High Court in that case was approved and adopted by the Privy Council when the case went on appeal before their Lordships in *Sri Gopal v. Pirthi Singh* (2). The cases in *Kailash Mondul v. Baroda Sundari Dasi* (14), *Woomesh Chandra Maitra v. Barada Das Maitra* (15) and *Rajendranath Ghose v. Tarangini Dasi* (17), being opposed to the above decision of their Lordships of the Privy Council, can, no longer, be considered good law.

In fact, the Calcutta High Court itself, in *Jamadar Singh v. Serajuddin Ahmed Chaudhuri* (19), has virtually dissented from the cases in *Kailash Mondal v. Barada Sundari Dasi* (14) and *Woomesh Chandra Maitra v. Barada Das Maitra* (15). At p. 987, one of the learned Judges says. [In *Jamadar Singh's* case (19)] :—"It is very difficult to see how a matter, which ex hypothesi was not before the former Court, could possibly have been heard and finally decided by it; and it seems to me that if this were necessary the whole of Expl. 2 (to S. 13) would be rendered meaningless." Their Lordships also decided in that case that the decision in *Sri Gopal v. Pirthi Singh* (1) is good law and that it is not necessary that the subject matter of the two suits must be the same before Expln. 2 (to S. 13) can be applied. I might however state that

this question (b) does not really arise in this case because I am unable to agree with the learned Judge whose judgment is under appeal, that the present question was not, as a matter of fact, heard and decided in the former suit. In the statement of facts in the beginning of this judgment, I believe I have shown that the question was really heard and decided as the defendant raised the plea as to the impropriety of the patta in the former suit and his plea was expressly overruled: see *Sooriomonee Dayee v. Suddanund Mohapatter* (9), which decides that pleadings must be looked into to understand what was in issue and what was decided in the former suit. The fact that the cause of action and the subject matters of the two suits are different is immaterial because the only question is whether the decision in the former suit on certain issues of fact is res judicata in the present suit and it is not necessary under S. 11 that the causes of action and the subject matters of the two suits should be the same for a decision on issues of fact to constitute res judicata in a subsequent suit.

Lastly, I am unable to hold that the decision as to the terms of the patta in the former suit was on a mere collateral question in the former suit. S. 11 does not use the word "collateral," but uses the words "directly and substantially in issue." The Privy Council case in *Misir Raghobardial v. Sheo Baksh Singh* (11) was decided mainly on the ground that the Court which tried the first suit was not competent to try the second suit and hence that the decision of an issue in the first suit was not res judicata in the second suit. There is an expression at p. 445 of the judgment that the issue decided in the former suit was merely a "collateral" issue, though the facts show that it was a direct and substantial issue. In the *Duchess of Kingston's* case (13), it would seem to have been held that where the Court which decided the first suit was not competent to decide the second suit, the question of fact decided by the former Court, though material for the decision, must be deemed to have been "collateral" to the subject matter of the first suit. It was with reference to that use of the word "collateral" that the Privy Council held that the Court, which decided the first suit, dealt with that issue only as a collateral

(35) [1889] 16 Cal. 682=16 I.A. 107 (P.C.).

(36) [1893] 20 Cal. 79=19 I.A. 234 (P.C.).

issue. If the Privy Council, by their obiter dictum, intended to state that the question was not directly and substantially in issue in the former suit, a dictum irreconcilable with the Privy Council decision in *Pahalwan Singh v. Maharaja Muheshur Buksh Singh Bahadur* (4) such dictum must be held to have been overruled by their later decisions already set out including *Sri Gopal v. Pirithi Singh* (2). The latest Privy Council case in *Mahomed Ibrahim Hossain Khan v. Ambika Persadh Singh* (16), seems to me to be conclusive on the matter, for their Lordships decide that S. 13, Expl. 2, would bar a defendant who omits to raise a material issue in a former suit when he was a party thereto, even though that issue was not, as a matter of fact, heard and decided in the former suit. The case in *Masilamani Pillai v. Tiruvengadam Pillai* (22) seems also to me to be conclusive on this question of res judicata. It is, no doubt, not enough to constitute res judicata that a determination contra in a later suit would be inconsistent with the determination in the former suit; for there is also a further requisite that the Court which decided the former suit should have been competent to decide the later suit. In this case, this latter requisite also is complied with, and I am, therefore, clear that the findings of fact in the former suit are res judicata, one of those findings being that the defendants held the extent of lands mentioned in the patta tendered to them and are bound to pay rent according to the terms of the said patta shortly.

I may now refer to one important question which was lightly touched upon during the arguments, namely whether, where the subject-matter of the former litigation and the relief claimed therein were the same as those claimed in the subsequent litigation, the plaintiff can bring two suits on what is put forward by him as two different causes of action. The question does not really arise in this case, but I wish to state that I agree with Subramania Aiyar, J., in *Arunachellam Chetty v. Meyyappa Chetty* (21) that Courts should try their best to hold that the causes of action in such cases are substantially the same. I shall here quote West, J.'s observations (quoted also by Subramania Aiyar, J.); "Under systems such as the Roman law or the English Common law, in which the

development of legal rights and duties has been greatly influenced by the reaction of a highly artificial mode of procedure, appropriate forms of action can be found for nearly all the ordinary cases which the legal consciousness of the community recognizes as justifying an exercise of the coercive power of the state; but, as the variety of human relations greatly exceeds that of the conceptions upon which a system of actions can be framed, it happens that the same transaction or group of circumstances may furnish ground for several different actions. In such cases, different causes of action arise to the party injured; but as it is felt that the same set of facts, which the mind at once grasps as jurally integral, ought not to be made the basis of repeated proceedings, the complaining party is allowed to frame his complaint in various ways, and the rule obtains that all the circumstances which exist when the former of two actions is brought and can be brought forward in support of it, shall be brought forward then, not reserved for a second action arising out of the same events. The cause of action is regarded as identical, though the form of action differs on the second occasion, and the test applied is whether the evidence to support both actions is substantially the same: *Hitchin v. Campbell* (37) and *Martin v. Kennedy* (38). Under a freer system of procedure, such as that of the equity Courts in England or of the civil Courts in India, second suits are to be admitted more sparingly than when the plaintiff has to proceed by set forms of action. As he can bring forward his whole case, unfettered by artificial restraints, and seek all remedies that the Court can justly award upon the facts proved, there is no reason why he should be permitted to harass his opponent and occupy the time of the Courts by repeated investigations of a set of facts which ought all to have been submitted for adjudication at once. His cause of action, into whatever Protean forms it may be moulded by the ingenuity of pleaders, is to be regarded as the same, if it rests on facts which are integrally connected with those upon which a right and infringement of the right have already been once asserted as a ground for the Court's interference."

(37) 2 W. Bl. 827=3 Wils. 804=Lofft 201.

(38) 2 Bos. & P. 69.

I am aware that Benson and Bashyam Iyengar, JJ., in *Ramaswami Aiyer v. Vythinatha Aiyer* (39) discuss some of the observations in the decision in *Arunachellam Chetty v. Meyyappa Chetty* (21) with disapproval and Subramania Aiyar, J., himself in *Veeranna Pillai v. Mythukumarasari* (40) said that "anything in the language used" by him in *Arunachellam Chetty v. Meyyappa Chetty* (21) "inconsistent with the view of the law as expounded" in *Ramaswami Aiyer v. Vithinatha Aiyer* (39) "can no longer be treated as an authority." I am, however, inclined to hold, with due deference to the contrary opinions, that all the observations in *Arunachellam Chetty v. Meyyappa Chetty* (21) as to the scope of the doctrine of *res judicata* are sound law and those observations in *Ramaswami Aiyer v. Vithinatha Aiyer* (39), which conflict with the views in *Arunachellam Chetty v. Meyyappa Chetty* (21), seem to me to draw rather fine distinctions and, in my humble judgment, would lead to unnecessary and undesirable multiplicity of litigation. However in so far as any principle in *Arunachellam Chetty v. Meyyappa Chetty* (21) is directly inconsistent with the later Full Bench decision of the Madras High Court in *Thrikaikat Madathil Raman v. Thiruthiyil Krishnan Nair* (41), [which approves of the decision in *Ramaswami Aiyer v. Vythinatha Aiyer* (39), but which does not refer to and does not expressly overrule *Arunachellam Chetty v. Meyyappa Chetty* (21), though it expressly overruled only *Rangasami Pillai v. Krishna Pillai* (42)], I am not anxious that such directly overruled principle should be again reconsidered. As at present advised, I do not see anything in *Thrikaikat Madathil Raman v. Thiruthiyil Krishnan Nair* (41), irreconcilably inconsistent with any observation in *Arunachellam Chetty v. Meyyappa Chetty* (21), as two separate mortgages can be separately redeemed, especially if there is an express understanding to that effect between the parties and all that *Thrikaikat Madathil Raman v. Thiruthiyil Krishnan Nair* (41) decided was that the failure of a suit to redeem one mortgage is not a bar to a suit to redeem another.

I would, for the reasons mentioned in paras. 5 and 6 of this opinion, reverse the judgment of the lower Courts and remand the case to the lower appellate Court for a fresh disposal of the appeal before it, the District Munsif not having decided the questions involved in issues 4 and 5 and the lower appellate Court also not having considered all the issues. The costs hitherto will abide the result.

S.N./R.K.

Appeal allowed.

A. I. R. 1914 Madras 418

WHITE, C. J., AND OLDFIELD, J.

T. Numberumal Chettiar—Appellant.

v.

Krishnajee—Plaintiff—Respondent.

Original Suit No. 46 of 1912, Decided on 30th January 1914.

(a) Letters Patent (Madras), S. 15—Order as to costs is not appealable—When costs are incidental to judgment appeal lies—Civil P. C., S. 35.

There is no appeal against an order relating merely to costs but when such costs are incidental to judgment an appeal lies: 17 M. L. J. 559, Dist. [P 419 C 2]

(b) Civil P. C., S. 35—Order as to costs will not be interfered with in appeal.

Ordinarily an appellate Court will not interfere with a mere order as to costs: 2 Bom. L.R. 254; 2 Ch. D. 472, Foll. [P 419 C 1]

(c) Civil P. C., S. 35—Patent erroneous order as to costs—Appeal Court should interfere.

Where there is a patent erroneous order as to costs the appellate Court should interfere. [P 420 C 2]

(d) Limitation Act (9 of 1908), Ss. 5 and 12—Party appealing not able to get copy of decree in time—Appeal presented out of time—Delay in appeal can be excused.

Where an appeal is presented out of time the fact that the party appealing was not in a position to get a copy of the decree is a sufficient reason for excusing the delay in filing the appeal. [P 420 C 2]

(e) Limitation Act (9 of 1908), Ss. 5 and 12—Time spent in obtaining review of erroneous order cannot be deducted from time required for appeal against order sought to be reviewed.

The time occupied in obtaining a review of an erroneous order cannot be deducted from the time required to present an appeal against the order sought to be reviewed: 14 Mad. 81; 15 Cal. 242; 18 Bom. 84, Foll. [P 420 C 1]

M. D. Devadoss and M. K. Ramaswami Aiyar—for Appellant.

Nugent Grant, Messrs. Grant and Greator—For Respondent.

White, C. J.—In this case two preliminary objections were taken by Mr. Grant on behalf of the respondent to the hearing of the appeal. The appeal is from a judgment of Wallis, J., sitting on

(39) [1903] 26 Mad. 760=13 M. L. J. 448.

(40) [1904] 27 Mad. 102=13 M. L. J. 439.

(41) [1906] 29 Mad. 153=16 M. L. J. 48.

(42) [1899] 22 Mad. 259.

the original side. The right of appeal is created by Cl. 15, Letters Patent. Mr. Grant's first objection was that no appeal lay since this was an appeal from an order as to costs only. The learned Judge gave the plaintiff a decree for a certain sum and directed that the costs must follow the event. This is no doubt, an appeal from an order as to costs only in the sense that the defendant only appeals from the judgment in so far as it directs that the plaintiff should have the general costs of the suit. It is not an appeal from a judgment or order which deals only with the question of costs. It is an appeal only as regards costs but it is not an appeal from an order as to costs only. For that reason it seems to me this case is distinguishable from the Full Bench decision of *Manali Saravana Mudaliar v. Rajagopala Chetty* (1). There Sir V. Bhashyam Aiyangar in his judgment says: "The order . . . the subject matter of the appeal is expressly restricted to costs." The order itself is set out in the judgment of Moore, J., and we have also looked into the records and the order was: "This Court cannot think fit to make any order on this application except as to costs." In the Full Bench case assuming there was any adjudication except as to costs, the adjudication to which the order for costs was incidental was not a "judgment" within the meaning of Cl. 15, Letters Patent, whereas in the case now before us it cannot be suggested that the adjudication to which the order for costs is incidental is not a judgment within Cl. 15 it seems to me the case before us is distinguishable from the Full Bench case on this ground.

No doubt, the general rule is well settled in England. It is laid down in the case of *Metropolitan Asylum District v. Hill* (2), where Lord Blackburn refers to the rule that "appeals shall not be brought merely for costs, or in relation to costs." Lord Watson says: "I quite concede the propriety of the rule that the Court of last resort ought not to entertain an appeal which involves nothing except the payment of costs." But in England the question is regulated by S. 49, Judicature Act of 1873. That section says in so

many words: No order made by the High Court or any Judge thereof by the consent of parties or as to costs only, which by law are left to the discretion of the Court shall be subject to any appeal except by leave of the Court or Judge making such order." We have no corresponding statutory restriction on the right of appeal. In S. 35, Civil P. C., no restriction is to be found. S. 35 is not one of the sections of the Code the application of which to the High Court is excluded by S. 120. If we turn to S. 96 we find an express provision that no appeals lie from the decrees passed with the consent of the parties. That section is to the same effect as the provision with regard to consent in S. 49, Judicature Act of 1873. There is no provision corresponding to the provision in the Judicature Act, as regards appeal in cases of orders for costs. S. 96 is not one of the sections which are made inapplicable to the High Court. Of course, the question as to whether if at all a Court of appeal should interfere with orders as to costs which are discretionary is an entirely different question. As regards the preliminary objection that in law no appeal lies from an order as to costs made in the circumstances in which the order was made in this case, that is to say, as incidental to a "judgment" as regards that question I think our answer should be in the affirmative and that the preliminary objection should be overruled.

The next preliminary objection was that the appeal was out of time. On 28th March judgment was delivered. The decree which was finally drawn up bears date 28th March. This is in accordance with the usual practice. In accordance with the usual practice the draft decree was furnished to the solicitors on both sides. The draft dealt with the direction as to costs on the footing that the plaintiff was to have the general costs of the suit. The defendant's solicitor objected and asked that the case might be posted on minutes of decree. On the 24th the case was posted, but for some reason or other which is not clear by this time the decree in the form of the draft to which the defendant's solicitor had objected had been formally sealed and to use the common expressions, "issued." This came to the knowledge of the defendant's solicitor and he thought it wise to put

(1) [1905] 17 M. L. J. 563 (F.B.).

(2) [1882] L. R. 5 A. C. 582=49 L. J. Q. B. 745=48 L. T. 225=29 W. R. 632.

in a review petition which he did on 26th April. On 1st May this review petition and also the draft decree which had been issued in the circumstances which I have stated came before the learned Judge. He made an order which is endorsed on the back of the draft decree in these terms:

"The decree has been issued by mistake as, when it was posted to be spoken to last week, I expressly directed it to be posted again before me. It must be recalled and no decree passed until approved by me. Report after vacation." At the same time he made an order that the review petition should be re-posted after the vacation. The review petition came before the learned Judge on 26th or 27th July and the order made by the Judge was "agreed to be taken as if decree had been drawn up. I have entertained some doubts as to the correctness of the order as to costs, but I do not feel at liberty to interfere under O. 47 as I doubt if there is sufficient cause within the meaning of the section." It has not been contended by Mr. Devadoss on behalf of the appellant that the time occupied in connexion with the presentation of the review petition can be deducted from the prescribed period of limitation within which he had to present his appeal. The authorities as to this are against him. I need refer only to *Govinda v. Bhandari* (3), *Ashnulla v. Collector of Dacca* (4) and *Pundlik v. Achut* (5). It is however contended that there was sufficient cause for not preferring the appeal within the prescribed period by reason of the events which happened. The order of the learned Judge on 1st May endorsed on the draft decree as it seems to me practically tied the hands of the appellant. He was entitled to deduct from his period of limitation the time required for obtaining a copy of the decree. The learned Judge made an order that the decree should be recalled. I express no opinion as to whether the learned Judge had jurisdiction to make this order. In view of the order of the learned Judge that the decree was to be recalled, it seems to me the appellant could not reasonably be required to present his appeal until some further order was made.

I doubt whether in those circumstances he was entitled to present his appeal at all. The appeal was in fact presented a day or two after the review petition was dismissed. The conclusion I have come to is that there was reasonable cause for non-presentation of the appeal within the prescribed period of limitation.

Now, we come to the most difficult question in the case and that is, can we interfere with the order of the learned Judge as to costs, and if we can ought we to interfere? As I have said the learned Judge gave the plaintiff a judgment for a certain sum of money. His order as to costs was: "I think under the circumstances the cost must follow the event."—The words "must follow the event" have been construed in different ways. They have been construed as meaning that the event means the result and if the plaintiff succeeds he is to get the costs. They have been construed especially in cases of counter-claims as distributive. I do not propose to discuss the various English authorities which have been cited. They are in connexion with O. 45, R. 1, of the rules of the Supreme Court. I only refer to *Hoyes v. Tate* (6), where it was held that in an action tried with a jury where there are separate issues, and the plaintiff obtains a verdict and judgment, but the defendant is successful as to one of the issues, if the Judge makes no order with regard to that issue interfering with the incidence of costs under O. 45, R. 1, the defendant is entitled to have the judgment drawn up so as to give the costs of the issue on which he succeeds.

The question has been discussed in India. The only Indian authority to which I need refer is the judgment of Sir Lawrence Jenkins in *Parshram Bhawoo v. Darabji Pestonji* (7), an appeal from the original side. There the learned Judge says: "An appellate Court will not interfere with an exercise of discretion of a lower Court unless it has proceeded on a manifestly wrong ground, such as the application of an erroneous principle, or misapprehension of the fact. So long as the discretion was in fact exercised, an appellate Court

(3) [1891] 14 Mad. 81.

(4) [1888] 15 Cal. 242.

(5) [1894] 18 Bom. 84.

(6) [1907] 1 K. B. 656=76 L. J. K. B. 408=96 L. T. 419=53 T. L. R. 291=51 S. J. 245.

(7) [1900] 2 Bom. L. R. 254.

will not interfere simply because it would itself have exercised the discretion differently." The learned Judge cites *Bew v. Bew* (8), in which it is laid down that "If the costs are in the discretion of the Judge the Court of appeal will assume that the Judge exercised his discretion, unless it is satisfied that he has not exercised his discretion." For the purposes of to-day I do not want to attempt to lay down any general proposition as to what are the circumstances in which an appellate Court should interfere if it so desires, with an order as to costs where the order purports to be made in the exercise of the discretion vested in the Judge. I do not want to suggest that I am not prepared to accept the proposition as laid down by Sir Lawrence Jenkins. But here we are dealing with a case in which the facts are of an unusual character. I think one is entitled to say, having regard to the history of the case, that it is not clear how the learned Judge intended his order as to costs to be worked out when he used the words "the costs must follow the event."

When the draft decree came before him for settlement (it was an accident that the decree had already been "issued") it seems clear from the term of his order either that he thought that the draft decree did not carry out his intention as to how the order should be worked out or at any rate that it was a matter for doubt as to how his order should be worked out. Otherwise it is impossible to understand why the learned Judge should have observed that the decree had been issued by mistake and that it should be recalled and that no decree should be passed until approved by him. When the matter was before him on 26th July or 27th for the purposes of the review application there was an agreement that the decree should be taken as if it had been drawn up. That agreement was for the purposes of that application only and for the purposes of enabling the learned Judge to deal with the application to review and I think it may be said that the agreement was without prejudice to any question as to whether the decree as drawn up and according to the learned Judge issued by mistake really embodied the learned Judge's intention. It is quite true that

the learned Judge on 26th or 27th of July had not an opportunity of saying "the decree which you have agreed should be treated as having been drawn up does not represent my intention" and that he did not say so. It seems to me that is not conclusive when we consider that the learned Judge was then dealing with the question whether the case was one for review. He came to the conclusion that it was not a case for review because as he puts it, he did not feel at liberty to interfere under O. 47 but he leaves on record the observations that he had doubts as to the correctness of the order as to costs. I take it to mean that he had doubts as to the correctness of the manner in which the decree purports to work out his discretion as to costs. Having regard to the special facts of this case I think it is open to us to consider the order as to costs as interpreted in the decree and that if we come to the conclusion that the order as interpreted is not the order which should have been made I think we are at liberty to interfere.

The amount of the plaintiff's claim is Rs. 22,700 odd. In para. 6 of the plaint the plaintiff gives credit to the defendant for a sum of Rs. 11,800 odd which he admits is due to the defendant as the price of certain timber supplied to him by the defendant. In para. 18 of the written statement the defendant pleads that after deducting certain items there remains due from him to the plaintiff a sum of Rs. 870-11-10. Among the items which the defendant says he is entitled to deduct is the balance of the price of timber supplied by the defendant. In his plaint the plaintiff puts this at Rs. 11,800 odd. This amount as found by the Judge comes to Rs. 14,500 odd. The defendant also sets up a counter-claim for damages for alleged breach of contract. This the learned Judge dismissed. We have gone through the judgment of the learned Judge very carefully and we have also considered the correspondence between the parties. As regards the various items of the plaintiff's claim with one or two exceptions he failed to satisfy the learned Judge and the learned Judge held that the plaintiff had not made out his case.

Then there is a claim by the defendant for the price of timber sold by the defendant to the plaintiff which is dealt

(8) [1899] 2 Oh. 467=68 L. J. Oh. 657=48 W. R. 124=81 L. T. 284..

with by the learned Judge in para. 1 of his judgment. On this the learned Judge gave judgment for the defendant for Rs. 14,500 odd. It works out thus: the total amount claimed is Rs. 22,743; the amount for which the defendant admitted his liability, though he did not make any payment into Court, is Rs. 800 odd and the amount for which the plaintiff finally gets a decree is Rs. 1,220-10-4. The learned Judge dismissed the defendant's counter-claim with costs. The plaintiff will have the costs of the counter-claim. As regards the general costs of the suit the parties will pay their own. The respondent must pay the costs of this appeal.

Oldfield, J.—I concur.

S.N./R.K.

Appeal allowed.

A. I. R. 1914 Madras 422

SUNDARA AIYAR AND SADASIWA
AIYAR, JJ.

Garikipati Paparayudu — Plaintiff—
Appellant.

v.

Garikipati Rattamma and others—De-
fendants—Respondents.

Second Appeal No. 930 of 1911, Deci-
ded on 9th October 1912, from decree of
Sub-Judge, Kistna, in Appeal Suit No.
426 of 1910.

(a) **Hindu Law—Reversioner—Suit—Un-
certainty of plaintiff's succeeding the widow
is no bar to declaratory suit.**

In suits by reversioners regarding the aliena-
tions of widows the uncertainty, regarding the
persons who would be entitled to succeed the
widow, is no ground for refusing a declaration
regarding the character of the alienation.

[P 423 C 2]

(b) **Transfer of Property Act (4 of 1882),
S. 100—Alienation declared invalid—Charge
should be declared in alienee's favour on
equitable grounds for amount for which
necessity is proved—Hindu Law—Alienation.**

When an alienation is declared invalid there
is no reason why a charge should not be de-
clared in favour of the alienee on equitable
grounds for the amount for which necessity has
been proved. It is not necessary that there
should be an offer in the plaint before a condi-
tional decree can be passed and the alienee
given a charge for the amount.

[P 422 C 2, P 423 C 2]

P. Narayanamurthi—for Appellant.

A. Visvanathier—for Respondents.

Sundara Aiyar, J.—This is a suit by
a Hindu reversioner for a declaration
that two sales made by the widow of the
last owner, defendant 1 in the suit to de-
fendants 2 and 3, respectively, are not
valid beyond the life time of the widow.

The sales were admittedly made for the
discharge of the widow's husband's debts.
The attack against them was based on
the ground that the prices settled for
the sales were very inadequate. Both
the lower Courts have dismissed the suit
on the ground that the plaintiff not
having offered to pay to the purchasers
the consideration money which was used
for the discharge of the husband's debts,
the suit is not maintainable. The deci-
sion is rested on the authority of *Singam
Setti Sanjivi Kondayya v. Draupadi
Bayanna* (1).

That case no doubt supports the
proposition that such an offer should
be made by the party seeking to set
aside a sale. But the decision of the
Privy Council in *Bhagwat Dayal Singh
v. Debi Dayal Sahu* (2) is authority for
the position that the suit should not fail
on the mere ground of the absence of an
offer in the plaint and that a conditional
decree might be passed. The case before
the Privy Council was one in which the
suit was instituted after the death of the
alienor and the plaintiff was entitled to
possession at the time of the suit. There
can be no doubt that a reversioner suing
for possession after the death of the
widow can only get a decree on condition
of paying whatever portion of considera-
tion for the sale by the widow is held to
be binding on the estate. In *Singam
Setti Sanjivi Kondayya v. Draupadi
Bayanna* (1), two decisions of the Bengal
High Court are relied on. In one of them
Mutteeram Kowar v. Gopaul Sahoo (3),
the suit was instituted after the rever-
sioner had become entitled to possession,
and there can be no doubt that he could
not claim a decree except on condition of
paying the amount. The case probably
went too far in laying down that there
should be an offer in the plaint to make
payment of any amount that was bind-
ing on the reversioners. The other case
is *Phool Chand Lall v. Rughoobuns
Suhaye* (4). It was decided in 1867, be-
fore the enactment of the Specific Relief
Act, S. 42 of which lays down the condi-
tions under which declaratory decrees

(1) [1908] 31 Mad. 153=3 M. L. T. 251=18
M. L. J. 11.

(2) [1908] 35 Cal. 420=12 C. W. N. 393=10
Bom. L. R. 230=7 C. L. J. 395=5 A. L.
J. 184=18 M. L. J. 100=3 M. L. T. 314
=14 Bur. L. R. 49 (P.C.).

(3) [1873] 11 B. L. R. 416=20 W. R. 187.

(4) [1868] 9 W. R. 107.

might be granted. One of the illustrations to that section shows that a Hindu reversioner might institute a suit for a declaration that a transaction entered into by a Hindu widow is not binding on the reversioner.

According to the new view of the Privy Council in *Isri Dat Koer v. Mt. Hansbutti Koerain* (5), a decision in a suit instituted by one reversioner may not be binding on another person who may happen to be the actual reversioner when the widow dies: see also *Mt. Chand Kour v. Partab Singh* (6). But there can be no doubt that, notwithstanding this inconvenience a suit by a presumptive reversioner at the time of the alienation for a declaration of its invalidity is maintainable. In *Phool Chund Lall v. Raghoobuns Suhaye* (4), the judgment was partly rested on the ground that the plaintiff did not ask that the Court should put the vendee (alienee) in the same position as if he had obtained a mortgage for the amount which was binding on the reversioner. This suggests that the Court might declare the sale invalid, but at the same time declare that the vendee has a charge for the portion of the consideration paid by him which is binding on the reversioner. Sir Barnes Peacock, no doubt, points out that a declaration that a reversioner may obtain possession on the death of the widow on condition of paying a certain sum of money ought not to be made because the plaintiff who institutes a suit for declaring an alienation invalid may not survive the widow and it would be optional with the actual reversioner, who becomes entitled to the estate on the widow's death, to recover possession or not, but, as already observed this inconvenience arising from the fact that the plaintiff may not be the actual reversioner who succeeds the widow exists equally whether the decree is one altogether setting aside or upholding a sale or one pronouncing it invalid as a sale, but declaring a charge in favour of the alienee. The law as to declaratory suits was not the same when *Phool Chund Lall v. Raghoobuns Suhaye* (4) was decided as it has been after the enactment of the Specific Relief Act. And the decision in that case therefore cannot safely be re-

lied on in cases arising under the present Act. In *Mahomed Shamsool Hooda v. Shewakram* (7), where a person having a reversion sued to set aside a sale made by a life-owner, their Lordships of the Privy Council felt no difficulty in passing a decree that on the death of the life-owner, the plaintiff would be entitled to possession on payment of the portion of consideration for the sale which was binding on him. Their Lordships did not decide whether the estate would on the death of the life-owner, pass to anyone as the owner of a vested reversion or to the person entitled to succeed under the Hindu law as reversioner on the termination of the life-estate. That decision therefore would be authority for the position that, even if the reversioner has no vested interest, a decree might be passed that the reversioner would be entitled to possession of the property after the death of the life-owner on his complying with certain conditions whatever that may be.

It is difficult, having regard to the ruling of the Privy Council in *Isri Dut Koer v. Mt. Hansbutti Koerain* (5), that the uncertainty regarding the person who would be entitled to succeed the widow is a ground for refusing a declaration regarding the character of the alienation, and if an alienation may be declared to be altogether valid or altogether invalid, notwithstanding the uncertainty about the reversion, there seems to be no apparent reason why a declaration should not be made that the alienation is invalid as a whole, but that on equitable grounds the alienee should have a charge declared in his favour. In *Gobind Singh v. Baldeo Singh* (8) a decree was given declaring that the reversioner would be entitled to possession on payment of a certain sum of money which was binding on the reversioner. The proper form of the decree however would appear to be to make merely a declaration that the alienee has a charge for a certain sum of money. The question whether a decree in such a form could not be passed was not considered in *Singam Setti Sanjivi Kondayya v. Draupadi Bayanna* (1). The decrees of the lower Courts must be reversed and the suit remanded to the Court

(5) [1884] 10 Cal. 324=10 I. C. 150=13 C. L. R. 418 (P.C.).

(3) [1889] 16 Cal. 98=15 I. A. 156 (P.C.).

(7) [1875] 14 B. L. R. 226=2 I. A. 7=22 W. R. 409 (P.C.).

(8) [1903] 25 All. 320=(1903) A. W. N. 57.

of first instance for fresh disposal according to law. Costs up to date will abide the result.

Sadasiva Aiyar, J.—It is now settled law that a widow inheriting the husband's estate obtains only a qualified interest in her husband's properties. It is further settled law that the nearest contingent reversioners can bring suits attacking the widow's alienations in her lifetime. To say under these circumstances that the suit of an honest reversioner who admits that the alienation was partially justified should be at once dismissed as a suit for a conditional declaration, while a suit by a dishonest reversioner who seeks to have the alienation wholly declared void as against the reversioner, should be tried to the end seems to be anomalous. On principle I do not see why a declaration that a sale is wholly void should be treated on a better footing than a declaration that the sale is void as a sale and can only be treated as a charge for a certain amount on the property alienated. The very object of allowing a suit by a contingent reversioner has been unfortunately (if I may be permitted to say so) defeated to a very large extent by the decisions which are binding on us to the effect that a decree passed in favour of or against such a reversioner is not binding on a remoter reversioner. I might be permitted to hope that the Legislature should see fit to enact that the decree in a suit bona fide brought and litigated by the then nearest reversioner is binding on the remoter reversioners. In the result, I concur in the decree proposed by my learned brother.

S.N./R.K.

Decree reversed.

A. I. R. 1914 Madras 424

SADASIVA AIYAR, J.

In re *Damappa Palai* and others—
Accused—Petitioner.

Criminal Revn. No. 664 of 1913 and Criminal Revn. Petn. No. 539 of 1913, Decided on 13th March 1914.

(a) Criminal P. C. (1898), S. 209—Case exclusively triable by Sessions Court—Magistrate has power to discharge.

It cannot be said that a Magistrate has no power whatever to pass an order of discharge in a case "exclusively triable by a Court of Session." [P 425 C 1]

(b) Criminal P. C. (1898), S. 209—Prosecution evidence unworthy of credit—Case

foredoomed to failure at Sessions—Accused must be discharged.

Where the entire prosecution evidence is quite unworthy of credit and bristles with improbabilities, and where it is clear that the case is foredoomed to failure at the Sessions, it is the duty of the Subordinate Magistrate to discharge the accused: 21 I. C. 129 and 8 I. C. 631, *Foll.* [P 425 C 1]

(c) Criminal P. C. (1898), S. 209—Discharge order under S. 209 revised by District Judge—If commitment to Sessions is directed High Court acting under S. 437 can see if District Magistrate's order was correct—Criminal P. C. (1898), S. 437.

Where an order of discharge passed by a Magistrate under S. 209 is revised by the District Magistrate and a commitment to the Sessions Court is directed, the High Court acting under S. 437, can interfere and can even go into questions of fact to see if the order of the District Magistrate was correct and proper: 30 *Mad.* 224, *Foll.* [P 424 C 2]

K. Narayana Row and H. Balkrishna Row—for Petitioners.

Public Prosecutor—for the Crown.

Order.—This is a petition to revise the order of the District Magistrate of South Canara. That order was evidently passed under S. 436, Criminal P. C., and it directed that the petitioners before me (the accused in a criminal case) should be committed to the Sessions Court on the charge of dacoity preferred against them to the Stationary Second Class Magistrate of Mangalore. The District Magistrate passed this order because he thought, in the words of S. 436, that these accused persons had been 'improperly discharged' by the Second Class Magistrate of Mangalore of the said charge of dacoity.

In *Muthia Chetty v. Emperor* (1) it was held that the High Court may, in revision, "consider the facts, as well as the questions of law involved, to determine whether a Sessions Judge, who had set aside an order of discharge passed by a Magistrate and directed the accused to be committed to the Sessions Court, had properly exercised the powers given to the Sessions Judge by S. 436," which section gives power both to the Sessions Judge and to the District Magistrate to revise such orders of discharge. The principle of that decision applies, of course, to a petition in revision directed against a similar order passed by a District Magistrate.

Though the High Court has thus got the power to go into questions of fact, it does so merely in order to see whether

(1) [1907] 30 *Mad.* 224=16 M. L. J. 529=5 Cr. L. J. 100.

the District Magistrate's order is improper and not as a sort of appellate Judge of facts over the District Magistrate. In other words, unless the District Magistrate's power of interference with the lower Magistrate's order of discharge was exercised on very weak and clearly untenable grounds, the High Court would not interfere with the discretion vested in law in the District Magistrate by S. 436.

As regards the power of the Subordinate Magistrate to discharge the accused in a case where the accused is alleged to have committed even an offence triable exclusively by a Court of Session, it has been held in numerous cases, see one of the recent cases reported as *In re. Bai Parvati* (2), that if the evidence tendered for the prosecution appears to the Magistrate to be totally unworthy of credit, he is entitled to discharge the accused. Of course, if there is evidence as to some material facts deposed to by credible witnesses, on which facts a Court or jury may not unreasonably find the accused guilty, that is a case in which the accused should be put on his trial before a Sessions Court leaving it to the Judge or to the jury (as the case may be) to find the accused's guilt proved or not proved on those facts, but where most of the important witnesses are totally unworthy of credit, according to the Magistrate, and where the case itself bristles with improbabilities, the Magistrate would be right in discharging the accused. "who should not be exposed to the expense and harassment of a Sessions trial which is practically foredoomed to failure," and in saving the accused "from the prolonged anxiety of undergoing a trial for an offence not brought home to the accused," and in saving also "the time of the Court of Session from being wasted over unsuitable cases." No doubt, in cases of this kind, the line between the Sub-Magistrate's "duty to discharge under S. 209, Criminal P. C., and the prerogative of the District Magistrate under S. 436, is not easy to draw:" see the whole question elaborately considered in *National Bank of India, Ltd. v. Kothandarama Chetti* (3). As Bakewell, J., said at p. 750: "I do not think that it is possible to fix positively the limits within which the Magistrate should exercise his discretion

and prefer to express the rule negatively by saying that he must not in any way encroach upon the functions of a jury." That was a case in which inference had to be drawn as to the knowledge or intention of the accused from certain facts spoken to by credible witnesses, and it was held there that such drawing of the inference as to knowledge or intention should, on the facts of that particular case, have been left by the Magistrate to the jury to be empanelled at the Sessions. So far as the question relating to the Magistrate's power to discharge the accused, if he finds the prosecution case wholly improbable and the prosecution evidence patently worthless, I do not think that the case of *National Bank of India, Ltd. v. Kothandarama Chetti* (3) intended to depart from the earlier rulings. In the present case the Sub-Magistrate's judgment, the District Magistrate's order passed under S. 437 and the evidence for the prosecution were fully discussed before me, and I have come to the conclusion that the District Magistrate's prerogative under S. 436 was exercised in this case erroneously and on very inadequate grounds, the Second Class Magistrate having given very good reasons for his opinion that the prosecution evidence is so unreliable that the accused persons ought not to be committed to the Sessions and harassed with a trial in the Sessions Court on that evidence. I therefore set aside the order of the District Magistrate and direct all proceedings to be dropped against the petitioners in connexion with the charge against them of dacoity under S. 395, I. P. C.

S.N./R.K.

Order set aside.

A. I. R. 1914 Madras 425

AYLING AND NAPIER, JJ.

In re *Adabala Muthiyalu*—Accused.

Criminal Reference No. 10 of 1912, Decided on 3rd September 1912, made by the Sess. Judge, Godavari, in Criminal Case No. 33 of 1912.

Criminal P. C. (5 of 1898), S. 307—Jury is competent to convict under S. 326, Penal Code, if charge under S. 397, Penal Code, is not proved—Penal Code (45 of 1860), Ss. 397 and 326.

A jury, in a Sessions case, is competent, where a charge under S. 397, Penal Code, is not established to convict the accused of an offence under S. 326, where the facts proved establish the commission of that offence: 22 *Mad.* 15; 24 *Mad.* 641 and 26 *Mad.* 243, *Ref.* [P 428 C 2]

(2) [1910] 8 I. C. 631=35 Bom. 163=1 Cr. L. J. 692.

(3) [1913] 21 I. C. 129=14 Cr. L. J. 529.

L. A. Govindaraghava Aiyar — for the Crown.

Facts.—The accused is charged under S. 397, I. P. C., with having committed robbery of a kuttikantu and at the time of the committing of the said robbery with having used a knife and voluntarily caused grievous hurt to Mandapati Seshamma, witness 1 for the prosecution. Seshamma was, at about lamp-lighting time on 30th April last, going to a Komati's shop to buy soap-nuts. The shop was at a distance of about 70 or 80 yards from her house. Between the shop and her house, there were only two vacant houses. As she was going along the punta, the accused rushed at her from the vacant house which was nearer to Seshamma's house and snapped the kuttikantu she was wearing on her neck. Seshamma held the kuttikantu fast in her hand and did not let it go. The accused then cut her at her neck with a knife and also stabbed her in the abdomen. She received an injury on the left thumb when she was holding the kuttikantu with her left hand. Seshamma fell down. The kuttikantu was not lost; but two gold beads and one five-franc piece out of it were found missing. She could not say whether the accused had taken away the gold beads and the five-franc piece or whether they were lost in the scuffle. Pullayya, her brother, witness 3, searched for the missing beads and the five-franc piece near the spot, but could not find them out. As soon as Seshamma was cut by the accused, she cried out, according to her, "Adabala Mutyalu is cutting me away." Witness 3 Pullayya, the brother of Seshamma, who had just then returned home from his field, heard the cry of his sister. He says the cry he heard was "Ammo Babo, he is stabbing me." He at once ran to the spot. When he was at a short distance from it, he saw the accused running away. Finding that his sister was lying on the ground with bleeding wounds, he did not run after the accused, but went to the help of his sister.

Reddeyya, the village naick, who was following the karnam and the Revenue Inspector, when they were going home after their field measurement, also heard the cry of someone. He at once ran to the spot. He found a person lying on the ground and another running away.

He gave chase to the latter, but the man ran southwards towards the sea and disappeared. Returning to the very spot, he found that the person that had been lying there was not there. He heard some noise at Seshamma's house, and, going there, found Seshamma covered with injuries. Thence he went to the karnam and reported the matter to him. Taking leave of him, he went home.

The Village Munsif sent word to him to fetch the report books and, with the Village Munsif, witness 6 again went to Seshamma's house. Witness 4, Reddeyya, the village naick, was not able to identify the accused or the person hurt. The husband of Seshamma, witness 5, was at his master's field. Word was sent to him that his wife had been cut. He returned home and questioned Seshamma as to her injuries. She is said to have narrated the same story. At the spot itself, Pullayya, the brother of Seshamma, had questioned her. She narrated the same story. Carrying her home and leaving her there, Pullayya went to the Village Munsif and reported the occurrence to him. The Village Munsif came to Seshamma's house and found the injuries upon her person. He sent her to the hospital at Rajole for treatment. He, at about 10 p. m., also despatched his report Ex. B to the Magistrate, which corroborates the evidence of Seshamma.

The chief witness in the case is Seshamma herself. She had known the accused before, and she distinctly says that she identified the accused as the person that had snapped the kuttikantu and cut her with a knife. Witness 3, Pullayya, had also known the accused. He too, states that he saw the accused run away from the spot as soon as he went to her assistance. Witness 4 Reddeyya's evidence will corroborate the other witnesses' evidence Nos. 1 and 3. The Village Munsif, witness 6, soon after the occurrence, sent his report, Ex. B, to the Magistrate. In the report these facts are set out. The distance from this village to Rajole is about eight miles and the report reached the Magistrate, you will find from the endorsement on it, at about 3 a. m. Seshamma was taken to the hospital at 2-45 a. m. The medical witness, witness 2, the Sub-Assistant Surgeon, examined her injuries and gave the certificate Ex. A. There

were three incised wounds: one in the neck, one in the abdomen and the other on the left thumb. The wound on the abdomen was an incised and penetrating one such as to endanger life. It was a serious wound. Seshamma was at the hospital for 21 days as an in-patient. On the 21st May afternoon, she left the hospital and did not return for treatment. At the time she left the hospital the wound in the abdomen was not completely healed. During 21 days she was at the hospital, according to the medical witness, she was unable to follow her ordinary pursuits of life.

The accused denies his guilt. He says he was not in the village at all on the night of the occurrence. He does not cite any witnesses.

Now, the principal question for your consideration would be, whether the evidence of these witnesses for the prosecution, namely witnesses 1, 3, 4 and 6, should be believed. There was nothing elicited in the cross-examination of these witnesses or mentioned in the statement of the accused to show that these witnesses were not giving true evidence. The fact that Seshamma had received the injuries that night is clear from the evidence of these witnesses and also from the evidence of the Sub-Assistant Surgeon. Who has caused the injuries, is the question for your consideration. You may take it that the occurrence took place between 7 and 8 p. m. that night. It was a moonlight night. The accused had been known to Seshamma and her brother Pullayya. Seshamma had every opportunity of identifying the man when he caused the wounds. She says he was the accused himself. If any other had caused the injuries there was no reason why she should foist the crime upon the accused and not upon the real offender. So, if you believe the evidence of the prosecution witnesses, you may take it that he snapped the kuttikantu and also caused these injuries to Seshamma.

Now, I shall briefly explain to you the law as far as it bears upon this case. You will remember that the accused was charged with robbery and, at the time of the committing of the said robbery, with having caused grievous hurt to Seshamma. The two offences embodied in this charge are robbery and voluntarily

causing grievous hurt at the time of committing the robbery.

First, I shall explain to you what the charge of voluntarily causing grievous hurt is. Whenever any bodily pain is caused to any person, hurt is caused. It becomes grievous hurt when the hurt endangers life. Also, any hurt which causes the sufferer to be during the space of 20 days unable to follow the ordinary pursuits is grievous hurt. In this connexion you will remember that the medical evidence was to the effect that the injury in the abdomen was such as to endanger life. If that portion of the evidence alone is relied on, the hurt caused in the abdomen will be grievous hurt. Further, the medical witness has stated that, during the space of 21 days, Seshamma could not have followed her ordinary pursuits. Taking that portion of the evidence even, it would follow that the hurt caused to Seshamma was grievous.

Now, I shall explain to you the charge of robbery. Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking is said to commit theft. Mere motion of the property in order to take it dishonestly from the possession of another would be sufficient to constitute the offence of theft. In other words it is not necessary that the property, or any portion of it, should have been actually lost. It need not be carried away by the offender. If, in this case, Seshamma's evidence is believed, the accused snapped her kuttikantu. Apparently, if he had done so, his intention would have been dishonest. If he had snapped it, as deposed to by Seshamma, theft would be committed even though the property was not lost.

Theft becomes robbery, if in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes hurt to any person. In the present case, Seshamma has deposed that as she did not leave hold of her kuttikantu she was stabbed by the accused. If her evidence is believed, it would follow that the hurt was caused in order to the committing of the theft or

in committing the theft, and the act would amount to robbery.

Then, if, at the time of committing robbery, the offender uses any deadly weapon or causes grievous hurt to any person, the act would fall under S. 397. The charge against the accused is under S. 397, I.P.C. S. 397 is, as I have told you, a combination of offences, robbery, and voluntarily causing grievous hurt. If, in the circumstances, it happens that you do not believe that any robbery was committed, but if you believe that the accused had voluntarily caused grievous hurt with a knife, then it would be open to you to find him guilty under S. 326, I.P.C., alone.

Thus taking all the circumstances of the case into consideration as disclosed by the evidence for the prosecution, and regarding also the statement of the accused, you will give your verdict. If there is any reasonable doubt in the case, the accused is entitled to the benefit of it and your verdict should lean towards acquittal.

One fact, I had forgotten to bring to your notice, and I wish you will take that also into consideration in arriving at your verdict. The kuttikantu or the portion of it that remained was not taken possession of by the police nor has it been produced before this Court. Seshamma states that she has it at her house and that she has not been using it since the occurrence in consequence of her wound at the neck. You will please take this circumstance also into your consideration in arriving at your verdict.

Verdict.—Unanimous. Not guilty.

Order.—The Jury have unanimously found the accused not guilty of any offence. I am unable to agree with the verdict. I should find the accused guilty of voluntarily causing grievous hurt by means of a knife, an offence falling under S. 326, I.P.C., though I would give him the benefit of a reasonable doubt as regards the robbery. I am clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court. I shall accordingly do so."

Judgment.—The Judge has referred the case under S. 307, Criminal P. C., on the ground that the evidence establishes an offence under S. 326, I.P.C.

On a consideration of the evidence and giving due weight to his opinions and that of the jury, we think that is so.

According to the view taken by this Court in *Queen-Empress v. Anga Valayan* (1) and *King-Emperor v. Krishna Ayyar* (2), it would have been open to the jury in this case to have convicted the accused of an offence under S. 326, I.P.C., and the same view was taken by Bashyam Iyengar, J., in *Pattikadan Ummaru v. Emperor* (3), though Benson, J., was of a different opinion. We follow these decisions and deem ourselves empowered under S. 307, Criminal P. C., to convict the accused of an offence under S. 326, I.P.C., which we accordingly do, and sentence him to five years' rigorous imprisonment. The stab in the abdomen was a very serious wound which might have ended fatally.

S.N./R.K. *Order accordingly.*

(1) [1899] 22 Mad. 15.

(2) [1901] 24 Mad. 641.

(3) [1903] 26 Mad. 243.

A. I. R. 1914 Madras 428

SADASIVA AIYAR AND SESHAGIRI
AIYAR, JJ.

Bodi Muttayya and others—Plaintiffs
—Appellants.

v.

Kavoori Kodandaramayya and others—
Defendants—Respondents.

Second Appeal No. 2397 of 1912, Decided on 12th March 1914, from decree of Dist. Judge, Guntur, in Appeal Suit No. 40 of 1910.

(a) **Hindu Law**—Limited owner—Gifts to Hindu females—Intention is not necessarily not to transfer absolute interest.

Documents of gift to daughters or other female members of a Hindu family are not to be construed to mean necessarily that no absolute interest could have been intended to be transferred by them. [P 429 C 2]

(b) **Hindu Law**—Gift by father-in-law of the property to widowed daughter-in-law—Transfer of life-estate is not presumed.

There is no presumption in law that a gift by a father-in-law of his one-fourth share in certain properties to his widowed daughter-in-law is only of a life-estate and much more so when he, along with this gift, has made other absolute gifts to others. [P 429 C 2]

(c) **Hindu Law**—Female in possession of property without legal title for more than 12 years acquires by prescription absolute title.

A female in possession of property without any legal title for more than 12 years acquires by prescription an absolute title to such property. [P 429 C 1]

S. T. Srinivasa Gopalachariar—for Appellants.

T. Chenchiah for *T. Prakasam*—for Respondents.

Judgment.—The appellants' learned advocate points out that the District Judge committed an error when he stated in one portion of his judgment that the alienation under Ex. 3, dated 30th June 1883, was by plaintiff 1, Bodi Parvathammal, while, as a matter of fact, it was by Ravipati Parvathammal (the widow of another one-fourth sharer). This incorrect statement cannot have materially affected the findings of the lower appellate Court, and we do not think that a remand is necessitated by the existence of this error.

One of the findings of the lower appellate Court is that there was an oral gift by Venkayya to his widowed daughter-in-law, Atchamma of one-fourth of his property about 40 years ago. The District Judge disbelieved the oral evidence on both sides, as to the different gifts respectively set up by the two parties. We think that if we rejected the evidence on both sides the logical result was that Atchamma, the daughter-in-law, somehow, without any right or title, got possession of one-fourth share of her father-in-law's property. If so, according to the Privy Council rulings, she acquired a full ownership title by adverse possession for 12 years against the next heir entitled to possession as against her and if she was such full owner, the plaintiff's suit admittedly fails and the second appeal by plaintiffs follows.

But we shall take it that though the learned District Judge says that the defence evidence is worthless, he still accepts it, as the probabilities support and corroborate that evidence; then as that evidence is to the effect that an absolute title was conveyed to his daughter-in-law by Venkayya the plaintiff's case fails on this basis also.

What however the plaintiffs want us to do is to accept the defendant's case to this extent only, that Venkayya made some gifts to his daughter-in-law and then to reject the defendant's case that it was an absolute gift and lastly to apply the rule of law that a gift to a widowed daughter-in-law by a Hindu is presumably only of a life-estate.

We do not see how, when plaintiff's case fails, he could elect to fall back upon only that portion of the defendant's case which suits the plaintiff and then argue that the other portion has not been proved by the defendants. Even if

he could do so, we think that there is no presumption of law that a gift by a man to his widowed daughter-in-law is only a gift of a life-estate, as whatever might have been the tendency of certain earlier decisions, it has been held in more recent cases that documents of gift to daughters or other female members of a Hindu family need not be construed with a bias in favour of the view that an absolute interest could not have been intended to be transferred. Even if there is such a presumption the District Judge has referred to circumstances, such as the gift at the same time of another one-fourth share to a male who was admittedly entitled to an absolute estate in that one-fourth share and the fact that the alienation from other females, who obtained their shares under gifts contemporaneous with the gift to the daughters, had not been questioned by plaintiff before this suit was brought indicating that the gift by Venkayya to his daughter-in-law was probably an absolute gift.

We therefore dismiss the second appeal with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 429

AYLING AND SADASIVA AIYAR, JJ.

Thirumala Rao and another—Defendants—Appellants.

v.

Kadekar Durgi Shettethi—Plaintiff—Respondent.

Appeals Nos. 38 and 146 of 1913, Decided on 15th January 1914, from decrees of Sub-Judge, South Canara, in Appeal Suits Nos. 410 and 408 of 1911.

Specific Relief Act (1 of 1877), S. 42—Declaratory suit by plaintiffs on ground of defendant's denial of title—Cause of action begins from knowledge in plaintiff of defendant's denial—Acts consequential to such denial do not give fresh cause.

When a plaintiff brings a declaratory suit on the ground that the defendant has denied his title, there is only one cause of action which accrues from the date of knowledge in plaintiff of the defendant's denial of his title. The fact that in consequence of such denial, a revenue or other authority has subsequently done some act in favour of the defendant and that the defendant has thereby become still more interested in denying the plaintiff's title, does not give a fresh cause of action for a suit under S. 42: 1 I.C. 557 and 26 Mad. 410, *Foll.*; 13 I.C. 96, *Diss. from.*

[P 420 C 1]

B. Sitarama Rau—for Appellants.

K. Ramanath Shenoi and K. Sundara Rau—for Respondent.

Judgment.—We are inclined to follow *Akbar Khan v. Turaban* (1) and *Rajah of Venkatagiri v. Isakapalli Subbiah* (2) and to hold that when a plaintiff brings a declaratory suit on the ground that the defendant has denied his title, there is only one cause of action which accrues from the date of knowledge in plaintiff of the defendant's denial of plaintiff's title. The fact that in consequence of such denial, a revenue or other authority has subsequently done some act in favour of the defendant (such as entry in a revenue registry or sale of a property in execution as the property of a person other than the plaintiff, and that, in that manner, the defendant has become still more interested in denying plaintiff's title cannot, in our opinion, give a fresh cause of action for a suit under S. 42, Specific Relief Act. We respectfully dissent from the observations contra in *Cudaparaya Anantharazu v. Narayanarazu Garu* (3) and *Sheopher Singh v. Deo Narain Singh* (4).

In the above view, the plaintiff's suits were rightly dismissed by the District Munsif as barred and reversing the Subordinate Judge's judgment we restore the Munsif's decrees with costs in all Courts on the plaintiff.

S.N./R.K. *Appeal accepted.*

(1) [1909] 1 I. C. 557=31 All. 9.

(2) [1903] 26 Mad. 410.

(3) [1912] 13 I. C. 96=36 Mad. 383.

(4) [1912] 17 I. C. 675.

* A. I. R. 1914 Madras 430

SADASIVA AIYAR AND SHESHAGIRI AIYAR, JJ.

P. M. A. Valliappa Chetty—Petitioner.
v.

T. N. Subramanian Chetty—Respondent.

Civil Revn. Petn. Nos. 95 and 96 of 1913, Decided on 13th March 1914, from decree of Temporary Sub-Judge, Ramand, in Small Cause Suits Nos. 1406 and 1407 of 1911.

* (a) **Negotiable Instruments Act (1881), S. 22**—(Per *Sadasiva Aiyar, J.*)—**Parties can contract that S. 22 shall not apply—Promisee cannot compel maker of note to take advantage of days of grace**—(*Sheshagiri Aiyar, J., contra.*)

(Per *Sheshagiri Aiyar, J.*)—It is open to parties to enter into a contract that the provisions of S. 22, relating to days of grace shall not apply to them, and it is not open to the promisee to insist that the maker of the note should be compelled to take advantage of the days of grace, [P 431 C 2]

(Per *Sadasiva Aiyar, J., contra.*)—As S. 22 omits in a marked manner the provision in S. 14, English Bills of Exchange Act, allowing the parties to contract that the bill shall come to maturity on the date fixed in it without addition of days of grace, it is not open to the parties to contract themselves out of the benefit of that section by agreeing that the days of grace shall be dispensed with. [P 430 C 2; P 431 C 1]

(b) **Practice—Giving up benefit secured by law not offending against public policy—Courts will enforce contract to that effect.**

Where the giving up of a benefit secured by law does not offend against public policy, the Court will enforce a contract to that effect: *East India Co. v. Odit Churn Paul* (1850); 7 M. P. C. 85; *MacAllister v. Bishop of Rochester* (1880) 5 C. P. D. 194 and *Markham v. Stanford*, (1863) 14 C. B. 376, Foll. [P 432 C 2]

(c) **Negotiable Instruments Act (1881), S. 22—Question of public policy is not involved in including or rejecting days of grace.**

No question of public policy is involved in the inclusion or omission of provisions for days of grace. [P 432 C 1]

A. Krishnasami Aiyar—for Petitioner.

A. Venkatarayula Aiyar—for Respondent.

Sadasiva Aiyar, J.—I have the great advantage of having read the judgment prepared in this case by my learned brother.

It is often a difficult question to decide whether a statutory provision has been made solely for the benefit and protection of the individual in his private capacity or whether some public right and public policy is also involved in it. I am inclined not to go behind the plain words of a statute. S. 22, Negotiable Instruments Act, clearly says that "every promissory note or bill of exchange, which is not expressed to be payable on demand at sight or on presentment, is at maturity on the third day after the day on which it is expressed to be payable." In the Contract Act, in the Transfer of Property Act, in the Negotiable Instruments Act and several other Acts, there are numerous provisions made solely for the benefit and protection of the individual in his private capacity, and yet the legislature has thought it necessary, whenever it wanted to indicate that the parties can waive the benefit of such provisions, to begin such sections with the words "in the absence of a contract to the contrary" or similar words. As S. 22, Negotiable Instruments Act, omits in a marked manner the provision in S. 14, English Bills of Exchange Act, allowing the parties to contract that the bill shall come to maturity on the date fixed in it with-

out the addition of days of grace, I think that the promissory note governed by the Negotiable Instruments Act cannot dispense with the days of grace. As regards the case, *The East India Company v. Odit Churn Paul* (1), it is of course binding on me, but it seems to me that it is rather against the defendant. Lord Campbell's words at p. 112 are: "There might be an agreement that, in consideration of an inquiry into the merits of a disputed claim, advantage should not be taken of the Statute of Limitations . . . and an action might be brought for breach of such an agreement" (that is, as I take it, for damages for breach of such agreement). His Lordship however proceeds to say, "but if to an action for the original cause of action the statute of limitations is pleaded, upon which issue is joined . . . the defendant, notwithstanding any agreement to inquire, is entitled to the verdict." This rather shows that the statute law could not be evaded by an agreement of parties though such an agreement might form the basis of independent action. I need not say that I put forward this conclusion of mine with some diffidence in view of the arguments which have been put forward by my learned brother to uphold the contrary view.

I entirely agree however with my learned brother on the second point discussed in his judgment. I do not believe that plaintiff 2 had the authority of plaintiff 1 to present or to sign the plaint on behalf of plaintiff 1 when plaintiff 2 so signed and presented it.

I am also satisfied that there was no ratification by plaintiff 1 of plaintiff 2's said act before the period of limitation was over and any ratification after the expiry of the period of limitation cannot be allowed to the prejudice of the defendant. I therefore agree that these civil revision petitions should be dismissed with costs.

Seshagiri Aiyar, J.—The suit is brought on a hundi executed on 18th May 1908 which runs as follows:

"180 days after date (without grace) I promise to pay, etc."

The 180 days ended with 14th November 1908. The suit was instituted on 15th November 1911. The question for decision is whether under S. 22, Negoti-

able Instruments Act, the plaintiff can claim that limitation commenced to run against him only on 17th November when the three days of grace allowed by that section expire, although the contract of the parties excludes the days of grace. Under the English law, the Bills of Exchange Act of 1882, S. 14, which corresponds to S. 22 of the Act, provides that the days of grace shall be included only when the bill itself does not otherwise provide. The Indian Act does not contain a similar provision. Moreover, there are provisions in the Act which protect rights of parties under contracts notwithstanding anything to the contrary in the sections of the Act: see Ss. 32, 35, 37 and 38). On this ground it is argued that the omission in S. 22 of words saving the contract of parties implies that the legislature deliberately precluded from entering into contracts against the provisions of S. 22. The report of the Select Committee on the Negotiable Instruments Bill shows that an endeavour was made to omit all reference to days of grace in the Act itself, but that failed. I am not prepared to accede to the contention that the failure to save the rights of parties in S. 22 was a deliberate departure from the rule of English law. It is a case of accidental omission. There was no intention to enact a separate rule of law in this country on the question of days of grace. I may also point out that the provision that a note shall be payable only after the days of grace is *prima facie* for the benefit of the maker of the note, and if he chooses to give up his privilege, the promisee cannot insist upon his taking advantage of the rule. As pointed out in Halsbury's Laws of England, Vol. 2, Note to S. 806, in all the continental countries, provision for days of grace has been abolished. It can therefore be safely assumed that no question of public policy is involved in the inclusion or omission of provisions for days of grace.

In *The East India Company v. Odit Churn Paul* (1) Lord Campbell, in delivering the judgment of the Judicial Committee, points out that it was open to the parties to stipulate that the ordinary rules of limitation shall not bind them with reference to particular contracts, the reason of the rule being that the non-observance of the statute affects only private rights and private indivi-

(1) [1850] 7 M. P. C. 85=18 E. R. 811=14 Jur. 258.

duals and does not offend against public policy. In *Mac Allister v. Bishop of Rochester* (2), Lindley, J., held that private rights can be waived or renounced by parties to the contract; but if one of the contracting parties happens to occupy a fiduciary position, it was not open to him to give up rights which inhere in the general body of the public and not in him in his private capacity. The learned Judge observes: "We think therefore the well-known principles of equity on which the defence set up is based are not applicable to a case of this description." This observation was made in answer to the argument of counsel that public policy is not opposed to parties waiving private rights. In Maxwell's "Interpretation of Statutes," Edn. 4, the general law is thus summarized at p. 580. Another maxim which sanctions the non-observance of a statutory provision is that, *cuilibet licet renuntiare juri pro se introductu*. Every one has a right to waive, and to agree to waive, the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity and which may be dispensed with without infringing on any public right or public policy." The cases of *Markham v. Stanford* (3) and *Walton v. Mascall* (4) are illustrations of this rule. The American law on this point is very clear.

In 7 Encyclopaedia of Law and Procedure, p. 871, it is stated: "Although the law merchant allows days of grace, the parties may stipulate that they shall not be allowed and, if the instrument shows an intention, it will be given effect. In some States the statute in terms allows grace only where the instrument contains no provision or stipulation to the contrary. The mere fact that an instrument or a memorandum therein states that it is due or payable on a certain day does not exclude grace. Even where there is no stipulation excluding days of grace, the right to grace may be waived by the party bound, as where a tender of payment is made on the day of maturity without grace and is refused on other grounds."

(2) [1880] (2) 5 C. P. D. 194 = 49 L. J. C. P. 443 = 42 L. T. 81 = 28 W. R. 584.

(3) [1868] 14 C. B. (n. s.) 376 = 5 L. T. (n. s.) 277 = 135 R. R. 739.

(4) [1844] 13 M. & W. 452 = 14 L. J. Ex. 54 = 2 Dowl. & L. 410 = 67 R. R. 671.

The above authorities show that where the giving up of a benefit secured by law does not offend against public policy, or is not renounced by a person who holds a representative character, the Courts will enforce the contract. In this case the parties have chosen to expressly stipulate that the days of grace shall not be counted in reckoning the due date; and the individual for whose benefit the provision of law was intended has agreed to abide by the terms of the contract. I have therefore come to the conclusion that it is open to the parties to enter into a contract that the provisions of S. 22 relating to days of grace shall not apply to them; and it is not open to the promisee to insist that the defendant should be compelled to take advantage of the days of grace in order that the starting point of limitation for him may commence on their expiry. My decision is that the suit is barred by limitation.

The decree of the Subordinate Judge can be supported on another ground also. The suit was instituted by two plaintiffs but the plaint was signed only by the second. Plaintiff claims to be the agent of the first. The Court returned the plaint on the ground that plaintiff 1 had not signed it; it was not represented until after the period of limitation was over. The affidavit filed to show plaintiff 2 had authority to file plaints does not give particulars regarding the authorization. I am unable to hold that plaintiff 2 had authority prior to the institution of the suit to file the plaint on behalf of plaintiff. The suit is therefore barred by limitation on that ground as well.

I dismiss the petitions with costs,
S.N./R.K. *Petitions dismissed.*

* A. I. R. 1914 Madras 432 Full Bench

WALLIS, SUNDARA AIYAR AND SADASIWA
AIYAR, JJ.

Gopalakrishnamaraju—Plaintiff—Appellant.

v.

Venkatanarasa Raju and others—Defendants—Respondents.

Second Appeal No. 1703 of 1909, Decided on 9th August 1912, from decree of Sub-Judge, Ellore, in Appeal Suit No. 145 of 1908.

*** Hindu Law — Debts — Necessity—Debts for marriage expenses are binding.**

Marriage is obligatory on Hindus who do not desire to adopt the life of a perpetual Brahmachari or of a Sanyasi. Therefore, debts reasonably incurred for the marriage of a twice-born male are binding on the joint family properties: 32 *Mad.* 422, *Foll.* and 27 *Mad.* 206, *Overruled.* [P 433 C 2]

T. Prakasam — for Appellant.

P. Narayanamurti — for Respondents.

Order of Reference

By this appeal the question has been raised whether defendant 3 in the suit and his property are liable for a debt incurred to meet the expenses of defendant 2's marriage. The defendants belong to a Kshatriya family.

In *Govindarajulu Narasimham v. Venkatanarasayya* (1), it was held that a sale of a land belonging to a joint family of Brahmins to defray the expenses of the marriage of one of its male members cannot be said to have been made for family necessity and is, therefore, not binding on the other members of the family. This decision has been dissented from in *Sundara Bai v. Sheo Narayana* (2) and its correctness has been doubted in the judgment of this Court in *Devulapalli Kameswara Sastry v. Palavarapu Veeracharlu* (3). In both of these cases the matter is fully discussed. There is however a suggestion in the last mentioned ruling and in a later judgment in *Appeal No. 95 of 1906* that a distinction might perhaps be drawn between the case of Sudras and that of the three twice-born castes. But though the judgment of Chandravarkar, J., in *Sundara Bai v. Sheo Narayana* (2) and of Krishnaswami Aiyar, J., in *Devulapalli Kameswara Sastri v. Palavarapu Veeracharlu* (3), show that regarding the question from the point of view of religious ceremonial it may be said that there is a greater necessity for marriage among the Sudras than among the higher castes, the Bombay ruling clearly holds there is no difference in the law in the two cases and that is also the inclination of opinion as expressed in *Devulapalli Kameswara Sastry v. Palavarapu Veeracharlu* (3).

The question whether the marriage of a male member of a joint Hindu family belonging to one of the twice-born castes is a family necessity and whether a debt incurred for the purpose of such mar-

riage is binding on the other members of the family is one of importance and ought to be settled. We, therefore, refer the above question for the opinion of a Full Bench. Pending the receipt of the opinion of the Full Bench, the second appeal will stand over.

Opinion.—It is sufficient to say that we agree with the judgment of Krishnaswami Aiyar, J., in *Devulapalli Kameswara Sastry v. Palavarapu Veeracharlu* (3) that marriage is obligatory on Hindus who do not desire to adopt the life of a perpetual Brahmachari or of a Sanyasi and this being so, that debts reasonably incurred for the marriage of a twice-born Hindu male are binding on the joint family properties.

S.N. R.K.

Reference answered.

A. I. R. 1914 Madras 433

WALLIS AND SADASIVA AIYAR, JJ.

In re *Uruma Mudali* and others—Prisoners—Appellants.

Criminal Appeal No. 38 of 1914, Decided on 17th April 1914, from order of Sess. Judge. Coimbatore. in Case No. 81 of 1913.

Criminal P. C. (1898). Ss. 413 and 408—Several persons convicted at one trial—Different sentences — Sentences made non-appealable under S. 413 passed on some, and heavier ones on others—Former have no right of appeal only because there is consolidated appeal by all convicted persons.

Section 413, prohibits an appeal against a sentence of less than one month's imprisonment or a fine of less than Rs. 50 passed by the District Magistrate or a Court of Session and the mere fact that such sentences were passed on some of the accused while heavier sentences were passed on the rest would not give to the former a right of appeal by all only because there is one consolidated appeal by all convicted persons. [P 434 C 1]

R. Sadagopachariar, C. Narasimhachariar and Rajagopala Aiyangar—for Appellant.

Public Prosecutor—for the Crown.

Judgment.—Twenty-four accused persons were charged (among other offences) with rioting and being members of an unlawful assembly before the learned Sessions Judge of Coimbatore. Of the twenty-four, two were acquitted. Out of the twenty-two who were convicted of the above offences, four have not appealed. The remaining eighteen accused have filed this appeal. Of these eighteen appellants, fourteen have been sentenced to a fine of Rs. 10 each and under S. 413, Criminal P. C., they are not entitled to ap-

(1) [1904] 27 *Mad.* 206.

(2) [1908] 82 *Bom.* 81=9 *Bom. L. R.* 1866.

(3) [1910] 8 *I. C.* 195=54 *Mad.* 422.

peal. Mr. Sadagopachariar's argument is that because in one and the same judgment, appellants 1, 2, 3 and 6 have been given sentences of three months' rigorous imprisonment and Rs. 750 fine, Rs. 200 fine, Rs. 200 fine, two months' imprisonment and Rs. 500 fine respectively, this fact entitles the other fourteen appellants also to prefer appeals against the lesser sentences passed on them. Reliance is placed in support of this argument on the case in *Palani Koravan v. Emperor* (1), decided on an interpretation of S. 408, Cl. (b), Criminal P. C. We think that the construction of the words of S. 408, Cl. (b), throws no light on the words used in S. 413, and that the words of S. 413 clearly prohibit a convicted person whose sentence is less than one month's imprisonment or a fine of less than Rs. 50 from appealing to a higher Court if the Court which passes such sentence is the Court of the District Magistrate or a Court of Session: see Criminal Revision Case No. 532 of 1910 on the file of the High Court. Though as a matter of long practice, several accused persons convicted in the same Sessions trial are allowed to appeal together, the consolidated appeal really consists of the several separate appeals made separately by the convicted persons. This appeal, so far as it is by the appellants other than accused 1, 2, 3 and 6, is, therefore, dismissed.

As regards the remaining four appellants we see no sufficient reason to differ from the conclusion of the learned Sessions Judge (and of the two intelligent assessors who sat with him in the Sessions Court) that these four persons with several others formed an unlawful assembly in Kilwani village, threw stones at the houses of Ramasami Mudali and Shengoda Mudali and that several of the crowd trespassed into the compounds of those two persons. The common object of a crowd can usually be inferred only from their acts and exclamations and in this case there is the reliable evidence of P.Ws. 1, 2, 3 and 11 proving, when read with the other evidence, that a riotous crowd trespassed into the compounds of those two people and threw stones on their houses. The evidence of the other prosecution witnesses and of the Court witnesses 3 and 4 is, no doubt, very unreliable as pointed out by the Sessions

Judge himself in paragraphs 21, 26, 30, 33 etc., of his address to the assessors; but so far as it corroborates the evidence of P. Ws. 1 to 3 and 11, that corroboration need not be wholly dispensed with. The evidence of one of the accused's party (D. W. 12) supports that portion of the prosecution story which establishes that stones were thrown by the accused's party also. The case for the defence that the appellants' party went innocently unarmed to rescue accused 1 (a story inherently improbable as pointed out by the Sessions Judge in para. 9 of his address) cannot be accepted. Most of the appellant's party belong to Mettupalayam and their presence at Kilwani (where the riot took place) in a large crowd is naturally explained by the prosecution theory and not by the defence theory. Accused 1 and 6 who are brothers live in Mettupalayam. They have been assisting accused 2 in his litigation with accused 2's brother's widow, Karuppayee. Ramasami Mudali and Sengoda Mudali into whose compounds the accused trespassed are partisans of Karuppayee.

The presence of accused 1, 2, 3 and 6 at Kilwani on the day of the riot and their arrest by the police almost immediately after the riot are not denied. The evidence of P. Ws. 1 to 3 and 11 read together proves that accused 6 was the leader of the riotous crowd who came to Kilwani from Mettupalayam and that all four were among the persons who made the riotous demonstration near and in the compounds of Ramasami Mudali and Sengoda Mudali. The story of D. W. 8, a landless pauper, as to how he sent word to accused 6 to come to Kilwani to rescue accused 1 is not worth belief. The appeal as regards Nos. 1, 2, 3 and 6 also should be and is dismissed.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 435

SANKARAN NAIR AND AYLING, JJ.

Raja Sree Maharaja Sahib, Mehara-ban Dostan Sree Maharaja Sri Hon'ble Row Venkata Siweta Chellapathi Ranga Row Bahadur, K. C. I., Maharaja of Bobbili—Appellant.

v.

Sree Rajah Narasaraju Pedaboliar Sin-hulu Bahadur Garu and others—Respon-dents.

Appeal No. 64 of 1911, Decided on 2nd May 1912, from order of Dist. Judge, Vizagapatam, D/- 26th October 1910, in E. P. No. 15 of 1910.

Civil P. C. (5 of 1908), Ss. 38, 39 and 41—Simultaneous execution when should be ordered—Execution application to original Court before return of certificate is improper unless simultaneous execution is ordered—Such application is step-in-aid—Limitation Act (1908), Art. 182, Cl. 5.

The Court which passed a decree can order concurrent execution of it simultaneously with execution proceedings instituted by the Court to which it has been sent for execution, but such execution should be allowed only in excep-tional circumstances. It is only when such execution is necessary in the interests of the decree-holder, and when it can be carried on without hardship to the judgment-debtor, that it ought to be allowed by the Court which passed the decree: 14 M. I. A. 529, *Ref.*

[P 436 C 2]

When a decree is transferred by the Court which passed it to another Court for execution, and an application made to the latter Court is dismissed, a subsequent application for execu-tion made to the Court which passed the decree, while the result of execution has not been certified by the Court to which it was sent for execution, is not an application made to the proper Court unless there is an order per-mitting simultaneous execution along with execution proceedings initiated in the Court to which the decree was sent for execution: 20 *All. 129, Ref.*; 8 *Cal. 687, Dist.*

[P 435 C 2; P 433 C 1]

Plaintiff obtained a decree in the District Court of Vizagapatam. It was sent for execu-tion to the Parvatipur Munsif's Court on 5th October 1904. There the petition for execution was dismissed by the Munsif on 10th March 1905. On 13th December 1907, plaintiff applied for execution to the District Court of Vizaga-patam, which returned the petition for amend-ment under S. 235, Civil P. C. of 1882. The peti-tion was re-presented without amendment and the District Court simply recorded it. On 21st October 1910 the decree-holder applied to the District Court for execution.

Held: that the application of 13th October 1907 was a step-in-aid of execution which saved limitation: 28 *Mad. 557, Foll.*

Held further: that the application, dated 13th October 1907, was not made to the proper Court, as the District Munsif's Court of Parvatipur had certain of the execution proceedings: 20 *All. 129, Ref.*

[P 435 C 2; P 437 C 1, 2]

L. A. Govindaraghava Iyer and V. Ramesam—for Appellant.

B. Narasimhaswara Sarma—for Res-pondents.

Sankaran Nair, J.—The question is whether the plaintiff's application is barred by limitation. The plaintiff ob-tained a decree in O. S. No. 11 of 1903 on the file of the District Court of Vizagapatam. The decree was transfer-red to the District Munsif's Court of Paravatipur for execution on 5th October 1904. The decree-holders got certain im-movable properties attached, but the petition was dismissed on 10th March 1905 and no further steps were taken in the District Munsif's Court. The decree-holder then applied to the District Court at Vizagapatam on 13th December 1907 for the sale of the property attached by the District Munsif. The petition was returned for amendment under S. 235, Civil P. C. of 1882. It was re-presented without amendment and was then re-corded without being registered. The decree-holder makes this present appli-cation on 21st April 1910 for notice and for the realization of the amount by sale of the properties already attached. The question whether this present appli-cation is barred by limitation depends on the question whether the application of 13th December 1907 to the District Court was in accordance with law and to the proper Court.

The application of 13th December 1907 prayed for notice under S. 248, Civil P. C. of 1882, and the decision of the District Judge that such application must be treated as a step-in-aid of execution, is in accordance with the decision in *Pachiappa Achari v. Poojali Seenan* (1). The only question that remains there-fore for decision is whether the applica-tion is made to the 'proper Court.' The District Judge decided that the proper Court to which the application should have been made was the District Munsif's Court of Parvatipur, to which the decree had been transferred for execution and that therefore the present application is barred. Under S. 223, Civil P. C. of 1882 (S. 41 of the present Code), the Munsif's Court of Parvatipur, to which the decree was sent for execution, has to certify to the District Court of Vizaga-patam the fact of such execution or, if the Munsif's Court fails to execute the

(1) [1905] 28 *Mad. 557.*

decree, the circumstances attending such failure. Till that is done the Munsif's Court retains its jurisdiction to execute the decree: see *Abda Begam v. Musaffar Husain Khan* (2).

There is no doubt therefore that the Munsif's Court had jurisdiction to entertain a similar application for sale though that Court had dismissed the application for execution in 1905. This was not denied in argument before us.

The next question is whether that is the only Court to which this application could be made, or had the District Court also jurisdiction to order the sale of the property. Under S. 38, Civil P. C. of 1908 (S. 223 of the Code of Act 14 of 1882), the decree may be executed either by the Court which passed it or to which it is sent for execution. This in itself does not authorize the District Court of Vizagapatam, which passed the decree, to execute it after it had been sent for execution to the Munsif's Court of Parvatipur. S. 39 states the condition under which a decree may be sent to another Court for execution. Under Cl. (c) it may be sent for execution to another Court if the Court directs the sale or delivery of immovable property situated outside the limits of the jurisdiction of the Court which passed the decree, and, presumably, within the limits of the jurisdiction of the Court to which it is sent for execution. The reason for the transfer of this case is plain enough. By Cl. (a) it may also be sent to another Court if the judgment-debtor resides there or carries on business or works for gain within the limits of the jurisdiction of that Court.

Under Cl. (b) if the judgment-debtor has no property within the jurisdiction of the Court which passed the decree sufficient to satisfy the decree and has property within the limits of the jurisdiction of the Court, to which it is sent the decree may be sent to that Court for execution. Under Cl. (d) of S. 39, if the Court which passed the decree considers for reasons, which shall be recorded in writing, that the decree should be executed by another Court, then also the decree may be sent to another Court for execution. This section does not say that, after the decree has been sent to another Court for execution, the Court passing the decree may not simultane-

ously carry on execution proceedings but it is plain enough that S. 39 intends that it is only for special reasons that the decree should be sent to another Court for execution. Thus, if there is sufficient property by the sale of which the debt may be realized ordinarily, no Court would be justified in sending the decree to another Court for execution. At the same time, it is quite possible that concurrent execution may be necessary.

If, for instance, a property within the jurisdiction of the Court which passed the decree is comparatively not of much value and the property within the jurisdiction of the Court to which the decree is sent is also not comparatively of much value, then there can be no injustice to the judgment-debtor in carrying on execution proceedings in both the Courts. If the decrees be sent for execution to two or more Courts to be executed at the same time and the amounts realized in the aggregate may be much higher than the judgment-debt, it would manifestly be an injustice to the judgment-debtor to allow the execution proceedings to go on at the same time. Furthermore, if the full amount of the decree is realized by two or three Courts it is difficult to see how matters can be worked out, which of the sales is to be held valid and on what grounds and what interest would be acquired by the purchasers at those sales. It is true the judgment-debtor may apply for stay of execution proceedings under O. 21. R. 26, but he is not entitled to get the execution proceedings stayed. While therefore these sections may not show that concurrent execution cannot be carried on, they certainly show that such execution should be allowed only in exceptional circumstances. It is only when such execution is necessary in the interests of the decree-holder and when it can be carried on without hardship to the judgment-debtor, that it ought to be allowed by the Court which passed the decree.

The other provisions show that such Court apparently retains control over the execution proceedings; when the decree has to be executed against the representative of the judgment-debtor, then, according to S. 50, the application has to be made to that Court which passed the decree; when a decree has to be executed at the instance of the assignee of the

decree-holder, then also the application has to be made under O. 21, R. 16, to the same Court. Then, again, power is given to such Court to stay the execution proceedings in the Court to which the decree is sent for execution. When therefore concurrent execution is necessary, the Court which passed the decree may order it; but when such order is passed and permission is given to the decree-holder to execute the decree simultaneously in more than one Court, he is not entitled to carry on execution proceedings at the same time. The decision seems to be one of this view.

In *Saroda Paroda Mullick v. Luchmeeput Singh Doogar* (3), their Lordships of the Privy Council held that it was open to a Court to send the decree for execution to three Courts at the same time. This decision was passed under the Civil Procedure Code of 1859. It may be pointed out that, under S. 286 of that Code, the Court was bound to transmit the decree for execution to another Court unless there be special reasons to the contrary. Under the Codes of 1882 and of 1908, it is optional with the Court to send it to another Court. Under S. 284 of the Code of 1859, their Lordships pointed out that when the decree is sent for execution to another Court, conditions may have to be imposed upon the decree-holder. This also shows the necessity of the exercise of judicial discretion. In the case of *Kristo Kishore Dutt v. Roop Lall Doss* (4) also, there was an order by the Court which passed the decree for simultaneous execution. These decisions are authorities for the proposition that decrees may be executed simultaneously in more than one Court, but in all these cases, there were orders allowing such execution, and the considerations that I have already set out would seem to indicate the necessity of an order, permitting concurrent execution before such execution proceedings can be carried out.

In the present case after the decree was transferred for execution to the Paravatipur Munsif's Court, that Court had seisin of the execution proceedings and it was bound to carry them on until execution was obtained or further execution became impossible. There was

no order of the District Court of Vizagapatam staying execution in that Court for the purpose of executing the decree in the Vizagapatam Court itself. I am therefore of opinion that the Judge is right in holding that the application for sale in 1907 should have been made to the Pravatipur Munsif's Court and that the District Court was not therefore the proper Court to entertain such an application. The present application therefore is barred. I would confirm the order of the District Court and dismiss this appeal with costs.

Ayling, J.—I agree.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 437

SANKARAN NAIR AND AYLING, JJ.

Pungalur Chennamma — Petitioner — Appellant.

v.

Minor Raja of Karvetinagar — Respondent.

Appeal No. 108 of 1913, Decided on 4th February 1914, from order of Dist. Judge, North Arcot, in Civil Miscellaneous Petition No. 247 of 1912.

Civil P. C. (1908), S. 73—Order under S. 73 is not appealable—Civil P. C. (1908), S. 104.

No appeal lies from an order passed under S. 73: 12 I.C. 911, *Dist.* [P 437 C 2]

N. Chandrasekhara Aiyer—for Appellant.

L. A. Govindaraghava Aiyer—for Respondent.

Judgment.—The appellant, a decree-holder, applied under S. 73, Civil P. C., to share in the distribution of the sale-proceeds of certain property sold in the execution of a decree obtained by another decree-holder, the Mahant of Tirupati, against the same judgment-debtor. His application was rejected by the District Judge and he appeals from that decision. A preliminary objection is taken that no appeal lies. We think this objection is well-founded. No appeal lies under S. 104, Civil P. C. But it is contended that this is a dispute arising between parties to the decrees, as the judgment-debtor alone contested his right to a share in the proceeds and he alone is a party to this appeal. We think this makes no difference. Any order passed under S. 73, Civil P. C., is an order which affects all the decree-holders who have applied for distribution under that section and the judgment-debtor. And it is con-

(3) [1870-72] 14 M. I. A. 529=17 W. R. 289=10 B. L. R. 214.

(4) [1882] 8 Cal. 687=16 C. L. R. 609.

ceded that so far as the decree-holders are concerned no appeal will lie by one decree-holder against another. This has been often decided; while that is so, we can see no ground for holding that separate appeals may be filed by the decree-holders against the judgment-debtor. The result would be anomalous. Every decree-holder is interested in any order that may be passed in appeal. We are therefore of opinion that no appeal lies. The case cited in *Sorabji Coovarji v. Kala Raghunath* (1) has no application.

We accordingly dismiss the appeal with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1911] 12 I.C. 911=36 Bom. 156.

A. I. R. 1914 Madras 438 (1)

TYABJI, J.

Nalu Subba Row—Petitioner.

v.

Gauti Venkataratnam—Respondent.

Civil Revn. Petns. Nos. 775 and 776 of 1911, Decided on 11th December 1913, from order of Dist. Munsif, Rajahmundry, D/- 20th April 1911 and 12th June 1911, in I. A. No. 351 of 1911.

Civil P. C. (5 of 1908), O. 9, R. 8—Dismissal of suit for default—Application for restoration dismissed for failure to produce judgment and decree—Second application for same purpose two months after original order was held time barred—Limitation Act (9 of 1908), Art. 163.

Where in a suit dismissed for default of plaintiff an application for the restoration of the suit was dismissed also, because the applicant had failed to produce the judgment and decree as directed by Court, and a second application for the same purpose was made two months after the original order,

Held: that the second application was time barred. [P 438 C 1, 2]

V. Ramesam—for Petitioner.

P. Narayanamurthi—for Respondent.

Judgment.—The suit was dismissed for default of the plaintiff to appear at the date of hearing on 19th December 1910. On the next day the plaintiff made an application for the restoration of the suit; and in the application he stated that he had had fever and so appeared rather late in Court. No affidavit was filed with this application. An order was made by the Court that the judgment and decree made on 19th December should be filed with this application. That order not having been complied with on 23rd January 1911 (i.e., a month later) the petition for restoration was dismissed. Another petition for the same purpose

was made by the plaintiff on 16th February and the suit was restored on 21st April 1911. No reasons appear why the plaintiff did not appear in the first instance on 19th December 1910; nor do any reasons appear why there was so much delay in asking for the suit to be restored. Art. 163, Lim. Act, requires the application to be made within 30 days. The application on which the suit was ultimately restored was made two months after the dismissal. There may have been reasons why there was delay in making the application; but the plaintiff has not put forward any reasons. Even in this Court at the present stage no reasons are stated to me for the restoration of the suit. I think the order was wrongly made and the suit should not have been restored. The decree obtained by the plaintiff will be reversed and the suit dismissed. It seems extremely doubtful whether on the merits the plaintiff ought to have obtained the decree. I will therefore order that the costs should be paid by the plaintiff throughout.

S.N./R.K.

Appeal accepted.

A. I. R. 1914 Madras 438 (2)

AYLING, J.

Rallabamdi Subbiah—Petitioner.

v.

Venkataramiah Apparao Bahadur Zamindar Garu and another—Plaintiffs—Respondents.

Civil Revn. Petns. Nos. 1019 to 1025 of 1912, Decided on 6th January 1914, from decrees of Dist. Munsif, Gudivada, D/- 19th June 1912, in Small Cause Suits Nos. 429, 430, 435, 436, 440, 442 and 444 of 1910.

Landlord and Tenant—Landlord not giving notice of higher rent is estopped from claiming it.

If a landlord gives no notice demanding rent at a higher rate to his tenant, who had cultivated land with wet crops for a long time, the landlord is estopped from claiming the higher rent, inasmuch as had the notice been given the tenant might have elected to raise dry crops and thus escaped the higher demand. [P 439 C 1]

T. R. Venkatrama Sastri—for Petitioners.

Swaminathan—for Respondents.

Judgment.—The District Munsif does not appear to have considered the legal effect of his finding on issue 3, that defendants had no notice of plaintiffs' intention to demand a higher rent for the

suit faslis. It is in evidence that the suit lands had been cultivated with wet crops for at least 15 years (according to defendants 24 or 25 years), and that during the whole of that time kist was collected only at the rate of 15 annas 10 pies per acre. In the absence of intimation to the contrary the tenants were justified in inferring that they would be allowed to cultivate on the same terms for the suit faslis, which expired on 30th June 1909. Plaintiffs gave them no notice of their intention to make a higher claim, but in 1910 filed suit for rent at a higher rate. If the tenants had received notice, they might have elected to raise dry crops only and thus escape the higher demand. It appears to me that in these circumstances plaintiffs are estopped from demanding the higher rent they claim for the suit faslis: vide *Narasimha Chari v. Gopala Ayuengar* (1) and *Sree Sankarachari Swamiar v. Varada Pillai* (2).

The Munsif's decree also appears to be erroneous as regards the allowance of Karnam's selagam. The defendants disputed their liability to pay this. The only evidence adduced in support of the demand consists of entries in Ex. A, series, muchilikas dated 1875. No evidence is adduced to show that this selagam was ever collected, and there is positive evidence that it was not paid for a period of 15 or 25 years.

The Munsif's decree must be set aside and plaintiffs given a decree for rent for faslis 1317 and 1318 at the rate of 15 annas 10 pies per acre only with interest thereon at Rs. 6 per cent. per annum. Each side will get proportionate costs both here and in the Small Cause Court.

This judgment will govern Civil Revision Petitions Nos. 1020 to 1025 also.

S.N./R.K.

Decree modified.

(1) [1903] 28 Mad. 891.

(2) [1904] 27 Mad. 382=18 M. L. J. 429.

A. I. R. 1914 Madras 439

SUNDARA AIYAR AND AYLING, JJ.

Titili Venkata Seetharamaya—Appellant.

v.

Vedula Venkataramaya and others—Respondents.

Second Appeal No. 2123 of 1910, Decided on 23rd April 1912, from decree of Sub-Judge, Ellore, in Appeal Suit No. 884 of 1909.

Civil P. C. (5 of 1908), O. 34, R. 1—Attaching creditor not joined as party—Order for sale obtained by mortgagee is not binding on attaching creditor.

Where mortgaged property was attached by a person holding only a money decree, and after attachment the mortgagee brought a suit on his mortgage and obtained a decree for sale, without impleading the attaching creditor as a party:

Held: that the order for sale obtained by the mortgagee was not binding on the attaching creditor, who was entitled to bring the property to sale under his attachment: 23 All. 467, Ref. and Expl. [P 439 C 2]

P. Narayanamurti—for Appellant.

P. Nagabhushanam—for Respondents.

Judgment.—In this case, the plaintiff is a person holding a mortgage from defendant 3 over some property belonging to him; defendants 1 and 2 obtained a money decree against defendant 3 and attached the mortgaged property. After the attachment the plaintiff instituted a suit for sale on his mortgage, but impleaded only defendant 3 as a party and obtained a decree for sale. Defendants 1 and 2 then made an application to bring the property to sale in pursuance of their attachment. The plaintiff then put in a claim petition stating that defendant 3 had no longer any saleable interest in the property as he had brought it to sale in pursuance of his mortgage decree. The claim was disallowed and he instituted the present suit for a declaration that defendants 1 and 2 are no longer entitled to bring the property to sale. An attaching creditor is one of the class of persons that are entitled to redeem a mortgage under S. 91, T. P. Act. A private alienation by the mortgagor after attachment would admittedly be invalid as against an attaching creditor's claims to bring the property to sale in pursuance of his attachment. Section 85, T. P. Act, requires all parties interested in the property to be made parties to a suit for sale. Section 91 recognizes an attaching creditor as one who, by virtue of his interest in the property, is entitled to redeem the mortgage. There can be no doubt that the plaintiff ought to have made the attaching creditors, defendants 1 and 2, parties to his suit for sale, and, as he failed to do so, the sale is not binding on them, and they are entitled to bring the properties to sale under their attachment. The decision in *Ghulam Husain v. Dina Nath* (1) is in accordance with this view. The

(1) [1901] 28 All. 467.

fact that there was an order for sale in that case made no difference in the rights of the attaching creditor. A mere order for sale does not increase the interest in the property which the attaching creditor has by virtue of his attachment.

The second appeal must be dismissed with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 440 (1)

SANKARAN NAIR AND AYLING, JJ.

Gopala Aiyangar — Defendant — Appellant.

v.

Venkatakrishna Aiyangar and others — Plaintiffs—Respondents.

Letters Patent Appeal No. 226 of 1912, Decided on 23rd January 1914, from order of Sadasiva Aiyar, J., D/- 23rd September 1912, in Civil Revn. Petn. No. 426 of 1911.

Hindu Law — Joint family — Promissory note—Payee dying leaving widow—Surviving members of joint family cannot sue on promissory note not taken for family benefit.

Where the payee of a promissory note dies leaving a widow, the surviving member or members of his joint family cannot maintain a suit on the same, if it is found that it was not taken for the benefit of the family: 30 *Mad.* 88, *Foll.* [P 440 C 1]

K. V. L. Narasimham and C. Padmanabha Aiyangar—for Appellant.

K. V. Krishnaswami Aiyar—for Respondents.

Judgment.—The promissory note sued upon is executed in favour of the deceased Venkata Varada Aiyangar who has left a widow. The suit is brought by the surviving members of the family to recover the debt on the ground that the debt is due to the family and the bond is taken in the name of the deceased on behalf of the family. There is no finding that the debt was due to the family, but it is found that the promissory note was taken for the joint benefit of plaintiff 1 and the deceased, who constituted "a family partnership" and therefore plaintiff 1 as the survivor is entitled to sue. As the bond is taken only in the name of Venkata Varada Aiyangar, and it is not found to be for the benefit of the family, we are of opinion that plaintiff 1 is not entitled to maintain the suit: *Subba Narayana Vaithiyar v. Ramaswami Aiyar* (1).

(1) [1907] 30 *Mad.* 88=16 *M. L. J.* 508=1 *M. L. T.* 377 (F.B.).

We must therefore set aside the decree of the learned Judge and dismiss the suit. Each party will bear his own costs throughout.

S.N./R.K.

Suit dismissed.

A. I. R. 1914 Madras 440 (2)

SANKARAN NAIR AND BAKEWELL, JJ.

Nanjaya Mudali and another—Defendants - Appellants.

v.

Shanmuga Mudali and others — Plaintiffs—Respondents.

Second Appeal No. 151 of 1911, Decided on 5th December 1913, from decree of Sub-Judge, Madura East, in Appeal Suit No. 742 of 1909.

(a) Hindu Law—Alienation — Alienation by coparcener of his share gives an alienee mere right to compel his alienor to sue for partition—Alienor remains member of coparcenary—If alienor's share is increased by death of member when alienation takes effect, increased share passes to alienee.

Where a member of a Hindu coparcenary, governed by the Mitakshara school of law, alienates his share in the coparcenary properties, it cannot be said that by the mere act of alienation he becomes a separated member, and his alienee a tenant-in-common invested with rights as such; the alienation, at most, gives the alienee a mere right in personam against his own alienor to compel him to sue for partition, but the alienor himself still remains a member of the coparcenary, and his share in the family properties fluctuates according as there are births or deaths in the family subsequent to the alienation; so, where on the date not of the alienation but when alienation takes effect the alienor's share in the family properties is increased by the death of some members that increased share passes co instanti to his first alienee, and the alienating coparcener cannot, by a subsequent conveyance, confer upon another person any title to such increased share: 7 *I. C.* 559 and 15 *I. C.* 354; *Diss. from.* [P 441 C 2]

(b) Hindu Law—Alienation—Alienation of coparcenary interest—Alienor cannot have interest in specific property.

The alienee cannot have any interest in any specific property and the alienation creates merely an equity in his favour: 20 *Cal.* 533; 24 *All.* 483; 23 *Bom.* 201; 11 *B. H. C. R.* 72 and 11 *B. H. C. R.* 76, *Ref.* [P 441 C 2]

(c) Hindu Law—Partition—Suit for partition by alienee lies not for his share but for partition of family properties.

The alienee cannot sue for partition and allotment to him of his share of the property alienated. His remedy is a suit for partition of the whole of the family properties: 13 *Mad.* 275; 20 *Mad.* 243 and 16 *I. C.* 698, *Ref.* [P 443 C 2]

(d) Hindu Law — Alienation — Alienee is not entitled to possession of alienated properties.

The alienee cannot be entitled to possession of the property alienated: 3 *Cal.* 198; 5 *Cal.* 148 and 10 *Cal.* 626, *Ref.* [P 444 C 2]

(e) **Hindu Law — Alienation — Coparceners can sue for possession of whole alienated property subject to alienee's right.**

The members of a Hindu coparcenary are entitled to sue for possession of the whole of the alienated properties, as joint family property subject to the alienee's right to demand partition: 20 I. C. 958 (P.C.), *Ref.*

[P 442 C 2]

(f) **Hindu Law — Joint family — Coparcener excluded from enjoyment for more than 12 years — His right to family properties is extinguished.**

Where a member of the Hindu coparcenary becomes an outcaste, and is excluded from enjoyment of the coparcenary properties for more than twelve years, his right in the family properties becomes extinguished and he has none to convey to others on the lapse of that period.

[P 443 C 1]

K. B. Ranganadha Aiyar — for Appellants.

T. R. Rama Chandra Aiyar and *T. R. Krishnaswami Aiyar* — for Respondents.

Sankaran Nair, J. — Defendant 3, a member of a Hindu family, conveyed his one fifth share in certain joint family properties in 1891 by Ex. 1. That interest has now vested in defendant 1, his father. Two of his brothers died, and in 1904 defendant 3 again transferred all his interest by Ex. A. At that time, on the footing that he was a coparcener, his interest amounted to one-third. The plaintiff has acquired the rights conveyed by Ex. A and he now seeks to recover possession.

The Subordinate Judge has held that the plaintiff is entitled to a two-fifteenths share of the properties, that is, the difference between one-third and one-fifth; and this is an appeal against that decision.

The first question that is argued before us is that by the transfer in 1894 the joint tenancy was put an end to and defendant 3's first alienee became a tenant-in-common with the other coparceners so far as the property alienated was concerned, and that therefore by the death of the other coparceners no interest accrued to him by survivorship; and for this the decisions of Benson and Miller, JJ., in *Srinivasa Sundara Thathachariar v. Krishnaswamy Iyengar* (1) and of Benson and Sundara Aiyar, JJ., in *Subba Row v. Ananthanarayana Aiyar* (2) are relied upon. These judgments follow the opinion of Krishnaswami Aiyar, J., in *Chinnu Pillai v. Kalimuthu Chetty* (3).

(1) [1912] 15 I. C. 354.

(2) [1912] 14 I. C. 524.

(3) [1911] 9 I. C. 596 = 35 Mad. 47.

It is argued before us that these decisions are not sound and that the alienation of a coparcener's interest in a portion of a joint family property does not make the alienee a tenant-in-common with the other coparceners in the property so alienated. On principle it is difficult to support the proposition.

When a coparcener alienates his share in certain specific family property, the alienee does not acquire any interest in that property. He can only enforce his rights in a suit for partition. In dividing the family properties the Court will, no doubt, set apart for the alienating coparcener's share the property alienated if that can be done without any injustice to the other coparceners, and such property, if it is so set apart, may be given to the alienee as the transferee of such coparcener. But this is only an equity and the alienee is not as of right entitled to have the property so allotted. If such property is not set apart, then the alienee would be entitled to recover that property which was allotted to his vendor for his share though it may not be the property that was alienated in his favour. The property allotted will take the place of the property which has been alienated to him so far as he is concerned.

This law has been repeatedly laid down in various cases by the other High Courts also: see *Hem Chunder Ghose v. Thako Moni Debi* (4), *Amolak Ram v. Chandan Singh* (5), *Narayan bin Babaji v. Nathaji Durgaji* (6), *Pandurang Anandram v. Bhaskar Shadashiv* (7) and *Udaram Sitaran v. Ranu Panduji* (8). This of course, is inconsistent with the view that the alienee acquires any interest in any specific property. The coparcener who alienated has himself no such interest. It is difficult to see therefore how the alienee could acquire such an interest.

For the same reasons it has been held by this Court that an alienee cannot sue for partition and allotment to him of his share of the property alienated: see *Venkatarama v. Meera Lebai* (9) and *Palani Konan v. Masa Konan* (10). This

(4) [1893] 20 Cal. 533.

(5) [1902] 24 All. 483 = (1902) A. W. N. 137.

(6) [1904] 28 Bom. 201 = 5 Bom. L. R. 945.

(7) [1874] 11 B. H. C. R. 72.

(8) [1874] 11 B. H. C. R. 76.

(9) [1890] 13 Mad. 275.

(10) [1899] 20 Mad. 243.

again is inconsistent with the view that a purchaser becomes a tenant-in-common with the others in the specific property alienated to him. They have not been overruled or dissented from and are inconsistent with the cases above cited, relied upon by the appellants.

In *Deendyal Lal v. Jugdeep Narain Singh* (11) a suit was brought by a son to recover the property sold in execution of a decree against his father. The Subordinate Judge passed a decree for a moiety of the family property claimed. That decree was reversed by the appellate Court which dismissed the suit. The High Court however gave the plaintiff possession of the whole of the property, not merely the plaintiff's share. In appeal before the Privy Council, their Lordships laid down the position of a purchaser in the following words: "It seems to their Lordships that the same principle may and ought to be applied to shares in a joint and undivided Hindu estate; and that it may be so applied without unduly interfering with the peculiar status and rights of the coparceners in such an estate, if the right of the purchaser at the execution sale be limited to that of compelling the partition, which his debtor might have compelled had he been so minded, before the alienation of his share took place." In accordance with such declaration, they held that the decree which awarded possession of the joint family property was right but they added a declaration that the purchaser was entitled to take proceedings to have his alienor's share and interest ascertained by partition; this was the principle which was subsequently acted upon by their Lordships.

In *Suraj Bansi Koer v. Sheo Prashad Singh* (12) their Lordships passed a decree confirming coparceners in their possession of the joint family property including the share of the alienor subject to such proceedings as the alienee might take to ascertain the share that he obtained by means of partition. The decree assumed that till such partition the alienee did not acquire any right to possession: *Suraj Bansi Koer v. Sheo Prasad Singh* (12). In the judgment of the Privy Council reported as *Hardi*

Narain Sahu v. Ruder Perakash Misser (13) their Lordships decided that in similar cases where the alienee has got possession of the property he should be turned out of possession of the whole of the property and that the other coparceners should recover possession of the same subject to a declaration that the alienee is entitled to demand a partition of the share of the alienor.

These decisions negative any right of the alienee to possession and his status as tenant-in-common although he might have obtained possession of the property in execution of a decree against one of the coparceners.

So far as Madras is concerned there is no distinction in this respect between the rights of a purchaser in execution of a decree and by private alienation and in *Ramkishore Kedar Nath v. Jainarayan Ramarachhpal* (14), which is a recent case of private alienation, the Judicial Committee pointed out that the members of a family who were not bound by the alienation were entitled to recover possession of the entire property as they were entitled to it as joint family property and desired to enjoy it as such. They also pointed out that in a suit for such possession it may be open to the Court to make the whole or any part of the relief granted to them conditional on their assenting to a partition, so far as regards the alienor's interest in the estate, so as to give effect to any right which the alienee may be entitled to, claiming through the alienor. The two Madras cases above referred to as well as these Privy Council decisions do not seem to have been considered by the learned Judges in arriving at the conclusion that the alienee becomes a tenant-in-common of the portion of the joint family property alienated. The decisions of the other High Courts cited by Krishnasami Aiyar, J., if opposed to these decisions, cannot be followed, nor has the decision of the Full Bench in *Chinnu Pillay v. Kalimuthu Chetty* (3) anything to do with the case. It only determined the time for ascertaining the alienating coparcener's share which passed to the purchaser. I am accordingly unable to follow the decisions relied upon by the appellants.

(11) [1877-78] 3 Cal. 198=4 I. A. 247=1 C. L. R. 49 (P. C.).

(12) [1880] 5 Cal. 148=4 C. L. R. 226=6 I. A. 88 (P. C.).

(13) [1884] 10 Cal. 626=11 I. A. 26

(14) [1913] 20 I. C. 958=40 Cal. 966=40 I. A. 213 (P. C.).

The other question is whether the interest of defendant 3 has been lost by prescription. It is found that he became an outcaste in 1891. It is also found that he was driven out of the family and that he did not enjoy the family properties. This is clearly exclusion, and as twelve years have elapsed since the date of exclusion, it appears to me that he had lost all his interest in the joint family property and that therefore the plaintiff did not acquire any interest under Ex. A. The decree of the Subordinate Judge must, for this reason, be reversed and that of the District Munsif restored with costs in this and the lower appellate Court.

Bakewell, J.—I have had the advantage of reading the judgment which my learned brother has just delivered and I entirely concur therein; since, however we are differing from learned Judges of this Court for whose opinion I have the highest respect, I think that I should also state my reasons.

The historical development of the law relating to the property of a joint Hindu family whereby a member of the family has obtained a power of disposing of his interest in the joint property is well described by Mr. Mayne in his book on Hindu Law, paras. 353 to 360, and he shows that this power is contrary to the theory of the ancient Mitakshara law and is due to modern ideas and is the creature of the judicial decisions.

It is clear that an ordinary member of a family cannot convey to his alienee a larger interest in the joint property than he himself possesses, and it is desirable to consider shortly the nature of that interest. It is not strictly comparable to any interest under any other branch of the law of property or of contract, still less can it be compared to joint tenancy or tenancy-in-common under the law of England. In *Appovier v. Rama Subba Aiyar*, (15) Lord Westbury states that "according to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share;" and when he speaks of the severance of a joint tenancy and its conversion into a tenancy-in-

common, he is careful to point out that he uses the language of the English law merely by way of illustration. With all respect, I think that the learned Judges, from whom we are differing, by using these terms have imported from the English law some of the ideas which they connote.

If, in order to describe the development of this branch of law, it be permissible to compare it with another branch of law, I would prefer to use the law of partnership rather than the English law of property in the same manner in which it was used by their lordships of the Privy Council in *Deendyal's case* (11). A member of a joint family cannot, any more than a partner, introduce a stranger into the community; he cannot for his own benefit alienate or deliver to a stranger a particular portion of the common property, and he cannot obtain his share of that property without winding up the concern; and his interest is therefore a right to a share of the general assets after the common liabilities have been discharged, and not a right to a share of any specific property of the family. It has accordingly been frequently held that his remedy is a suit for the partition of the whole of the family property, and not of specific property, as is pointed out by Sundara Aiyar, J., in *Narayanasawmi Naidu Garu v. Tirumalai Setii Subbayya* (16).

I must respectfully dissent from the dicta of the same learned Judge in *Subba Row v. Anantanarayana Aiyar* (2) and of Krishnasami Aiyar, J., in *Iburamsa Rowthan v. Tiruvenkatasawmi Naik* (17) that the question whether a suit for general or for partial partition will lie is "one relating to processual law and must be decided not according to any rule of Hindu law, but according to the principles of Civil Procedure." A suit for an account of the property of an undivided family and an inquiry as to its liabilities, that is for general partition, is necessitated by the nature of the interests of the plaintiff and his coparceners; the circumstances of a particular case may enable this procedure to be dispensed with, but the general rule remains that each coparcener may ask that it should be followed. It has been clearly

(15) [1888-87] 11 M. I. A. 75=8 W. R. 1=20 E. R. 80.

(16) [1913] 16 I. C. 698.

(17) [1910] 7 I. C. 559=34 Mad. 269.

laid down by their Lordships of the Privy Council that the purchaser of the interest of a cosharer in a joint family estate under a sale in execution of a decree, or under a voluntary sale in the Madras Presidency, stands in the shoes of the cosharer, and acquires the right as against the other cosharers to compel a partition: *Deendyal's case* (11); the interest which is purchased is not the share at that time in the property, but is the right which the alienor would have to a partition, and what would come to him upon the partition being made: *Hardi Narain v. Ruder Perkash* (13). "The law as established in Madras and Bombay has been one of gradual growth, founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition:" *Suraj Bansi Koer v. Sheo Pershad Singh* (12). It has been held that this right is not determined by the death of the alienor before partition, (*ibid*), and that the quantum of interest transferred must be taken as that of the alienor at the date of the assignment, *Chinnu Pillai v. Kalimuthu Chetty* (3), but there appears to be no reason why the transferor should not by appropriate words convey all such rights as he may possess, whether vested or contingent upon the death of another coparcener in the transferor's lifetime; and the transferor obviously cannot prevent his share from being diminished by reason of the birth of a collateral cosharer, or by legitimate payments or alienations by the manager of the family. In accordance with these authorities it has been held that a purchaser of the interest of a coparcener must sue for a general partition of the entire family property. *Iburamsa Rowthan v. Thiruvengkatasami Naick* (17).

Since the transferee only acquires an equity to compel a partition he has only a right in personam and not a right in rem, and the transferor remains a member of the family and retains all the rights which attach to membership, including the right to an increased share upon the death of another coparcener. An alienation by a coparcener of a particular item of the family property, or of a specific share in such an item, differs in some respects from an alienation of the whole or a fraction of the interest of the transferor in the general assets of

the family. Since a member of a joint family has no right to a specific share of any particular property of that family, an assignment by him of such a share to a stranger conveys no interest whatever to the transferee; if however the grantor should, subsequently become entitled to the property included in the grant, then on a well-settled principle of equity, which is embodied in S. 43, T. P. Act, 1882, he cannot deny the title of the transferee and is bound to make the grant effectual. The Courts have in this case also recognized the right of the transferee to stand in the shoes of the transferor and to enforce his equity by means of a suit for the general partition of the entire family property, and in order to do equity as between the transferor and transferee will endeavour to marshal the property in such a way as, if possible, to give effect to the alienation; but this is in order to avoid a fraud upon the transferee, and this procedure will not be adopted to the prejudice of the other coparceners.

In the present case defendant 1 and his four sons in 1891 formed a joint family, and as such owned ancestral immovable property. By a sale deed, dated 10th December 1891 (Ex. I), defendant 3, one of the sons, conveyed one-fifth share of specified ancestral immovable property situate in Appayampatti village to one Govindan Chetty; and by a sale deed, dated 9th December 1894 (Ex. III), the latter conveyed the same parcels to defendant 1. In para. 5 of his written statement defendant 1 stated that he made this purchase in order to avoid unnecessary litigation, and, since there is no allegation that the purchase moneys were his self-acquisition, it may be presumed that the purchase was for the benefit of the family, and the effect of the conveyance, Ex. III, was to extinguish the claim of Govindan Chetty under Ex. I. Even if the deed, Ex. III could be construed as an assignment to defendant 1 of Govindan Chetty's right in personam against defendant 3, it would merely give to defendant 1 an equity against the latter which he could enforce upon a partition of the family property. In either view and in accordance with the principle above enunciated, defendant 3 remained a member of the family. About the year 1900, defendant 1 succeeded by inheritance to ancestral

property which had been taken by his brother upon a partition made some time prior to 1891; and two of his sons died between the years 1891 and 1904. Defendant then, as a member of the family, became entitled to an increased share both in the property situate in Appayampatti village and in property situate in Poojaripatti village.

By a sale deed, dated 31st August 1904, (Ex. A) defendant 3 conveyed a half-share of specific immovable properties in both these villages to defendants 4 and 5 who by a sale deed, dated 3rd December 1905 (Ex. B), conveyed the same parcels to the plaintiff, who is a divided brother of defendant 1. By a sale deed dated 12th November 1904 (Ex. C), defendant 2 conveyed certain shares in specified immovable property in the same villages to one Muthusami Chetty.

By his plaint the plaintiff claimed as assignee from defendant 3, under the deeds Exs. A and B, that these properties should be divided and one-third share should be allotted to him. By their written statements defendants 1 and 2 pleaded, inter alia that defendant 3 had been outcasted and excluded from the family for more than 12 years prior to the suit, and that his right to a share became extinguished by the sale under Ex. I; and also that certain liabilities of the family should be provided for before any partition could be made.

I think that the plaintiff might have maintained a suit for partition, as assignee of the interest of defendant 3 in the properties comprised in the sale deeds, Exs. A and B, but that his proper remedy was by suit for general partition of the family properties, and that when an issue was raised by the District Munsif as to the frame of the suit, he should have applied for amendment of his plaint accordingly, and that the suit might have been dismissed upon this ground: see *Subba Rao v. Anantanarayana Aiyar* (2).

I agree with my learned brother that the plaintiff's suit also fails on the ground that defendant 3's rights had been lost by prescription, and with the decree proposed by him.

S.N./R.K.

Decree reversed.

A. I. R. 1914 Madras 445

WHITE, C. J., AND SANKARAN NAIR, J.
Mandoth Veetil Chappan—Appellant.
v.

Puthanpurayil Ranu and others—Respondents.

Second Appeal No. 2042 of 1910. Decided on 26th April 1912, from decree of Dist. Judge, North Malabar, in Appeal Suit No. 301 of 1909.

(a) **Transfer of Property Act (4 of 1882), S. 60—Amount of mortgage or mortgages admitted as binding by plaintiff is proper valuation of suit—Averments in plaint decide jurisdiction.**

The proper valuation of a suit to redeem a mortgage is the amount of the mortgage or mortgages admitted by the plaintiff to be binding on him and not the mortgages set up by the defendant. The question of jurisdiction has to be decided on the averments in the plaint and not with reference to the pleas of the defendant: 9 *Mad.* 208, *Ref.* [P 446 C 1]

(b) **Malabar Law—Tarwad junior member need not set aside alienation before suing for possession—Onus of proving validity of alienation is on defendant.**

A junior member of a Hindu family or of a Malabar tarwad need not, in the first instance, sue to set aside alienations made by the manager or karnavan before suing to recover possession of the property alienated by him. He may sue to recover possession on his title and will be entitled to recover such possession if the defendant does not prove the validity and binding effect of the alienation on the plaintiff. [P 446 C 2]

Where a junior member of a tarwad sued to redeem a mortgage, ignoring the subsequent mortgages created on the property by the karnavan as not binding on him:

Held: that the suit was maintainable and that the plaintiff was not bound to sue to set aside the later mortgages: 9 *Mad.* 208 and 14 *Mad.* 26, *Ref.* [P 446 C 2]

C. V. Ananthakrishna Aiyer—for Appellant.

K. R. Subramanya Sastri—for Respondents.

Judgment.—The plaintiff, the trustee of a Devasom, sues to redeem a mortgage of Rs. 50 created by the plaintiff's karnavan on 21st January 1891. It is admitted, that, on 21st February 1905, the same karnavan mortgaged the lands included in the mortgage instrument aforesaid with certain other lands for Rs. 1,650. On the same day, he also mortgaged the equity of redemption for Rs. 1,500. It is conceded this mortgage for Rs. 1,650 was a consolidation of two previous mortgages, one for Rs. 900, dated 25th March 1890 and the other for Rs. 700 on 13th February 1890 and the mortgage for Rs. 900 has been already declared to be binding on the pro-

perty. The District Judge held that the mortgage of Rs. 50 is now no longer in force as it is merged in the mortgage for Rs. 1,650 and that the plaintiff is bound to sue to set aside the mortgages of 21st February 1905 and as a suit to redeem on those mortgages or set them aside will not lie in the Munsif's Court, he dismissed the suit. The question in dispute is concluded by authority. The proper valuation of a suit to redeem a mortgage is the amount of the mortgage or mortgages admitted by the plaintiff to be binding on him, not the mortgages set up by the defendant. Otherwise, if the plaintiff files this suit in a Court of higher jurisdiction and succeeds in proving that the mortgages binding on him are less than Rs. 2,500, his plaint may be returned to him to be filed in the Munsif's Court.

In a suit of this nature, the question of jurisdiction has to be decided upon the averment in the plaint, not with reference to the pleas of the defendant: see *Chandu v. Kombi* (1), which is directly in point. It was then argued that the plaintiff is bound to set aside the subsequent mortgages created by his karnavan and the present suit treated as one to set them aside is not maintainable as three years from the date of the mortgages had expired before its institution and as the amount of the mortgages exceeds the jurisdiction of the Munsif's Court. It may be doubted whether the plaintiff is in the position of a junior member of a tarwad seeking to set aside an alienation by his karnavan. He is a trustee impeaching the conduct of his predecessor-in-office. But treating the case as that of a member of a tarwad seeking to recover possession of properties mortgaged by his karnavan, we do not think it is necessary for him to set aside the mortgages granted by the karnavan.

The same contention was put forward and disallowed in *Chandu v. Kombi* (1) by Karnavan and Muthusami Ayyar, JJ., and by Shephard and Weir, JJ., in *Unni v. Kunchi Ammal* (2), following the judgment in an earlier case, S. A. No. 270 of 1880, by Turner, C. J., and Kernan, J.: see the judgment extracted in *Unni v. Kunchi Ammal* (2). The property of the tarwad is vested in the members of the

tarwad. The karnavan can alienate the property only when the interests of the tarwad require such alienation. When he makes therefore, an alienation which is not binding on the other members it is unnecessary for the other members to set them aside. They may sue to recover possession on their title and they would be entitled to recover such possession if the defendant does not prove the validity and binding effect of the alienation on the other members of the tarwad. The case may be different where the plaintiffs themselves have executed the instrument under which the defendant claims. Certain cases were relied upon by the respondent's pleader in which it was held that a minor was bound to set aside an alienation by his guardian. The case of a guardian and a minor is governed by a separate article in the Limitation Act. Those cases may be distinguished on the ground that in such cases a guardian executes the instrument solely on behalf of a minor and if it is not binding on the minor, it ceases to have any legal effect, whereas an alienation by a karnavan, though not binding on the other members of a family, may continue to be binding on the karnavan. We, therefore, reverse the decree of the lower appellate Court and direct the appeal to be restored to the file and disposed of in accordance with law. Costs will abide the result.

S.N./R.K.

Appeal allowed.

A. I. R. 1914 Madras 446

SANKARAN NAIR AND TYABJI, JJ.

Rasool Bee and others—Defendants—Appellants.

v.

Madari Mahaldar Gulam Kasim Sahib and others—Plaintiffs—Respondents.

Second Appeal No. 1776 of 1911, Decided on 27th February 1914, from decree of Court of Sbu-Judge, Kurnool, in Appeal Suit No. 174 of 1908.

(a) Mahomedan Law—Gift—Gift whether of nature of Hiba-bil-iwaz or Hiba-ba-shart-ul-iwaz are not valid without delivery of possession.

Gifts under Mahomedan Law, whether of the nature of Hiba bil-iwaz or Hiba ba-shart-ul-iwaz are not valid without delivery of possession: 2 Cal. 184, Dist. [P 447 O 2]

Mahomedan Law—Gift—Essentials of Hiba-bil-iwaz stated.

A Hiba-bil-iwaz is a gift which has been completed and for which an iwaz or return has been accepted. It consists of two gifts (1) the original gift and (2) the reciprocal gift and

(1) [1886] 9 Mad. 208.

(2) [1891] 14 Mad. 26.

both are subject to the law of gift pure and simple and it postulates the completion of both these gifts. A Hiba-ba-shart-ul-iwaz is a gift the legal incident of which is that the two parties agree to make an exchange of the properties forming the subject of two gifts and after mutual possession has been taken neither party can revoke the transfer. [P 448 C 1]

H. Balkrishna Rao—for Appellants.

Mahomad Ibrahim—for Respondents.

Sankaran Nair, J.—The lands in suit belong to a mosque and were held by the plaintiffs' grandfather on its behalf. On his death his three daughters entered into an agreement for the division of produce amongst themselves with a condition that on the failure of issue of any one of them that share should go to the rest: Ex. A. The plaintiffs' case is that the line of Makka Bi, one of the three sisters became extinct when her son Hayath Sahib died and they were entitled to recover the property. That event however happened more than 14 years ago. In order to get over the plea of limitation the plaintiffs alleged that Karim Bi, the widow of Hayath Sahib held the property with their consent and she has surrendered her interest Ex. (C). The finding of the lower appellate Court is against the plaintiffs on the point that Karim Bi held with plaintiffs' consent and the plaintiffs' claim based on Ex. A was therefore held to be barred by limitation. In second appeal the plaintiffs' claim on this ground has not been pressed on us.

But the Subordinate Judge holds that her surrender or gift Ex. C, is valid to the extent of her interest in the property which comes to 172/768 of the property and he has given the plaintiffs a decree for that share. But he does not notice the fact that possession was not given if it could be given of this fractional share and the gift is therefore invalid under the Mahomedan Law. His decree therefore in so far as it is based on Ex. C, cannot be supported.

The Subordinate Judge also holds apparently that the plaintiffs are entitled to recover as heirs of Karim Bi apart from Ex. C. The answer is that the ownership was not in Karim Bi and the plaintiffs are only entitled to recover if at all on behalf of the mosque, and they did not sue as her heirs and this was for the obvious reason that in that case they will be bound by her mortgage in favour of the plaintiffs.

The plaintiff's claim entirely fails and the suit must be dismissed. The parties will bear their own costs throughout. This will not, it is needless to say, affect the right of the representatives of the mosque whether plaintiffs or others to claim possession or any other appropriate relief on its behalf.

Tyabji, J.—The plaintiffs sue for possession of certain lands. Defendant 1 claims to be the mortgagee of these lands and sets up that Rs. 150 are still due on the mortgage to him and that he is entitled to keep possession until he is redeemed. Defendant 2 seems to have been made a party by an order of the Court dated 24th July 1907. No relief was claimed against defendant but he stated in his written statement: "The plaintiffs' suit is neither just nor sustainable according to law. It is therefore prayed that the Court will be pleased to pass a decree dismissing the plaintiffs' suit with costs and directing that the defendants' costs be paid by the plaintiffs."

The plaintiffs support their claim in the first instance by a deed of gift, Ex. C. The first point taken before us was that Ex. C was of no effect because possession of the lands had not been transferred to the plaintiffs under Ex. C. On behalf of the plaintiffs it was argued before us that Ex. C must be considered to be a hiba-bil-iwaz or a hiba-ba-shart-ul-iwaz and that in that case transfer of possession would be unnecessary for giving effect to it. This argument proceeds on the fallacy that a hiba-bil-iwaz or a hiba-ba-shart-ul-iwaz can be completed without the possession of the subject of the gift being transferred, an argument which totally disregards the true nature of such transactions. The misconception of the law includes an omission to notice that neither a hiba-bil-iwaz nor a hiba-ba-shart-ul-iwaz consists of one disposition of property but each of them consists of at least two transactions. A hiba-bil-iwaz arises in a manner which may be illustrated as follows:

A makes a hiba (simple gift) to B and completes that gift by transferring the possession of the subject of the gift (e.g., a horse) to B; afterwards B makes a reciprocal gift to A (e.g., of a book) stating that this reciprocal gift is an iwaz (return) for the gift of the horse made by A to B; thirdly, A accepts the second

reciprocal gift of the book from *B* as an iwaz (return) for his original gift. fourthly *B* transfers possession of the book the subject of the iwaz (or return) to *A*.

It is only after all these stages have been gone through and after possession has been mutually transferred of the horse and the book but not until then, nor otherwise that the first of the horse by *A* to *B* can be called a hiba-bil-iwaz. Thus it will be seen that a hiba-bil-iwaz is nothing but a gift which has been completed and for which after it has been completed an "iwaz" or return has been accepted. For hiba-bil-iwaz there have to be two complete gifts each perfected by transfer of possession. Each of these gifts, the original gift and the reciprocal gift or iwaz is subject to the same incidents of law as a hiba or gift pure and simple, the only distinction being that each of the two reciprocal gifts becomes irrevocable after completion: the distinction is only in the results or the legal incidents following the completed transactions. There is no room for any distinctions arising previous to the transaction being completed for a hiba-bil-iwaz postulates the completion of two reciprocal gifts. The law is clearly laid down in the texts and I need only cite the following sentences from Baillie's Digest of Mahomedan Law, Edn. 1, p. 584: "An iwaz is without any difference of opinion between "our" masters a gift ab initio. . . . All the conditions of gift are applicable to the "iwaz" The nature of hiba-bil-iwaz is also indicated by the expression itself which means a hiba with a return, i.e., a gift for which a return has been made.

A hiba-ba-shart-ul-iwaz is slightly different. A hiba ba-shart-ul-iwaz starts with a gift. But at the time of making the gift (e.g., of a horse) the donor, *A* makes it a condition that the donee, *B* will make a reciprocal gift (e.g., of a book). Such a gift (of the horse) by *A* is nonetheless a gift (though there is a condition annexed to it) and the gift is not valid unless possession of the horse is transferred to *B* by *A*. *B*, on the other hand is not bound to fulfil the condition on which *A* has made the gift and if he does not fulfil it the gift of the horse will still continue in force (assuming that it has been completed) unless *A* validly revokes it..

If on the other hand *B* performs the condition and makes a reciprocal gift (i.e. gives the iwaz) of the book to *A* and *A* accepts the book as return or iwaz, nonetheless the second reciprocal gift of the book is governed by the law of gift and is not complete unless *B* transfers the subject of the reciprocal gift (the book) to *A*. Where all these stages have been completed, in the case of hiba-ba-shart-ul-iwaz, the result is that *A* has transferred certain property (the horse) to *B* and *B* has transferred certain property (the book) to *A*, each by way of gift. But after these transfers have been completed by possession, subjects of the gifts and of the iwaz being given and taken in each case, the legal incidents in the case of a hiba-ba-shart-ul-iwaz are as though *A* and *B* had agreed to make an exchange of the properties forming the subjects of the two gifts, or as though *A* and *B* had reciprocally purchased from each other the subjects of the two gifts, i. e., that *B* had purchased the horse from *A* and *A* had purchased the book from *B*.

The law as to hiba-ba-shart-ul-iwaz is also found in Baillie's Digest 1st Edn., pp. 534 to 535, from which the following passages may be extracted: "The second kind of iwaz is that which is stipulated for in the contract of gift All the conditions of gift attach to the iwaz in the beginning Property is not established in it before possession; and each of the parties may refuse delivery. But after mutual possession has been taken the effect is that of sale; hence, neither of the parties can recall what was his (i.e., after "mutual possession has been taken neither party can revoke or cancel the transfer of the ownership of the articles or property mutually transferred.) Pre-emption is established by the transaction; and each of the parties may return for a fault the thing of which he took possession." It is unnecessary to refer to any reported cases though it may be that loose dicta and unguarded statements are occasionally to be found showing that the law relating to hiba-bil-iwaz and hiba-ba-shart-ul-iwaz is frequently misapprehended. I must however draw attention to the fact that the head-note in *Khajooroyissa v. Roushan Jehan* (1) is inaccurate, it seems to state as a

(1) [1876-77] 2 Cal. 184=26 W. R. 36=3 I. A. 291 (P.O.).

ruling of the Privy Council what was merely a reference to an argument which was not accepted: see pp. 197, 198.

The legal incidents after transfer of the property has taken place in the case of *hiba biliwaz*, and *hiba ba shart uliwaz* must be distinguished from the rules in accordance with which the transactions ought to be given effect to in the first instance or which in other words, are required for completing the transactions.

It is therefore clear that the plaintiffs cannot succeed on the strength of Ex. C without proving that they had been given possession of the properties in question.

The next ground on which the plaintiffs claim to succeed is that they are the heirs of a person referred to in the pleadings as *Davidee Vale Shali Sahib*. In the lower Courts the suit seems to have been decided on the basis that the property should devolve on the persons entitled to succeed as the heirs of the said *Shali Sahib*: the decree under appeal proceeds on the basis that the property must be treated as his private property and the rights of the plaintiffs have been determined accordingly.

When however the pleadings are referred to I find it stated both in the plaint and the written statement of each of the defendants that the lands in question appertain to certain mosques. Under these circumstances it is difficult to understand how the Courts should have permitted the suit to proceed on the basis that the rights of the various parties to it were to be determined as though the lands were held as private property subject to inheritance and liable to be partitioned.

I find it impossible to deal with the question as to who is entitled to the possession of the properties which are the subject matter of the suit on the materials now before me having regard to the circumstances above referred to. The Advocate General is not a party to the suit, and there is no one who can in any way protect the interests of the mosque to which the lands have been admittedly dedicated or to claim appropriate relief on behalf of the mosque whether by appointment of *muttawali* for the purpose of taking possession of the lands or otherwise. It is obvious that these questions cannot be disposed of without its being determined what the nature of the subsisting trusts is and without having

the charity properly represented before the Court. This is greatly to be regretted as it is obvious from the pleadings that it is the case of all the parties that gross breaches of trust have taken place. Under the circumstances however it is only possible to order that the suit should be dismissed.

All the parties will however bear their own costs throughout for the reasons which I have indicated.

S.N./R.K.

Appeal allowed.

A. I. R. 1914 Madras 449

MILLER AND SUNDARA AIYAR, JJ.

Uncle Rajah Raja Sir Raja Velugoti Sri Raiagopalakristna Yachendra Bahadur Varu. K.C.I.E., Panchahazar Musabdar Rajah of Venkatagiri—Plaintiff—
Petitioner.

v.

Vemuru Chinta Reddi and others—Defendants—Respondents.

Civil Revn. Petn. No. 740 of 1916, Decided on 8th February 1912, from decree of Dist. Judge, Nellore, D/- 17th February 1908, in Small Cause Suit No. 97 of 1907.

Civil P.C. (5 of 1908), O. 23, R. 3—**Agreement to abide by decision in another suit is not adjustment of a suit by lawful compromise and is not binding in subsequent suit.**

In a suit to recover the amount due under a pro-note, the parties agreed to abide by the decree of the District Munsif in a suit for cancellation of the same pro-note.

Held: that the agreement was not binding on the parties in the subsequent suit. The agreement could not be regarded as an adjustment of the subject-matter of the suit by a lawful agreement or compromise.

The ordinary rule is that when the Court is seised of a case, it has jurisdiction to decide it in the manner prescribed by law and that parties have no right to interfere with its authority to do so. There are, no doubt, well understood exceptions to this rule, but where the exceptions do not apply the rule must prevail: 1 I.C. 622 and 31 *Mad. 1*, *Rel. on.*

[P 450 C 2]

S. Subramania Iyer—for Petitioner.

S. Swaminathan—for Respondents.

Judgment.—This is an application by the plaintiff in Small Cause Suit No. 97 of 1907 in the District Court of Nellore to revise the judgment of the District Judge. The suit is to recover from the defendants a sum of Rs. 349-8-0 on a pro-note executed by them in favour of the plaintiff in 1906. The defendants pleaded that there was no consideration for the note, that they had instituted a suit, Original Suit No. 281 of 1907, in the District Munsif's Court of Nellore for

the cancellation of the note and that the suit was therefore not maintainable. It appears from the B Form Diary, that the suit was adjourned pending the decision of the Munsif in Original Suit No. 281 of 1907, and that, after the Munsif's decision of the suit declaring the pro-note not enforceable against the defendant this suit was dismissed. The judgment of the District Judge states: "Both parties represented in this Court that they would abide by the decree of the District Munsif of Nellore in Original Suit No. 281 of 1907 on his file in regard to the question raised in this case." The question referred to in this sentence seems to be whether the pro-note was unenforceable on the ground that it was not supported by any consideration. Unfortunately, there is no written record of the representation by the parties except what appears in the judgment. Nor are the parties agreed as to what exactly the representation was. The plaintiff says that the agreement between the parties was that the question in dispute should be decided in accordance with the final judgment of the matter in Original Suit No. 281 of 1907 on the file of the District Munsif of Nellore, which was capable of being carried up on appeal to the District Court and finally to this Court. The defendants, on the other hand, contended that the decision of the District Munsif in Original Suit No. 281 of 1907 was to be accepted as binding between the parties in the Small Cause Court. In the view we take of the case we think it unnecessary to decide which of these statements is correct. It may be noted that the decision of the Munsif in Original Suit No. 281 of 1907 was reversed by the District Court on appeal and the pro-note was held to be binding on the defendants; and the second appeal against the District Judge's judgment was dismissed by this Court.

The question argued in this revision petition at the hearing was, assuming that the plaintiff had originally represented that the case might be decided in accordance with the decision of the Munsif in Original Suit No. 281 of 1907, he thereby disentitled himself to ask subsequently that it should be decided by the District Judge on the merits. We are not at present concerned with the question of what legal effect, apart from any agreement between the parties, the

judgment of the Munsif in Original Suit No. 281 of 1907, or the final appellate judgment in that case, would have upon the controversy in the small cause suit. We have come to the conclusion that the defendants were not entitled to insist on the representation originally made by the parties as a bar to the plaintiff's right to the trial of the small cause suit. The agreement in question cannot be regarded as an adjustment of the subject-matter of the suit by a lawful agreement or compromise. The agreement did not settle the dispute but postponed the settlement and purported to authorize the Court to settle it in a certain manner. A compromise has been defined as "a mutual agreement between two or more persons at difference, to put an end to such difference, upon certain terms agreed upon." Burrill's Dict., quoted in 8 American Cyclopaedia of Law and Procedure, p. 501. It must be an agreement which one of the parties can insist on the Court enforcing against the will of the other. Can it be said in this case that one of the parties could insist on the Court postponing the small cause suit till the District Munsif's decision in Original Suit No. 281 of 1907? We think, not. The ordinary rule is that, when the Court is seised of a case, it has jurisdiction to decide it in the manner prescribed by law, and that parties have no right to interfere with its authority to do so. There are, no doubt, well understood exceptions to this rule, but where the exceptions do not apply, the rule must prevail. Notwithstanding the pending of a suit, the parties may settle their disputes as they like by any lawful arrangement, and the Court is then bound to give effect to the settlement. Again, they may ask the Court to refer the questions in dispute to an arbitrator, in which case, though the decision of the cause is primarily transferred to another tribunal, the Court will retain some control over the proceedings. The parties may also enter into an agreement making the oath of one of them conclusive evidence of all or any of the facts in issue between them. This again is subject to the control of the Court.

The present case does not fall within any of these exceptions. Our attention is not drawn to any rule or principle which would compel a party to adhere to

any agreement by him that the suit may be decided in a manner different from that prescribed by law. For instance, we do not think that if a litigant agreed that the Judge might decide the suit in the manner that a certain individual might advise, such an agreement would bind him. In *Rukhanbai v. Adamji* (1) Beaman, J., held that an agreement, that certain disputes relating to the accounts between the parties in the case should be decided by the Assistant Commissioner in a summary manner without going into formal evidence beyond the accounts, objections and surcharges filed before him, was not binding. The learned Judge observes that it did not amount to an adjustment or compromise and that the agreement not being in writing would not constitute a binding reference to arbitration. He elaborately discusses the question whether an agreement to refer to arbitration and to be bound by the award passed by an arbitrator can be treated as amounting to a compromise and expresses disinclination to accept as sound the decisions cited before him in support of the position that such an agreement would amount to an adjustment or compromise when an award had been passed by the arbitrator. We consider it unnecessary to express any opinion on this question, as it is clear that the agreement in the present case cannot be treated as a reference of the dispute in the small cause suit to the arbitration of the Munsif who was trying Original Suit No. 281 of 1907. In *Moyan v. Pathukutti* (2) an agreement by the plaintiff to take a certain oath and to have his suit dismissed, if he failed to do so, was regarded as not binding on him. We hold that the agreement in question in this case did not deprive the plaintiff of his right to have the suit decided on the merits. We therefore reverse the decision of the Judge and remand the suit to the District Munsif of Nellore to be disposed of by him according to law as a regular original suit. The costs of this petition will abide the result.

S.N./R.K.

Case remanded.

Advocate High Court

(1) [1909] J.C. 622=33 Bom. 699
 (2) [1908] 51 M.L.J. 27 M.L.J. 545=8 M.L.
 T. 98.

Srinagar.

A. I. R. 1914 Madras 451

WALLIS, J.

Pushparalli Thoyarammal—Plaintiff.

v.

P. Raghavaiah Chetty—Defendant.

Suit No. 364 of 1912, Decided on 18th December 1913.

(a) **Hindu Law — Maintenance—Widow — Principles on which Court should fix widow's maintenance stated.**

Where a Hindu widow asks for separate maintenance, the principle on which Courts should fix it is to look first at the mode of life of family during her husband's lifetime and to find out what amount will be sufficient to allow the widow to live as far as may be consistent with the position of the widow, in something like the same degree of comfort and with the same reasonable luxury of life as she had in her husband's lifetime, then to see what the husband's estate is and how far the estate is sufficient to supply her with maintenance on this scale without doing injustice to the other members of the family, who also have their rights as heirs, or their rights to maintenance out of the estate: 9 C.W.N. 651, *Foll.* [P 452 C 2]

(b) **Hindu Law — Maintenance — Widow — Husband's share sufficient to supply widow's maintenance—Family people being traders living modest life and taking pleasure in accumulation and spending on average Rs. 400 a month — Monthly allowance to widow of Rs. 140 is liberal.**

Where the husband's share of the estate is amply sufficient to supply the widow with maintenance to live in the way of life to which she has been accustomed, and where the family belong to a class of people, e. g., traders, who take greater pleasure in the accumulation than in the spending of riches, and are shown to have lived in a modest manner at the expenditure averaging about Rs. 400 a month, exclusive of house-rent, a monthly allowance of Rs. 140 to the widow is sufficiently liberal. [P 452 C 2; P 453 C 1]

(c) **Hindu Law — Maintenance—Widow — Right of action respecting maintenance arrears does not depend on wrongful withholding of it—Status as widow entitles her to maintenance from date of husband's death—Arrears can be refused only on ground of abandonment which cannot be inferred only from separate residence.**

The right of action in respect of arrears does not depend upon the wrongful withholding of maintenance, nor is any demand necessary to give such a right, as her own status as the widow of one of the members of a joint family holding property in common is sufficient to entitle her to receive maintenance from the date of her husband's death. Arrears can be refused only when the person liable to make the payment has justifiable ground for inferring that the claim was abandoned, but waiver or abandonment cannot be necessarily inferred in every case from the fact of separate residence alone. [P 453 C 1]

Venkatasubba Rao and Radhakrishnaiya—for Plaintiff.

C.P. Ramaswami Aiyar and P. Ranga-swami Iyengar—for Defendant.

Judgment.—This is a suit brought by a widow against her father-in-law to recover possession of certain jewels which she says were given to her by her husband and her father-in-law and also for maintenance. She also claims certain clothes in Sch. C to the plaint and the defendant has now consented that she should have the clothes which are numbered 1 and 2 in that schedule.

The rest of the articles mentioned in that schedule are also admitted and there must therefore be a judgment for those articles.

The questions relating to the jewels and to the maintenance are more difficult. The story of the plaintiff is that negotiations were entered into before her marriage with her deceased husband who had been married previously and who was about 22 years of age, that the plaintiff's people offered to give Rs. 2,000 for the purchase of jewels and that the defendant's people offered to let the plaintiff have the jewels which had been in the enjoyment of the first wife which they say were worth Rs. 16,000 and also to give her further jewels. * * * *

But the question I have to deal with is whether the plaintiff's story is sufficiently proved, and I am of opinion that it has not been sufficiently proved. * * * *

Then the question remains whether, apart from that evidence, the use of the jewels by the plaintiff is sufficient to show that it was intended to give them to her. Now it seems to me that the balance of evidence is that these jewels remained in the custody and control of the defendant and I cannot regard it as insignificant that these jewels were left behind when the plaintiff went to her mother's house never to return as it turned out. The plaintiff's explanation of her reasons for not taking them with her seems to me very weak, and I think there is more probability in the defendant's story that she was allowed to take away the venki only at her request as a special favour. Having regard to the fact that the defendant is a trader, not perhaps inclined to incur unnecessary expenditure, it does not seem to me likely that he would have parted with the property in these jewels to his daughter-in-law, though, no doubt, as he says, he allowed her the very full use of them. The conclusion to which I have come is

that the plaintiff's case on this point is not proved.

The next question is as to the rate of maintenance which should be allotted to her. Various cases have been cited to me, and in particular the judgment of Wilson, J., in *Shrimati Karoonamoyee Dabee v. Administrator-General of Bengal* (1) in which the learned Judge says: "I apprehend that there is no reasonable doubt now as to the principle on which the Court should try to deal with these matters, though the application is nearly in every instance extremely difficult. The principle so far as it can be defined, is substantially this. Where a widow has asked for separate maintenance, you look first at the mode of life of the family during her husband's lifetime and you try to find out what amount will be sufficient to allow the widow to live as far as may be consistently with the position of a widow in something like the same degree of comfort and with the same reasonable luxury of life as she had in her husband's lifetime. Then you see what the husband's estate is, and you also see how far that estate is sufficient to supply her with maintenance on this scale, without doing injustice to the other members of the family who also have their rights as heirs, or their rights to maintenance out of the estate." There is no question in the present case that the husband's share of the estate is amply sufficient to supply the widow with maintenance to live in the way of life to which she has been accustomed, and therefore, the only question is what is the rate that should be awarded. The defendant's family are traders and they belong to a class of people, as has been pointed out in another case cited before me, who take greater pleasure in the accumulation than in the spending of riches, and they are shown to have lived in a modest manner at an expenditure averaging about Rs. 400 a month or about Rs. 5,000 a year in a house in one of the main thoroughfares of George Town which is said to be worth as much as Rs. 40,000. The defendant and his son kept horses and carriages and the defendant is said to have recently bought a motor car. Various cases have been cited to me in which particular sums were awarded, but each case was decided with regard to the circumstances of the family. I do not think that the circum-

(1) [1833] 9 C. W. N. 651.

stances of a zamindar's family are in the least a guide to the circumstances of a trader's family of this Chetty caste in George Town. As Wilson, J., says, it is an exceedingly difficult task to fix the amount. I am disposed to fix it on what I consider to be a liberal scale and have decided to award Rs. 140 a month.

Then the question arises as to the right of the widow to arrears of maintenance. Certain cases have been cited in which it was stated that the right of action depends upon the withholding of maintenance, and a more recent case was cited: the case of *Rangathay Ammal v. Nelli Munuswamy Chetty* (2). In that case it is stated: "A wrongful withholding is not necessary to entitle a widow to arrears of maintenance, if by that expression is meant that the withholding should be morally improper. No demand is necessary to give a right to receive arrears. Her status as the widow of one of the members of a joint family holding property in common is sufficient to entitle her to receive maintenance from the date of her husband's death. She may, no doubt, by living with her parents or otherwise, impliedly waive her right to be maintained by her husband's relations during the time that she lives away from them, but waiver cannot be necessarily inferred in every case from the fact of separate residence alone. The true principle to be applied is laid down in *Raja Yarlagadda Mallikarjuna Prasada Nayadu v. Raja Yarlagadda Durga Prasada Nayadu* (3) by the Privy Council that arrears will be refused only in cases where the person liable to make the payment had justifiable grounds for inferring "that the claim was abandoned," and had in consequence not set aside any portion of his annual income to meet such a claim."

In this case the plaintiff was maintained for nine months in her husband's family after his death, and left them when no differences had arisen. The differences according to the evidence first became acute when she refused to attend her husband's annual ceremony on 1st June 1911. And applying the principle laid down in the case referred to, I think that we may take it that from that date the defendant had notice that she did not intend to waive any claim for main-

tenance and therefore that I should be justified in awarding her arrears of maintenance as from that date i.e., 1st June 1911. There will accordingly be a decree to that effect with proportionate costs. There will be also a judgment for the effects mentioned in Schs. A and C to the plaint. The maintenance will be a charge on items 1 and 2, Sch. D to the plaint.

S.N./R.K. *Suit partly decreed.*

A. I. R. 1914 Madras 453

MILLER, J.

Manchu Paidugadu — Complainant—Petitioner.

v.

Kadimsetti Tammayya and others—Accused—Respondents.

Criminal Revn. No. 108 of 1913, and Criminal Revn. Petn. No. 95 of 1913, Decided on 24th October 1913, from order of Dist. Magistrate, Godaveri, in Criminal Revn. No. 42 of 1912.

Penal Code (1860), S. 379—Sluice in enclosed tank closed—Fish in tank are in owner's possession and can be subject of theft.

Where the sluice of a private enclosed tank remains closed, and the fish in it cannot escape, such fish are in possession of the owner of the tank and are liable to become the subject of theft. [P 453 C 2]

V. Ramesam for S. Srinivasa Aiyangar —for Petitioner.

Public Prosecutor—for the Crown.

Order.—At the time of the alleged taking, in this case, the fish were in a private enclosed tank and unable to escape; they were therefore in my opinion, within the possession of the owner of the tank and liable to become the subject of theft. The test seems to be "Could the fish escape?" Here they could not get out without opening the sluice, just as a wild bird in a cage cannot get out without opening the door. The fact that if the door is open the bird may escape would not prevent it from being in the possession of its captor so long as the cage in which he has placed it remains shut.

The dismissal of the complaint seems to be wrong and I must set it aside and direct the Sub-Magistrate to proceed according to law.

S.N./R.K.

Order set aside.

(2) [1911] 10 I. O. 110.

(3) [1901] 24 Mad. 147=27 I. A. 151 (P.C.).

* A. I. R. 1914 Madras 454

WALLIS AND BAKEWELL, JJ.

T. M. Narasimhachariar—Plaintiff.

v.

V. Krishnamachariar—Defendant.

Original Civil Suit No. 174 of 1913,

Decided on 5th March 1914.

* Civil P. C. (1908), Ss. 63 and 73—Decree-holders of money decrees attaching judgment debtor's property in execution in several Courts without actual receipt by highest Court are entitled to rateable distribution in that Court without transfer of decrees.

Under Ss. 63 and 73 all the holders of money-decrees, who have attached the property of their judgment-debtor in execution in several Courts before the actual receipts of the assets by the Court of the highest grade, are entitled to share in the rateable distribution on application to such Court without getting their decrees transferred to it. [P 455 C 1]

V. V. Srinivasa Iyengar—for Plaintiff.

C. K. Mahadeva Iyer—for Defendant.

Wallis, J. — This case raises a question of some difficulty and importance as to the effect of S. 63, Civil P. C., which provides that when property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court to receive or realize the property and to determine the claims thereto and objections to the attachment thereof shall be the Court of the highest grade, or where there is no difference in grade, the Court which first attached. The section, whilst conferring on the Court in question exclusive jurisdiction not only to receive the attached property, but also to determine claims thereto and objections to the attachment thereof, even if such objection be to an attachment in one of the other Courts, does not say to what extent, if any, the Court which receives or realizes the assets is to take account of the attachments in execution of the decrees in the other Courts, and different views have been taken as to this question. In the present case a debt due to the judgment-debtor by the Public Works Department and attached in execution of several decrees against the judgment-debtor in several Courts has been paid into this Court under S. 63 and O. 21, R. 36, Civil P. C., by the Executive Engineer who has at the same time forwarded a list of the attachments served on him up to that time, one of which was prior in date to the attachment by this Court. The case then came before me sitting alone, when the prior attaching creditor, who has not

transferred his decree to this Court, claimed to be paid in priority to the decree-holder in this Court, or at least to be entitled to rateable distribution; and in view of the importance of the question and the conflict of decisions, I directed the case to be posted before a Bench and notice to be served upon all the creditors mentioned by the Executive Engineer as having attached before payment into this Court; and they have now appeared and preferred their claim to rateable distribution.

The right to rateable distribution is conferred by S. 73 upon holders of decrees for money who have made application to the Court holding the assets for the execution of their decrees before the receipt of such assets. This right was conferred as to the assets realized by sale or otherwise in execution of a decree by S. 295 of the Code of 1877, whereas under the Code of 1859 the first decree-holder who attached in execution of his decree was entitled to be paid in full as under the writ of fieri facias at Common law and the principle of rateable distribution was only made applicable as against subsequent attachments. It appears to me that under this section, both under the old Code and the present Code, a substantive right as decided in *Sankaralinga Reddy v. Kandasami Tevan* (1) to apply for a rateable distribution of the assets is conferred upon decree-holders who fulfil the prescribed conditions, though under sub-S. (2) such assets may be recovered back in a suit if it be shown that the decree-holder was not entitled to receive them, as where his debt was only colourable or the assets were subject to a prior charge: *Shankar Sarup v. Mejo Mal* (2). In this view every holder of a money decree who attaches property of the judgment-debtor in execution thereby acquires a right to share equally with other creditors in the assets arising therefrom when subsequently realized or received by the Court. The nature of the right which cannot be called a vested right is discussed in *Sankaralinga Reddy v. Kandaswami Tevan* (1). What however where the attachments are in different Courts and the property is received or realized by the Court of the highest

(1) [1907] 30 Mad. 413=17 M.L.J. 334=2 M. L.T. 365.

(2) [1901] 23 All. 313=28 I.A. 203=5 C.W.N. 649=3 Bom. L.R. 713 (P.C.).

grade under S. 63? In such a case there is no receipt at all by the other Courts unless the receipt by the Court of the highest grade can be deemed to be a receipt by the other creditors as well.

In my opinion this is the correct view and it is only for purposes of convenience that the highest Court is made the collecting Court and the Court to adjudicate on claims and objections, and the property received or realized must be deemed to have been received or realized by or on behalf of all the Courts in which there have been attachments in execution of money-decrees prior to the actual receipt of the assets. If this be so, then the decree-holders in the other Courts are entitled to rateable distribution under the very terms of S. 73. There seems no reason to suppose that it was the intention of the legislature to prefer the decree-holder whose decree happened to be in the Court of the highest grade over other decree-holders who may have attached earlier and for large amounts. The difficulty is obviated if the payment into the Court of the highest grade is treated as payment into Court in all the suits and this, in my opinion, is the true construction of S. 63 which does not in terms confer any preference on the decree-holders in the highest Court and indeed says nothing as to how after claims and objections to attachments have been dealt with the money realized is to be disposed of. This is quite natural if such disposal is governed by S. 73. On the other hand if that section does not apply and the decree of the Court of the highest grade is to be first satisfied, there is no provision as to how any balance is to be dealt with.

According to the ordinary rule of construction a section like S. 63, which merely deals with procedure, should not be construed as affecting the substantive rights inter se of the decree-holders in the different Courts. The construction of S. 63 above adopted seems to be supported by the authority of Wilson, J., in the unreported case referred to by Sale, J., in *Clark v. Alexander* (3), where property attached in execution of a decree of the High Court was subsequently acquired under the Land Acquisition Act, and the compensation money representing the property, whilst in the hands of the Collector, was attached in execution

of the decree by the Alipore Court and was paid by the Collector into the High Court at its request. Though of opinion that in the circumstances of that case the money had been paid into the High Court irregularly and not strictly in accordance with S. 285, now S. 63, the learned Judge was of opinion that there it must be deemed to have been "realized in all the suits" and rateably distributed. The same conclusion would have followed a fortiori if the money had been paid into the High Court regularly under S. 285, now S. 63. In this view all the holders of money-decrees, who have attached in execution in any Court before the actual receipt of the assets by the Court of the highest grade, are entitled to share in the rateable distribution on application to such Court and without getting their decrees transferred to it. This has also been held by Sale, J., in *Clark v. Alexander* (3) and O'Kinealy, J., and another learned Judge in *Har Bhagat Das Marwari v. Anandaram Marwari* (4).

These two decisions have been doubted in *Ramjas Agarwala v. Guru Charan Sen* (5). Where however the point did not arise for decision, and it has been suggested that decree-holders whose attachments were subsequent in date to that of the decree-holder attaching in the Court of the highest grade were not entitled to claim rateable distribution against him, but that a decree-holder who had attached in another Court before the date of his attachment might object to it and the Court might dispose of his objection under the express terms of S. 63 and prefer the creditor whose attachment was prior in date. For the reasons already given I am unable, with great respect, to adopt this view of the section.

There is no doubt a decision of this Court in *Mattalagiri Nayak v. Muttayyar* (6), that the decree-holder in the Court of the lowest grade must get his decree transferred to the Court of the highest grade before he can claim rateable distribution, though S. 285, now S. 63, was mentioned in the argument, it is not referred to in the judgment or in the three cases cited in the judgment.

Muttalagiri Nayak v. Muttayyar (6) has been dissented from on this point by Krishnasami Aiyar, J., in *Arimuthu*

(4) [1898] 2 C.W.N. 126.

(5) [1909] 3 I.C. 105.

(6) [1883] 6 Mad. 357.

(8) [1894] 21 Cal. 200.

Chetty v. Vyapuri Pandaram (7) following *Clark v. Alexander* (3) and *Har Bhagat Das Marwari v. Anandaram Marwari* (4); but earlier in the judgment the learned Judge is reported to have laid down that he was bound to hold on the authority of *Muttalagiri Nayak v. Muttayar* (6) that an application to the Court of the highest grade for execution before the receipt of the assets was an essential pre-requisite of a general claim to rateable distribution. No such proposition was to be found in the judgment, nor is there anything in the sections themselves, as I construe them, to support it. For these reasons I think all the decreeholders who attached the money in question in execution of their money decrees before it was paid into this Court by the Executive Engineer are entitled to rateable distribution. The rateable distribution will be effected by this Court and the moneys attached by creditors who have attached through the Courts other than the High Court will be transferred by the registrar to that Court.

Bakewell, J.—I agree.

S.N./R.K. Order accordingly.

(7) [1910] 8 I.C. 852=35 Mad. 388.

A. I. R. 1914 Madras 456

WALLIS AND AYLING, JJ.

Juturi Nagiah—Appellant.

v.

Ariparala Vencatrama Sastrulu and others - Respondents.

Second Appeal No. 2095 of 1910, Decided on 19th April 1912, from decree of Dist. Judge, Guntur, in Appeal Suit No. 13 of 1908.

Specific Relief Act (1 of 1877), S. 15—Contract to sell share of joint family property by manager—Agreement not binding on other members is not enforceable—S. 15 applies—Hindu Law—Joint family.

Section 15 applies where a member of an undivided Hindu family agrees to sell part of the joint property in which he has only a share.

Where the managing member of a Hindu family agrees to sell the family property and the other coparceners are not parties to the agreement, and it is found that the agreement is not binding on the latter, specific performance of the contract cannot be enforced: 26 Mad. 74; 1 I.C. 506; 5 I.C. 79, *Expl. and Dist.*; 13 I.C. 471, *Ref. and Barrett v. Ring*, (1854) 2 Sm. & Giff. 43, *Dist.* [P 457 C 1]

E. Vencatarama Sarma and *P. Nagalushanam*—for Appellant.

T. Prakasam—for Respondents.

Judgment.—This is an appeal from the decision of the lower Courts refusing

specific performance of a contract of sale entered into by defendant 1, who is the managing member of the family and against defendants 2 to 4, his major sons, and defendants 5 to 8, his minor sons, who appear by their guardian, defendant 1. The lower Courts have both found that this contract is not binding on defendants 2 to 8 and the question which we have to decide is, whether specific performance should in these circumstances be granted or not.

We have been referred to a decision in *Kosuri Ramaraju v. Ivalury Ramalingam* (1), in which it was decided, without specific reference to the provisions of the Specific Relief Act, that the proper course in such cases as this would be to give a decree for specific performance of the whole of the contract against defendant 1 leaving it to be settled in future litigation what passed under the conveyance.

Another case to which we have been referred is *Srinivasa Reddi v. Sivarama Reddi* (2), in which similarly, a decree was granted directing defendant 1 to sell the whole land without determining whether such a sale would bind defendant 2. In that case the provisions of S. 15, Specific Relief Act were referred to and it was observed that: "S. 15, Specific Relief Act would be applicable only if defendant 1 had no interest in any portion of the property agreed to be conveyed as in *Illus. (a)* or is unable to convey such portion as in *Illus. (b)* to that section"

In *Ponaka Subbarani Reddy v. Vadamadi Sesha Challam Chetty* (3), the Court considered it unnecessary to express any opinion as to the correctness of the observation that we have just cited and refused in that case to grant a decree for specific performance of the whole contract distinguishing the previous case on the ground that the contract before them was one entered into on behalf of the minors as well, but gave the plaintiff the benefit of the latter provision of S. 15, Specific Relief Act.

In *Govinda Naicken v. Apathsahaya Iyer* (4), these cases were again considered and *Srinivasa Reddy v. Sivarama*

(1) [1903] 26 Mad. 74=12 M. L. J. 400.

(2) [1909] 1 I. C. 506=32 Mad. 320.

(3) [1910] 5 I. C. 79=33 Mad. 359.

(4) [1912] 13 I. C. 471.

Reddi (2) was distinguished from the case before the Court and was explained as proceeding on the ground that an undivided father has an interest in every portion of the undivided property, and that therefore, S. 15, Specific Relief Act, does not apply. To us, however, it appears that the consideration that an undivided father has an interest in every part of the undivided property in no way takes the case out of the operation of the section which runs thus: "Where a party to a contract is unable to perform the whole of his part of it and the part which must be left unperformed forms a considerable portion of the whole, he is not entitled to obtain a decree for specific performance." We think the words of the section apply where a member of an undivided family agrees to sell part of the joint property in which he has only a share and the present case is a particularly plain one, because, according to the plaintiff's own evidence, defendant 1 agreed to get the other members of the family to execute the sale-deed.

Further, the contract has been decided in the present suit not to be binding on the other members of the family and a decree for specific performance against defendant 1 only would be merely encouraging useless litigation. We may add that *Barrett v. Ring* (5) is no authority on the present point as the facts were entirely different.

The plaintiff does not claim the benefit of the latter part of S. 15, Specific Relief Act, and we dismiss the appeal with costs.

S.N./R.K. *Appeal dismissed.*

(5) [1854] 2 Sm. & Giff. 43.

A. I. R. 1914 Madras 457

MILLER AND TYABJI, JJ.

Kachi Yuva Rangappa Kalakka Thola Udayar—Appellant.

v.

Kulandai Ayal—Respondent.

Civil Appeals Nos. 223 and 289 of 1911, Decided on 20th January 1914, from decree of Sub-Judge, Trichinopoly, in Original Suit No. 9 of 1910.

(a) **Hindu Law—Impartible estate—Widow of junior family member holding impartible estate is entitled to maintenance.**

The widow of a junior member of the family of a holder of an impartible estate is entitled to maintenance out of the impartible property. It is at least doubtful whether such member

can bind by a compromise his heirs to receive a particular amount as maintenance out of the impartible estate in lieu of such rights as they might have independently of his right to receive maintenance for his life. [P 458 C 1]

(b) **Hindu Law—Maintenance — Widow's maintenance is an allowance keeping her in suitable condition of comfort—Maintenance of male member represents his interest in family property.**

The widow's maintenance is properly such allowance as may keep her in a suitable condition of comfort, whereas the maintenance of a male member of a joint family represents at least to some extent his interest in the property of the family. [P 458 C 2]

(c) **Hindu Law—Maintenance — Widow — Considerations in fixing widow's maintenance stated.**

In fixing the rate of arrears of maintenance to be paid to a widow it is not improper to take into consideration the fact that the widow during all the time she received no maintenance, did not borrow, had no difficulty in obtaining all the comforts which she required, delayed long to demand maintenance and would be receiving a lump sum. [P 458 C 2]

(d) **Limitation Act (1859), Art. 129—Person pleading bar of Art. 129 must prove denial.**

Under Art. 129, where there has been no denial there is no bar, and the person pleading the bar of the article must prove the denial.

[P 457 C 2]

S. Sreenivasa Aiyangar — for Appellant.

K. Sreenivasa Aiyangar and R. Rangaswami Aiyangar—for Respondent.

Judgment.—It is claimed for defendant 1 that the suit is barred by limitation on the ground that plaintiff's right to receive maintenance from the zamindar was denied more than twelve years before the date of the plaint. It is on defendant 1 to prove this denial and, in our opinion, he has failed. We agree with the Subordinate Judge that the four witnesses examined on defendant 1's side are untrustworthy and the story which they tell seems to us to be improbable. Eliminating that evidence there remains only the fact that no maintenance has been paid to plaintiff at any time since her husband's death and the plaintiff's allegation in Ex. U, that when the zamindar was asked to provide for her, he promised to arrange—a statement in para. 12 of the plaint is relied on as an admission of the alleged denial but it does not amount, in our opinion, to an admission of the denial of a right to receive maintenance. The evidence is insufficient to prove that the right was denied.

The alleged denial not being proved there is no room for the application of

Art. 129, Sch. 1, Lim. Act, and accepting the view presented on behalf of defendant 1 that that article is the specific article applicable to a suit for future maintenance there is no bar because there has been no denial.

Defendant 1 contends that the plaintiff as widow of a junior member of his family is not entitled to maintenance out of the zamindari. It having been decided in this Court that junior members of the family of the holder of an impartible estate are entitled to maintenance out of the impartible property, there is no reason why their widows should not also be entitled to maintenance. The decision of this Court in *Therumal Rao Sahib v. Arni Rangasawmy* (1) shows that the juniors are to be considered as members of a joint family of which the senior is also a member. Accepting that as the principle on which the decision is to be based, we can hardly refuse to treat the case of the widow as though she were the widow of a member of a joint family and on that footing to admit her right to maintenance.

A further contention is that the plaintiff cannot claim maintenance from the zamindar, because her husband in compromising a suit in which he claimed zamindari accepted by his guardian an allowance of Rs. 750 a month for himself and his two brothers, and agreed to to give up any claim to succeed to the zamindari.

We think it unnecessary to say more on this point than that this allowance charged on certain villages of the zamindari is clearly, on the construction of Ex. 3, nothing more than a maintenance allowance for the three brothers and that the compromise did not operate to give the plaintiff's husband a separate ownership of any part of the zamindari descendible to his heirs except by a division of the estate, and that was clearly not intended even if it could be effected. It is at least doubtful whether the plaintiff's husband could bind his heirs to receive a particular amount as maintenance out of the zamindari in lieu of such rights as they might have independently of his right to receive maintenance for his life. The compromise does not therefore stand in the way of the plaintiff's claim.

There remains for consideration the question of the amount to which the

plaintiff is entitled. Defendant 1 does not quarrel with the Subordinate Judge's decree so far as it relates to maintenance falling due after the suit, but the plaintiff in a cross-appeal challenges it as making insufficient provision for her wants.

As regards arrears, defendant 1 attacks the decree on the ground that arrears ought not to be awarded at the same rate as future maintenance, it not having been shown that the plaintiff was, as she alleged, obliged to borrow money to maintain herself.

As regards the amount of maintenance, though we are disinclined to interfere with the discretion of the Subordinate Judge, we think that the allowance he has made should in a way be adjusted by a decrease in the rate at which arrears are to be paid and an increase in the rate of future maintenance. In 1845, a lady in this family received only Rs. 40 a month, but having regard to the increased cost of living to which the Subordinate Judge refers, to the more than proportionate increase in the income of the zamindar, to the fact that the plaintiff's husband was allowed Rs. 250 a month, we do not think that an allowance of Rs. 80 a month exceeds what is required to maintain the plaintiff in circumstances suitable to her position and for the maintenance after the suit. We shall modify the decree accordingly. But in regard to the arrears it has to be remembered that the plaintiff is a widow and not entitled to any share or interest in the property of her husband's family: the widow's maintenance is properly such allowance as may keep her in a suitable condition of comfort whereas the maintenance of a male member of a joint family represents at least to some extent his interest in the property of the family. We think therefore that it is not improper to take into consideration the fact that the plaintiff has not shown that during the 12 years in which she received nothing from the zamindar, she had to borrow money or had any difficulty in obtaining all the comforts which she required. She allowed one year's allowance to be barred by limitation, a fact which suggests that her need of money was at least not extreme. We have to consider also the fact that she is now to receive in a lump sum the allowance which she has for so long delayed to

(1) [1912] 15 I. C. 412.

demand, and on the whole we think that a sum of Rs. 6,000, i. e. slightly more than Rs. 40 a month, is as much as she ought now to be given. We modify the decree accordingly and confirm it in other respects. As regards costs in the lower Court the plaintiff will receive proportionate costs on the amount we have allowed her and defendant 1 will bear his own costs. In this Court defendant 1 will pay plaintiff's costs of the Appeal No. 223 of 1911 and of the Appeal No. 289 of 1911, the parties will bear their own costs.

S.N./R.K.

*Decree modified.***A. I. R. 1914 Madras 459**

SANKARAN NAIR AND TYABJI, JJ.

Guruswami Aiyar and others—Appellants.

v.

Mari Chetty and others—Respondents.

Second Appeal No. 28 of 1912, Decided on 12th January 1914, from decree of Dist. Judge, Ramnad, in Appeal Suit No. 418 of 1911.

Hindu Law—Title-deeds in name of one joint member—Properties cannot be presumed to be his self-acquisitions.

The mere fact that title-deeds stand in the name of one member of a joint Hindu family gives rise to no presumption that the properties covered by them are his, self-acquisitions; but if there is proof that he had a trade of his own and that there was no ancestral property in his possession out of the income of which he would have acquired any property, the properties mentioned in the title-deeds must be held to be his acquisitions: 5 I. C. 143, *Foll.*

[P 459 C 2]

B. Sitarama Rao—for Appellants.*Rangachariar and C. S. Venkatachariar*—for Respondents.

Judgment.—We are unable to accept the District Judge's finding in this case on the question whether the properties in dispute are the plaintiff's self-acquisition or not. He starts with the proposition that because the title-deeds stand in the plaintiff's name, the presumption is that they are his self-acquisitions. He cites no authorities for this proposition. *Mari Veelil Chathu Nair v. Mari Veelil Mulamparal Sekharam Nair* (1) is against this view. The District Munsif started with the contrary presumption and held that there was no evidence to rebut it, except the plaintiff's own statement. The Judge says that the presumption in the plaintiff's favour is not sufficiently rebutted. In the view

of both the lower Courts, the decision of the case would depend on the view taken as to the onus of proof. It is at least clear that in the circumstances of this case there can be no presumption in the plaintiff's favour, because, although he was junior to Chidambaram, another member of the family, it is not denied that Chidambaram had left the place to live elsewhere. The plaintiff who came to Court was bound to prove that the properties were his self-acquisitions. We must also observe that Ex. C supplies strong *prima facie* proof against the plaintiff. The circumstance that the instrument purports to be a deed of release and not of partition is immaterial unless property worth Rs. 3,000 was given gratuitously by the plaintiff to Chidambaram. The Judge has not found that such was the case. We must request the lower appellate Court to submit a fresh finding on issue 1 on the evidence on record. The finding will be submitted within one month from the date of receipt of this order and seven days will be allowed for filing objections.

[In compliance with the above judgment the District Judge of Ramnad submitted the following:]

Findings.—Under Ex. C the plaintiff gave up property of considerable value. His explanation that this was done merely because the plaintiff's brother was poor is hardly likely. His case is that he lent money and carried on shroff's business on capital borrowed by his mother. There is no document or other evidence to prove this loan and its re-payment by the plaintiff. It has to be noted that in Ex. 1—a deposition in a previous suit—the plaintiff began by stating that he had borrowed the money though he did not finish his evidence without amending his previous statement by putting his mother forward as the borrowing party. The plaintiff states that his brother, Chidambaram Chetty from whom he got the release deed, Ex. C, was not earning anything in any way. Plaintiff's witness 3 states that the plaintiff's brother had nothing to do with the plaintiff's trade. Plaintiff's witness 2, who is related to the plaintiff, states that the plaintiff only got a tiled house as his ancestral property and that all the rest of his property was self-acquired. This witness however in a previous deposition (Ex. 6) admitted that the

plaintiff's brother used to lend money. He also admitted that the plaintiff's brother claimed some property thereby contradicting the present case that the property was gifted to the plaintiff's brother in Ex. C out of charity. The circumstances of the family do not appear to have been strained. A charity, small though it be, was conducted by it. Two of the widows in the family were possessed of property. I have little doubt that the plaintiff had a substantial nucleus to work on and that Ex. C evidences a partition of ancestral joint property, its accretions and of other property that has been treated as joint. This being so, none of the property obtained by the plaintiff at the partition can be regarded as self-acquired. The plaintiff has since Ex. C obtained 3/8ths pangu in Kottakudi from Veerayee his uncle's widow. There appear to be good grounds for supposing that this property also was ancestral for the plaintiff admits that his grandfather gave it to Veerayee for her maintenance though he seeks to destroy the value of his own admission by stating later on that it was based only on hearsay. The fact that the property came back to the nearest reversioner goes to support the admission. I therefore find that the plaintiff's properties are not the separate self-acquired property of the plaintiff.

(This second appeal coming on for final hearing this day, after the return of the above finding, the Court delivered the following) :

Judgment.—We are unable to accept the finding. It is found that the plaintiff had his own trade and that he was acquiring properties. There is no evidence that he had any ancestral property in his possession out of the income of which he would have acquired the plaintiff's property. We accordingly confirm the decree of the District Judge and dismiss the second appeal with costs except as to the building on the site admitted to be family property.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 460

WHITE, C. J., AND BENSON, J.
Vaithilinga Mudali—Appellant.

v.

Munigan and others—Respondents.

Second Appeal No. 1216 of 1908, Decided on 3rd May 1912, from decree of Dist. Judge, Tanjore, in Appeal Suit No. 565 of 1907.

(a) **Hindu Law—Adoption — Invalid adoption does not per se destroy adoptee's rights in natural family.**

An invalid adoption does not under Hindu law per se destroy the adoptee's rights in his natural family : 1 *M. H. C. R.* 363 and 12 *B. H. C. R.* 364, *Ref.* [P 461 C 1]

(b) **Hindu Law—Adoption—Orphan cannot be given in adoption.**

As no one but the parents of a child can give him away in adoption, an orphan cannot be given away in adoption either by himself or by anyone else : 2 *M. H. C. R.* 129, 6 *B. H. C. R.* (O. C. J.) 83 and 10 *B. H. C. R.* 268, *Ref.* [P 461 C 2]

(c) **Hindu Law—Adoption — Authority to give cannot be presumed simply because adoption took place long ago or was acquiesced.**

There is no presumption in law that an apparent adoption, which had taken place long ago and was throughout acquiesced in by all concerned, was made in pursuance of an authority given by some person competent to give away the son in adoption : 7 *B. H. C. R. App.* 33, *Dist.* [P 461 C 2]

(d) **Hindu Law — Adoption — Evidence of giving away by parents long before actual adoption would validate orphan's adoption.**

The adoption of an orphan would be valid, if there was evidence to show that the adoptee's natural parents had given the boy away to a person who made the adoption years afterwards and even after the death of the natural father: 7 *Mad.* 548 and 18 *Mad.* 145, *Ref.* [P 461 C 2]

(e) **Evidence Act (1 of 1872), S. 115 — Acquiescence does not bar the plea of invalidity of adoption unless adoption has adversely changed the position of person contesting.**

There is no estoppel against the plea of invalid adoption, even though the adoption was acquiesced in by the family, so as to debar the adoptee being restored to his natural family, unless the position of those contesting such right has, in consequence of the adoption, been changed to their disadvantage : 7 *M. H. C. R.* 250, *Ref.* [P 461 C 1]

S. Muthiah Mudaliar—for Appellant.

T. V. Gopalaswami Mudaliar — for Respondents.

Judgment.—The facts out of which this second appeal arises may be stated as follows :

There were four divided brothers in a Hindu family. The plaintiffs are two of these. Another was Akshayalinga, who was apparently adopted by one Subba Mudaliar in 1873, but in the course of the suit, it was found that the adoption

was invalid because both the father and mother of Akshayalinga were dead at the time of his apparent adoption. The fourth brother was Visvalinga who died in 1892. The dispute is in regard to his property. The plaintiffs claimed it as his reversionary heirs, and their suit was to recover it from the defendant, who is the son of Akshayalinga, and who is said to have trespassed upon it in 1901. The defendant originally claimed the property as the self-acquisition of Akshayalinga, purchased benami in the name of Visvalinga, but both the Courts below found against that plea. In the alternative, defendant resisted the plaintiffs' suit on the ground that, as the adoption of Akshayalinga was invalid, he (defendant) had not lost his rights in his natural family, and was therefore entitled to one-third of the property and plaintiff could not recover even the remaining two-thirds in this suit as it is framed as a suit in ejectment against a trespasser, and cannot be converted into a suit for partition. The District Judge accepted this alternative defence and dismissed the plaintiffs' suit.

The plaintiffs appeal. They contend that the adoption of Akshayalinga having been made so long ago as 1873, and having been treated as a valid adoption by Akshayalinga himself (Ex. J in 1878) and by Subba Mudaliar (see his will Ex. II in 1898) and generally by the family, the defendant cannot now deny the validity of the adoption. It is not however shown how any estoppel arises against the defendant's plea. The four brothers were divided before Akshayalinga's apparent adoption, and it is not shown that, in consequence of the adoption, the plaintiffs' position has been in any way changed to their disadvantage, so as to render it inequitable that the defendant should be restored to his place in his natural family. This appears in be the test which should be applied to accordance with the principle underlying the decisions in *Gopalayyan v. Raghupathayyan* (1), and *Parvatibayamma v. Ramakrishna Rau* (2). It is hardly necessary to quote authority for the proposition that an invalid adoption does not per se destroy the adoptee's rights in his natural family : *Bawani Sankara*

Pandit v. Ambabay Ammal (3), approved in *Laksmappa v. Ramara* (4).

But it is contended for the plaintiffs that the apparent adoption having taken place so long ago as 1873 and having been acquiesced in by all concerned for so long, it ought to be now presumed by the Court that the adoption was made in pursuance of an authority given by some persons competent to give away the son in adoption. No doubt, that presumption was raised in the case of *Anandray Sirai v. Ganesh Eshvant Bokil* (5) but no authority for the decision is quoted, and that case was essentially different from the present case, for there the adoptee desired to maintain the adoption, whereas, in the present case the adoptee's son disclaims it, the adoptee being dead. No doubt, if there was evidence that Akshayalinga's father give him to Subba Mudaliar and the latter accepted him with a view to adoption, the adoption, though made years afterwards, and after the death of the father, would be valid because there was the essential giving and taking of the child with a view to adoption : *Venkata v. Subhadra* (6). But there is no such evidence in the present case, nor are there any other circumstances by which the suggested presumption could be supported. There is abundant authority that no one but the parents of a child can give him away in adoption and therefore that an orphan (as Akshayalinga was at the time of adoption) cannot be given away in adoption either by himself or by anyone else : *Subbalurammal v. Ammakutti Ammal* (7), *Balvantrav Bhaskar v. Bayarai* (8), *Bashetiappa bin Basalingappa v. Shivlingappa bin Ballappa* (9).

We therefore hold that the adoption of Akshayalinga was invalid, and the defendant has not lost his rights in his natural family.

We think that the District Judge is right in holding that the present suit, which is one in ejectment, cannot be properly converted into a suit for partition so as to give plaintiffs a decree for $\frac{2}{3}$ rd of the plaint property. There may be other property which would have to

(3) [1862-63] 1 M.H.C.R. 363.

(4) [1875] 12 B.H.C.R. 364.

(5) [1870] 7 B.H.C.R. 33.

(6) [1884] 7 Mad. 548.

(7) [1864-65] 2 M.H.C.R. 129.

(8) [1869] 6 B.H.C.R. (O. C. J.) 83.

(9) [1873] 10 B.H.C.R. 269.

(1) [1871-74] 7 M.H.C.R. 250.

(2) [1895] 18 Mad. 145.

be brought into the hotchpot if the plaintiffs should sue for partition.

Their right to obtain partition in a suit properly framed for the purpose is apparently not yet barred, and they must be left to that remedy.

We dismiss the second appeal with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 462

SADASIVA AIYAR AND SESHAGIRI
AIYAR, JJ.

Chamarti Suryaprakasarayadu—Plaintiff—Appellant.

v.

Arardhi Lakshminarasimhacharyulu and others—Defendants—Respondents.

Second Appeal No. 599 of 1911, Decided on 2nd March 1914, from decree of Sub-Judge, Kistna, in Appeal Suit No. 38 of 1910.

(a) **Specific Relief Act (1877), S. 22—Agreement to sell—Vendor to register proper conveyance before calling upon vendee to pay balance of purchase money—Demanding payment without executing conveyance is breach of contract.**

Where under the terms of an agreement to sell, the vendor is bound to execute and register a proper conveyance before he can call upon the vendee to pay the balance of the purchase money, he commits a breach of contract if he demands such payment without executing a conveyance. [P 462 C 2 ; P 463 C 1]

(b) **Specific Performance—Delay in instituting suit is not waiver of claim—Specific performance should not be refused even where it is claimed on last day of limitation period.**

As mere laches or delay short of the period of limitation is not always evidence of waiver or abandonment of claim, even where it is up to the hilt of the limitation period, that is no ground for refusing specific performance: 27 *All.* 678, *Dist.*; 21 *Mad.* 42; 33 *Cal.* 633, *Lindsay Petroleum v. Hurd*, (1873) *L. R.* 5 *P.C.* 221 and 29 *Bom.* 234, *Foll.* [P 463 C 2]

(c) **Specific Relief Act (1877), S. 22—Agreement to sell—Decree for specific performance should direct person to execute conveyance.**

A decree for specific performance of an agreement to sell should direct the person in whom the property vests, on the date of the decree, to execute a conveyance. [P 464 C 1]

V. Ramesam—for Appellant.

Patanjali Sastry for *P. Narayana-murthy*—for Respondents.

Sadasiva Aiyar, J.—Plaintiff is the appellant in this second appeal. He brought the suit for specific performance of the agreement, dated 4th November 1904, Ex. A, executed in his favour by defendant 1.

Under Ex. A, defendant 1 agreed to execute a sale deed for Rs. 400 in favour of the plaintiff within a month and to receive Rs. 360 out of the Rs. 400 (purchase-money) after so executing the sale deed, the remaining Rs. 40 having been received by defendant 1 in advance.

The suit was brought on 2nd December 1907, just within three years from the expiry of the one month's time fixed by the agreement for the execution of the sale deed by defendant 1. The learned District Munsif gave a decree in plaintiff's favour. The learned Subordinate Judge, on appeal, reversed the Munsif's decision and dismissed the plaintiff's suit with costs on the following findings and reasonings:

(a) Though the plaintiff made more than one statement that he was always ready to pay the balance of Rs. 360 as soon as defendant 1 executed the sale deed, the probabilities are that the plaintiff never had Rs. 360 ready in his hands to make such a payment.

(b) As the plaintiff delayed for nearly three years in bringing this suit for specific performance, he has been guilty of laches and hence the Court in its discretion ought to refuse the relief of specific performance prayed for by the plaintiff.

(c) Not only has the plaintiff been guilty of laches but the said negligence of the plaintiff itself amounts to a waiver or abandonment of his right under the contract on the part of the plaintiff, and hence also the plaintiff's suit ought to be dismissed.

I think that the Subordinate Judge's finding of fact that the plaintiff had not got Rs. 360 ready with him to be paid whenever defendant 1 was ready with a properly executed document is based upon no legal evidence. The Subordinate Judge may be entitled to find on the evidence on the record that the plaintiff has not proved that he would have been ready with the money if the sale deed had been executed and tendered to him, but he was not entitled to go further and say that the plaintiff was not ready with the money, as there is no evidence on the record to show that the plaintiff had not enough money with him on any of the occasions when defendant 1 or the prior mortgagee, P. W. 4, applied to the plaintiff for payment of money to plaintiff's witness 4. The plaintiff cannot

be said to have broken his part of the contract evidenced by Ex. A until defendant 1 had performed defendant 1's own part of the contract, namely the execution of a proper sale deed. Then as regards the alleged laches on the part of the plaintiff, he cannot be legally charged with any laches in the performance of his part of the contract till defendant 1 had performed his own part of the contract. As defendant 1 did not execute the sale deed within the one month's period which he himself fixed in Ex. A for the execution by him of the sale deed and had not executed it even till the date of the suit, there could have been no laches on the plaintiff's part in the performance of his part of the contract.

As regards the delay in bringing this suit for specific performance, the learned Subordinate Judge relies upon the case of *Nawab Begam v. A. H. Creet* (1) for the position that such delay in bringing the suit would itself justify the Court in the exercise of its discretion to refuse relief in a suit for specific performance. In that case however the defendant had definitely refused to perform his part of the contract nearly three years before the suit was brought. In this case defendant 1 is not proved to have definitely refused to execute the sale deed to plaintiff. In his registered notice, Ex. C, he merely asked the plaintiff to give effect to all the terms of the agreement Ex. A within a week from the date of that notice (which was dated 6th January 1905). It is only if the plaintiff did not give effect to all the terms of Ex. A within one week that defendant 1 said in that notice that he will treat the agreement as at an end. The plaintiff replied to this notice by Ex. C, and he pointed out in that reply that he was always ready to perform all the terms of the agreement Ex. A, but that defendant 1 had first to perform his part of the agreement, namely the execution of the sale deed and that, then, the plaintiff was ready and willing to perform his own part of the contract. As I said, defendant 1 merely threatened to break the agreement if the plaintiff did not conform to the terms of the agreement. When the plaintiff sent his reply that he was ready to perform his part of the agreement, it cannot be said that under

the terms of the notice Ex. C, defendant 1 must be deemed to have definitely broken the contract as soon as he received the plaintiff's reply. Further, having regard to the cases in *Athikarath Nannu Menon v. Erathanikat Komu Nayar* (2), *Kissen Gopal Sadaney v. Kally Prosonno Sett* (3), I am not satisfied that the decision in *Nawab Begum v. A. H. Creet* (1) has not been expressed in rather too wide and general a language. The decision in that particular case might be justified on the facts of that case, as the defendant in that case seems to have spent a considerable sum of money in improving the property after he had definitely broken the contract which breach had taken place nearly three years before the suit, and the refusal of specific performance might be justified under Cl. 2, S. 22, Specific Relief Act. The plaintiff brought his suit within two months of the sale made to defendant 2 of the property contracted to be sold to the plaintiff. I am therefore of opinion that there has been no such laches on the part of the plaintiff either in performing his part of the contract or in bringing the suit which could justify the Court in the exercise of its judicial discretion in dismissing the suit for specific performance.

Then as regards the finding of the Subordinate Judge that the laches itself amounts to a waiver or abandonment, I think it is an error of law to hold that mere delay amounts to a waiver or abandonment apart from other facts or circumstances or conduct of the plaintiff indicating that the delay was due to a waiver or abandonment of the contract on the plaintiff's part. In this case there are no such circumstances proved. In the result, I would reverse the decision of the Subordinate Judge and restore that of the Munsif. But I would make a slight modification in the decree of the District Munsif (as it is not in strict accordance with law). The object of adding defendant 2's subsequent purchaser with notice of the plaintiff's contract as party was to enforce specific performance of the plaintiff's contract as against him, he having become the legal owner of the property since the date of the contract to sell that property made with the plaintiff. The conveyance in favour of the plaintiff as regards the

(1) [1905] 27 All. 678=(1905) A. W. N. 147=2 A.L.J. 405.

(2) [1898] 21 Mad. 42.

(3) [1906] 33 Cal. 633.

plaint land ought therefore to be executed by him in order to convey the title to the plaintiff, and the Munsif's decree which directs defendants 1, 3 and 4 to execute the sale deed to plaintiff will be modified by substituting the direction that defendant 2 do execute the conveyance in the plaintiff's favour, within one month from the re-opening of the Munsif's Court after the summer vacation. The Munsif's decree will stand in other respects. The defendants must pay the costs of the plaintiff in all Courts.

Seshagiri Aiyar, J.—I agree with my learned brother's conclusion that the plaintiff was not at fault in performing his part of the agreement, and that the defendant ought to have executed the sale deed before claiming the money. There is no allegation or proof in this case that the defendant had executed the document and called upon the plaintiff to pay the money nor any suggestion that the defendant was willing to execute the document and that the plaintiff did not perform his part of the contract. Therefore I cannot accept the finding of the Subordinate Judge given under a misapprehension regarding the nature of the contract between the parties. The Subordinate Judge also comes to the conclusion that the delay in bringing the suit is fatal to specific performance being granted. Ever since the decision of *Lindsay Petroleum Co. v. Hurd* (4) it has been settled law that mere laches on the part of the person in bringing a suit for specific performance will be no defence in law, and that has been followed in this Presidency in *Athikarath Nanu Menon v. Erathanikath Komu Nayar* (2). *Kissen Gopal Sadanzy v. Kally Prosonno Sett* (3) accepts that principle. The same has been affirmed in *Peer Mahomed Dewji v. Mohomed Ebrahim* (5).

There is nothing in the Specific Relief Act which says that laches in bringing a suit will by itself be a ground for refusing specific performance. The only section dealing with the discretion of the Court is S. 22 and under that section the discretion must be judicially exercised. A few illustrations are given which are intended to guide the Courts in either granting or refusing relief. Laches is not one of the grounds mentioned as disentitling a party to a contract to

specific performance. Having regard to the fact that a special period of limitation has been fixed for bringing a suit for specific performance, I think the legislature has not intended that mere laches should be one of the grounds for refusing specific performance. On these grounds I concur with my learned brother in his conclusion and in the decree which he has proposed.

S.N./R.K.

Appeal allowed.

A. I. R. 1914 Madras 464

SESHAGIRI AIYAR, J.

Vogoti Chengiah — Plaintiff — Petitioner

v.

Putta Ramudu and others—Defendants—Respondents.

Civil Revn. Petn. No. 941 of 1912, Decided on 19th February 1914, from order of Dist. Judge, North Arcot, in Misc. Appeal No. 42 of 1911.

Madras Estates Land Act (1908), S. 3, Cl. 2 (a)—Civil suit by inamdar to eject tenants from land "eternal waste"—Tenants, to oust jurisdiction of civil Court, must prove that grant was of only land revenue and inamdar is only estate-holder within S. 3 (2) (a).

In a suit brought by an inamdar in a civil Court to eject tenants from land which was "eternal waste" on the date of the grant the burden of proof, in order to oust the jurisdiction of civil Courts, is on the tenants to show that the grant was only of land revenue, and the inamdar is only an "estate holder" within the meaning of S. 3, Cl. (2) (a). The presumption, in cases of such grant, is of a grant of both warams: 20 I. C. 769, *Foll.*; 8 I. C. 365 and 9 I. C. 272, *Foll.* [P 465 C 1]

Judgment.—In this case the question is, which Court has jurisdiction to entertain the suit, the revenue Court or civil Court. That again depends upon whether the estate in reference to which the suit is brought to eject and to recover the rent comes within the definition of "estate" in S. 3, Cl. (2) (a), Estates Land Act. The District Judge on appeal has come to the conclusion that this is a case in which it has not been shown that the plaintiff is entitled to both the melvaram and the kudivaram rights. He refers to the evidence and says that it is established that for 30 years the defendants have been on the land and that the inamdars have never charged their tenants; and he says that the plaintiff's evidence is vague and meagre and he therefore holds that the plaintiff is the grantee of the land revenue only and the suit should be instituted in the

(4) [1873] L. R. 5 P. C. 221=22 W. R. 492.

(5) [1905] 29 Bom. 234=7 Bom. L. R. 260.

revenue Court. I may say at once that it has been admitted before me, and there can be no doubt upon that matter, that this estate was not granted within the last 30 years. It must also be borne in mind that in the written statement filed by the defendants in this case in para. 3, they distinctly state that the land has been "eternal waste" therefore unless the defendants can show that at the time of the grant the plaintiff was given only the land revenue, the presumption will be as pointed out in *Tadikonda Buchi Virabhadrayya Iyyavaru v. Sonti Venkanna* (1), that it was a grant of both the warams.

A distinction has been drawn on the question of burden of proof between cases which deal with the question of jurisdiction and the cases which deal with the recovery of the property from the tenants. In the former class of cases, before the civil Courts can be said to have no jurisdiction it is incumbent upon the defendant who pleads want of jurisdiction to show that the property in dispute comes within the definition of "estates" in the Estates Land Act, that is to say, the defendant will have to prove that the plaintiff has not got the right to both the warams. In this case the evidence which has been let in will not suffice to prove that. This principle has been laid down in *Indety Chinr Nagadu v. Potu Konchi Venkatasubbayya* (2) and *Arunachala Sastry v. Krishna Sastry* (3). This is in no way inconsistent with the course of decisions which hold that, ordinarily where an inamdar or zamindar seeks to eject a tenant, he ought to show that he has got the right to both the warams and that the tenant has no right in the soil. Following the decisions in *Arunachala Sastry v. Krishna Sastry* (3) and *Indety China Nagadu v. Potu Konchi Venkatasubbayya* (2). I must hold that the evidence let in by the defendants is not enough to establish that the plaintiff is an estate holder as defined in S. 3, Cl. (2) (a), Estates Land Act. It is further in evidence that, when the plaintiff brought a suit before the revenue Court that Court came to the conclusion that the plaintiff was entitled to both the warams and that it would not entertain the suit. The defendant did not prefer

an appeal against this decision. I must set aside the decision of the District Judge and direct the case to be taken on the file and to be disposed of according to law. The case will have to go before the Munsif for trial on the merits. The costs will abide the result.

S.N./R.K.

Case remanded.

A. I. R. 1914 Madras 465

SANKARAN NAIR AND TYABJI, JJ.

Krishnammal and another — Defendants—Appellants.

v.

Manandiar Sundararaja Aiyar — Plaintiff—Respondent.

Second Appeal No. 1125 of 1912, Decided on 23rd December 1913, from decree of Sub-Judge, Negapatam, in Appeal Suit No. 800 of 1911.

(a) **Transfer of Property Act (4 of 1882), S. 55 (1) (f)** (Per Tyabji, J.)—Effect of S. 55 (1) (f) read with S. 54 is that purchaser has no right to possession until conveyance is complete in absence of express agreement to transfer possession without conveyance.

Per Tyabji, J.—The effect of S. 55 (1) (f), when read with S. 54 of the same Act and with the Registration Act, is that, in the absence of an express agreement to transfer possession independently of the registered conveyance, the purchaser (or to be accurate, the person agreeing to purchase) has no right to possession of the property until the conveyance is completed: 24 *Mad* 491 (P. C.); 11 *Mad*. 151. *Dist.*; 18 *Bom*. 537 and 8 *Cal*. 483, *Ref.*

[P 467 C 1]

(b) **Civil P. C. (5 of 1908), O. 2, R. 2—Suit for specific performance of contract—Subsequent suit for possession is not barred.**

A suit by a vendee for possession of immovable property on the basis of a conveyance obtained in execution of a decree for specific performance of contract and also against persons not parties to that decree is not barred under O. 1, R. 2, Civil P. C.: 22 *Mad*. 24, *Dist.*

[P 466 C 2]

K. V. L. Narasimham and T. V. Gopalaswami Mudaliar—for Appellants.

T. R. Venkatarama Sastri—for Respondents.

Facts.—Plaintiff is the purchaser of a house site from defendants 1 and 2, and defendants 3 and 4 are tenants in occupation under defendants 1 and 2. The plaintiff entered into an agreement with defendants 1 and 2 that the latter should convey to him a house for Rs. 150, and the material portions of the agreement were as follows:

"The defendants should execute in plaintiff's favour, the sale deed in respect of the said manai and register it

(1) [1913] 20 I. C. 769.

(2) [1910] 8 I. C. 335.

(3) [1910] 9 I. C. 272.

before 26th July 1896, that the mortgage right possessed by Pulangudi Chellaperuma Pillai over the said manai should be discharged and got executed, that his attestation should be obtained on the sale deed in plaintiff's favour, that the tenants in the said manai should be removed and the manai vacated and given possession and that if said Chellaperuma Pillai" * * *

On this agreement, the plaintiff instituted a suit (Original Suit No. 447 of 1896) and obtained a decree for specific performance of contract and in accordance with the decree in the suit he obtained a sale deed through Court on 13th December 1898. On the strength of that sale deed he instituted the present suit for possession (Original Suit No. 299 of 1910, on 27th July 1910). Defendants 1 and 2, the vendors, contested the suit on the ground that the suit was barred by limitation and by O. 2, R. 2, Civil P. C. As to the bar of limitation both the lower Courts held that the suit having been instituted within twelve years from the date of the sale deed is not barred by limitation. As to bar by O. 2, R. 2, it was held by both the lower Courts that as the agreement did not give the right to possession to the plaintiff such right does not arise until the execution of conveyance and consequently the plaintiff was not in a position to add a prayer for possession in the former suit and the present suit for possession is not therefore barred. The defendants appealed against that decree.

Sankaran Nair, J.—The question is whether the suit is barred by O. 2, R. 2, Civil P. C. The plaintiff obtained a decree in his favour for the execution of a deed of sale in accordance with an agreement to sell property to him. Having obtained the sale deed in execution of the decree he now sues for possession on the strength of the sale deed. The defendant's contention is that having failed to claim possession also in the previous suit, the present suit is barred and they rely on *Narayana Kavirayan v. Kandasami Goundan* (1). It is true that it was open to the plaintiff to sue not only for the execution of deed of sale, but also for possession in the previous suit. But was he bound to do so? At the time he brought that suit the right to possession

was not vested in him. He would acquire that right only on the execution of the deed of conveyance. Possession is not merely an incident or subsidiary to the sale-deed. In a suit for specific performance the parties to the contract alone need be parties. In a suit for possession all persons in possession are proper parties.

I am therefore of opinion that the suit is not barred.

We dismiss the second appeal with costs.

Tyabji, J.—The plaintiff is the purchaser from defendants 1 and 2 of the land referred to in the plaint. He sues for possession of the land on the strength of a conveyance executed in his favour by his vendors, defendants 1 and 2. The claim is resisted on the ground that the plaintiff had not included a prayer for possession in a previous suit * which the plaintiff had instituted against his vendors and in which he had merely claimed specific performance of the agreement to convey the land without claiming possession. It is argued for the defendants that in that suit the plaintiff ought to have claimed possession also and having failed to do so, he is debarred under O. 2, R. 2, from now claiming possession. The plaintiff's reply to this contention is that the rule referred to can only apply if the cause of action in the earlier is the same as the cause of action in the later suit; and that in the present case the cause of action arises on the execution of the conveyance, whereas in the previous suit the cause of action arose on the agreement to execute the conveyance.

In answer to this contention the defendants rely upon *Narayana Kavirayan v. Kandasami Goundan* (1), where Shephard and Boddam, JJ., held that the right to possession arose coincidentally with the right to obtain the conveyance. With great respect, I am unable to follow their train of reasoning. If two rights arise coincidentally neither can be the cause or the effect of the other. They must both result independently from some other cause; that other cause for the present purposes can only be either the agreement or the general law. If it had been meant that in accordance with the terms of the particular agree-

* Civil Suit No. 447 of 1896 on the file of the District Munsif's Court of Negapatam.

ment, with which the learned Judges who decided *Narayana Kavirayan v. Kandasami Goundan* (1) were dealing, the purchaser was entitled on the one hand to claim execution of the conveyance (i. e., transfer of the ownership of the property) and, on the other hand, to obtain possession, that the transfer of ownership and of possession were agreed to be made independently of each other, and that the right to claim each happened (under the terms of the agreement) to arise at the same moment—then I could have understood that the two claims arose coincidentally. It does not appear that the Judges considered that any such special agreement existed in *Narayana Kavirayan v. Kandasami Goundan* (1). They proceeded on a proposition of general law, that—apparently by operation of S. 55, T. P. Act—by every agreement to sell “the right to possession arises coincidentally with the right to the execution of a conveyance.” But further they intended, it would appear, to hold (contrary to the opinion expressed by Sargeant, C. J., in *Nathu v. Budhu* (2), to which I shall refer later), that the causes of action on the agreement and the conveyance are the same. With those propositions I am unable to agree.

It seems to me that the effect of S. 55 (1) (f), T. P. Act, when read with S. 54 of the same Act, and with the Registration Act, is that in the absence of any express agreement to transfer possession independently of the registered conveyance, the purchaser (or to be accurate, the person agreeing to purchase) has no right to the possession of the property until the conveyance is completed. For S. 55, Cl. (1) (f), T. P. Act, binds the seller of the property on being so required, to give possession to the buyer; under S. 54 there is no sale until there is a transfer of the ownership of the property, and there is no such transfer, until there is a registered instrument. It is true that some of the clauses in S. 55 (1) do not warrant its being said that there is no “seller” within the terms of that section until there is a complete sale as defined in S. 54. Thus Cl. (d) speaks of the “seller” being bound to execute a proper conveyance to the “buyer,” so that a person who has agreed to sell, but who

has not completed the sale by transfer of ownership, is referred to by the term “seller” in Cl. (d). If the expression “seller” were interpreted in the same sense in Cl. (f) as in Cl. (d) then the person agreeing to purchase could immediately after the agreement demand possession. This would be going beyond what was held in *Narayana Kavirayan v. Kandasami Goundan* (1), and it is not suggested that that should be the interpretation of the clause. There seems to me to be nothing unreasonable in interpreting the various clauses of S. 55 so that the earlier clauses are taken to refer to the period between the agreement for sale and its completion, and Cls. (f) and (g) to the time after the sale has been completed within the terms of S. 54. It is difficult to hold, on the other hand, that the legislature intended to give the right to possession to a person who has agreed to have its ownership transferred to him merely by reason of such agreement before or irrespective of the transfer being made.

It may indeed be, that the agreement to sell the property contains not only a covenant to transfer the ownership of the property by a registered instrument, but also an independent and so to say incidental covenant to permit the vendee to take possession of the property—or to exercise other rights, which for brevity may, for the present, be referred to as obtaining possession. Two cases were cited to us in which such independent covenants to give possession to the purchaser were alleged. One of these cases, *Rangayya Goundan v. Nanjappa Rao* (3), was relied upon by the appellant. There the purchaser in the first instance came into Court relying upon the agreement for sale and sued for possession under that agreement; for obtaining the relief claimed in his first suit he had to prove the facts leading up to and including the execution of the agreement. When those facts were proved he became entitled to claim a decree for specific performance of the whole of the agreement including the vendor's covenant to execute the conveyance; and yet, after having proved the execution of the agreement—after proving all that had to be proved for obtaining execution of the conveyance—he stopped short of claiming the latter

(2) [1894] 18 Bom. 587.

(3) [1901] 24 Mad. 491=3 Bom. L. R. 111 =, O. W. N. 17=28 I. A. 221 (P. C.).

relief, and prayed merely for one portion of his rights arising from the facts proved, viz. possession. In these circumstances it was held that he could not subsequently come into Court once more on the same cause of action (namely, proof of the execution of the agreement to convey) and ask for (the execution of the conveyance) a relief which he could have asked in the previous suit, and for obtaining which he would have to prove over again the same set of facts that were proved in his earlier suit.

In the present case the facts are quite different. The plaintiff does not now sue for any right under the agreement to convey. In the previous suit he prayed for specific performance of the agreement. Both the lower Courts have held that in the agreement there was no covenant on which the plaintiff could have sued for possession. Assuming (as was argued before us) that the agreement gave the right of possession apart from the right to obtain a conveyance, still possession under the agreement could only be for the period prior to the conveyance—after which the purchaser's title would be completed and he would then be entitled to possession not under the agreement, but on the basis of his title. The plaintiff's failure to ask for possession in the previous suit might therefore have been fatal to any claim he might have set up in the present case under the agreement: if for instance the plaintiff had alleged that he was entitled to possession under the agreement at some time previous to the conveyance, and had claimed in the present suit damages for being kept out of possession from that date, the answer might, no doubt, have been that the plaintiff's rights to such damages until the date of the conveyance were barred: cf. *Venkoda v. Subbanna* (4). The plaintiff makes no such claim. His claim is on a distinct cause of action which had not arisen at the time when the first suit was instituted.

What I have just stated seems to me to have been the view expressed by Sir Charles Sargeant, C. J., in the second case to which I alluded above, *Nathu v. Budhu* (2), though the very concise terms in which that great Judge has expressed the views of the Court, has perhaps prevented his judgment from having been availed of to the same extent as an ex-

pression of his opinion would otherwise be. In that case the contract for sale seems to have provided that the purchaser may take possession prior to the conveyance. This, it is true, is not explicitly stated in the judgment, or in the report. But in the first suit instituted by the purchaser he alleged that possession had actually been delivered to him at some time prior to 1st July 1889 (see p. 539 of the report). At that time no conveyance had been executed. Sargeant, C. J., also refers in his judgment to the claim of possession on the contract for sale (as distinguished from the sale deed). I take it therefore that it was conceded in that case that the purchaser could have claimed possession under the agreement for sale even before the sale deed was executed.

The argument of Mr. Apte (who represented the vendor in the High Court) was that the right to possession could not be asserted in the second suit, inasmuch as possession could, by virtue of the agreement for sale, have been claimed in the first suit. The purchaser's reply to this argument was twofold. First, that possession could not have been claimed in the first suit because the purchaser had alleged that possession had already been given to him. This argument was not accepted by the Court. They held that, as a matter of fact, the purchaser had not been put into possession prior to the first suit and that therefore, he could have sued for possession, and then his failure to do so in the first suit debarred him in the second suit from claiming such possession as he could have sued for in the first. But the Court accepted the second argument for the purchaser, that though possession could have been claimed in the first suit on the agreement, still the purchaser was not debarred from praying for it in the second suit on the conveyance or the deed of sale, for a new and distinct cause of action arose from the deed of sale itself: Sir Charles Sargeant expressed this view quite definitely both during arguments and in his judgment. On the former occasion he cited *Kalidhun Chuttapadhya v. Shibo Nath Chuttapadhya* (5), where Garth, C. J., in expressing the view of himself, and Pontifex, Morris and Mitter, JJ., said: "It would indeed

(4) [1888] 11 Mad. 151.

(5) [1882] 8 Cal. 483 (F.B.).

seem almost a mockery to empower a civil Court to declare a plaintiff entitled to relief, and then, when the defendant refuses him that relief and disregards the Court's order, to tell the plaintiff that he is wholly without remedy, and that the Court has no power to assist him." Garth, C. J., said this in deciding that as the law empowers the Courts to pass a merely declaratory decree without consequential relief, where such a decree has been passed, and the defendant disobeys that decree, so as to prevent the plaintiff from having the consequential relief flowing from the declaratory decree, in such a case, the plaintiff may obtain in a subsequent suit the consequential relief, the right to obtain which had been declared in the earlier suit. This is certainly going much further than is necessary for the present case.

I am therefore clearly of opinion that the plaintiff's suit for possession on the basis of the conveyance to him was not barred by his previous suit to obtain execution of the conveyance, and that therefore the appeal should be dismissed.

It is argued on behalf of the appellant, however that the plaintiff should not have the costs of these proceedings on the grounds that this suit was unnecessary, because the purchaser could have obtained in the previous suit the relief which he seeks in the present suit. That the two prayers can be joined in the first suit was decided in *Ranjit Singh v. Kalidasi Debi* (6). I concede that a purchaser ought to be permitted for convenience to claim both reliefs at once in order to prevent disregard of his rights by a vendor as bold as the present appellant. Yet in strict form the right to sue for possession on his title does not arise until the conveyance has already been executed, and unless thereafter the vendor refuses to give possession prior to execution of the conveyance, there being no right to obtain possession, the denial of a right that has not arisen cannot furnish a cause of action. I allude to these purely technical considerations merely for the purpose of deciding the question of costs: it would have been entirely in keeping with the vendor's conduct to have raised this technical objection if the purchaser had added a prayer for possession in his first suit. The

vendor cannot be permitted, after he has opposed his purchaser's just claim through three Courts, to turn round and say that these proceedings are unnecessary. He cannot now contend what he might have contended if he had been ready and willing to give possession without any legal proceedings. I am therefore of opinion that the defendants should be made to pay the costs throughout.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 469

SANKARAN NAIR AND EAKEWELL, JJ.
J. S. V. Nazareth—Appellant.

Jaffer Meghji Shet—Respondent.

Second Appeal No. 2527 of 1912, Decided on 19th November 1913.

(a) **Specific Performance — Contract to sell — Agreement in plaint not set up by plaintiff — Court may in discretion refuse specific performance.**

A Court has discretion to refuse specific performance of a contract to sell, where the plaintiff fails to establish in full the agreement set up by him in his plaint; but that rule does not apply where the plaintiff does not deliberately put forward a false claim. [P 470 C 1]

(b) **Specific Performance—Variation between contract set up and contract proved — No wilful omission or concealment—Suit for items in agreement proved is maintainable.**

Where the agreement was to sell four items of property and subsequently one of the items was mortgaged to the plaintiff and in consequence the plaintiff was not in a position to state what items were sold to him, the fact that he claimed in these circumstances a larger number of items than he was found entitled to would not put him out of Court. [P 470 C 1]

M. O. Parthasarathy Ayyangar and K. P. Madhava Row—for Appellant.

J. L. Rozario—for Respondent.

Judgment.—The suit is for specific performance of an agreement to convey to the plaintiff the properties which bear the Survey Nos. 15, 16, 18, two houses and certain trees. The plaintiff has got a decree for No. 15 and some of the trees claimed. The contention in second appeal is that, as the plaintiff has failed to prove the contract set up, i. e., for the sale of all the properties claimed, he is not entitled to any decree for specific performance, and the cases *Lindsay v. Lynch* (1), *Legal v. Miller* (2) and *Marshall v. Berridge* (3) are relied upon.

The lower appellate Court has found that after the parties entered into the

(1) 9 R.R. 54=2 Sch. & Lef. 1.

(2) 2 Ves. Sen. 299=28 E. R. 193.

(3) 19 Ch. D. 233 at p. 241=51 L.J. Ch. 329=45 L.T. 599.

agreement to sell, a mortgage (Ex. A), of the properties agreed to be sold was granted to the plaintiff as an intermediate step. It is stated that item 15 was mortgaged and that the houses in the occupation of two persons, Ragunath Naik and Kisto Souza, were excluded. F and G are the houses in Naik's occupation and No. 18 is the house in Souza's occupation. There was really no dispute between the parties as to the scope of the agreement so far as the properties were concerned. They were the properties in Ex. A. The only question was what were the properties in Ex. A. The correspondence that passed between the parties does not show that the defendant took any exception to the plaintiff's claim on the ground that he has claimed more properties than he was entitled to. On the other hand, he claimed a higher purchase amount which has been disallowed. He also claimed that the agreement was to be carried out within a certain time. On this point also the finding is against him. So far as the plaintiff's claim is concerned, it is found that Survey No. 16 is really included in Ex. A. But as Survey No. 15 is mentioned by name, the plaintiff gave up his claim to it in appeal and the Judge states that both the parties were under a mistake as to that item.

As regards No. 18, and the houses or house-sites, and the trees, the Judge finds that the differences between the plaintiff's claim and what was proved at the trial are very insignificant considering the value of the property. It is not shown that the plaintiff wilfully and with knowledge put forward a claim which he knew to be false; he has not obtained a decree for any property not claimed by him or not included in the agreement set up by him. No objection was advanced by the defendant before suit for specific performance on this ground, and the difference is not material. In these circumstances we are of opinion that the Judge was right in decreeing specific performance when the plaintiff consented to accept a decree for the same. He is however bound to pay the balance of the purchase-money Rs. 500. We will modify the decree of the Court below by directing the plaintiff to deposit in Court the amount of Rs. 500 within three months from this date. In default his suit will stand dismissed. With this modification we confirm the decree of the lower appel-

late Court and dismiss the second appeal with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 470

SESHAGIRI AIYAR, J.

Seshappier—Petitioner.

v.

Subramania Chettiar and others—Respondents.

Civil Revn. Petn. No. 122 of 1912, Decided on 13th February 1914, from the decree of Sub-Judge, Negapatam, in S. C. No. 1023 of 1911.

(a) Limitation Act (1908), Art. 48—Suit for moveable property originally obtained lawfully but subsequently converted unlawfully—Art. 48 and not Art. 49 applies—Limitation Act (1908), Art. 49.

A suit for the recovery of a specific moveable property, which has been originally obtained lawfully but has since been unlawfully converted or retained, is governed by Art. 48 and not Art. 49, Lim. Act: 3 M. L. T. 324, not Appl.; 29 All. 579; 12 I. C. 207; 4 I. C. 652; 5 I. C. 457, Foll. [P 471 C 2]

(b) Contract Act (1872), Ss. 108 and 178, Principles underlying Ss. 108 and 178 and S. 41, T. P. Act, proceed on principle that legal owner's right should prima facie be protected unless innocent purchasers are made to believe that intermediate possessor is true owner—Mere bona fides of purchaser is not enough—Transfer of Property Act (1882), S. 41.

Sections 108 and 178, Contract Act, as well as S. 41, T. P. Act, and the sections dealing with reputed ownership in the various Insolvency Acts proceed upon the principle, that prima facie the rights of the legal owner should be protected, unless he has done something to induce innocent purchasers or pledgees into the belief that the intermediate possessor is the true owner. Mere bona fides on the part of the purchaser or pledgee is not enough; he will have to prove that by some act or omission, the true owner has forfeited his right to recover back his possession. It is therefore incumbent upon the party resisting the claim of the true owner to adduce strict proof of the equities which have arisen in his favour or of the laches on the part of the owner which have led him to advance the moneys. [P 471 C 2]

(c) Contract Act (1872), Ss. 108 and 178—Ss. 108 and 178 apply to cases where intermediate possessor is entitled to legal dominion over property.

Sections 108 and 178, apply only to cases where the intermediate possessor is entitled to a legal dominion over the property and not to cases where he has simply the custody of the property: 12 B. L. R. 42: 24 Bom. 458; 27 Mad. 424, Foll. [P 471 C 2]

R. Kuppasawmy Aiyar and V. Vaidyanatha Aiyar—for Petitioner.

T. V. Gopalasawmy Mudaliar—for Respondents.

Judgment.—The plaintiff's case is that he gave the jewel in dispute to one Kolandasawmy Pather, the husband of defendant 1 and the father of defendant 2, on 19th May 1907 on the representation of Kolandasami that "there was a demand for the said jewel, that he would show it and bring it back and that if the purchaser liked the jewel, he would settle the price in the presence of the plaintiff." Kolandasami did not act up to his representations, but on 20th June 1907 he pledged it with defendant 3 and received from him a sum of Rs. 175. Kolandasami not having redeemed the jewel from defendant 3, defendant 3 asked the plaintiff to sell this jewel for him. The plaintiff then came to know that it was his own jewel and he asked defendant 3 to restore it to him. Defendant 3 refused. Hence the suit. I ought to mention that Kolandasami died two or three months after the jewel was given to him.

The plea of defendant 3 is that the suit is barred by limitation, inasmuch as the pledge to him was on 20th May 1907 and the present suit was brought in 1911. His second plea is that under any circumstances he is entitled to be repaid the money given by him to Kolandasami with interest, before the plaintiff can claim to recover the jewel.

The Subordinate Judge came to the conclusion that the suit was not barred by limitation. He held that Art. 48, Lim. Act, was applicable to the suit and that, as the suit was brought within three years of the plaintiff's knowledge, that the jewel was in the possession of defendant 3, it was within time. Mr. Kuppusami Aiyar argued that the proper Article applicable to the case was Art. 49. I cannot accede to this contention. There is no doubt that this was a case of conversion. The original undertaking which was a lawful one was to show the jewel to persons willing to purchase it. It was on 20th June 1907, when Kolandasami conceived the idea of treating the property as his own and of pledging it, that he converted to his own use the plaintiff's jewel. The case of *Arunachalam Pillai v Alagianambia Pillai* (1) has no bearing upon this question. The observations of the learned Judges

in *Ram Lal v Ghulam Husain* (2) go to show that in the case of a specific moveable property, which was originally obtained lawfully, but has since been unlawfully retained, the proper article applicable would be Art. 48. The case of *Gopalasami Iyer v Subramania Sastry* (3) is also an authority for that position: see also *Nandlal Thukersey v Bank of Bombay* (4) and *Nandlal Thakersey v. Bank of Bombay* (5). I agree with the Subordinate Judge that the suit is in time.

The second question is not altogether free from difficulty. Mr. Kuppusami Aiyar relies upon S. 178, Contract Act, and says the pawnee in this case got the jewel in good faith and consequently he had acquired a good title for the payment of the money which Kolandasami had taken from him; and he argues that the proviso to S. 178 has no application to this case as the jewel was not obtained by his client or by Kolandasami by means of an offence or fraud.

Before I refer to the decided cases on the point, I may observe that Ss. 108 and 178, Contract Act, as well as S. 41, T. P. Act, and the sections dealing with reputed ownership in the various Insolvency Acts proceed upon the principle that prima facie the rights of the legal owner should be protected, unless he has done something to induce innocent purchasers or pledgees into the belief that the intermediate possessor is the true owner: mere bona fides on the part of the purchaser or pledgee is not enough; he will have to prove that by some act or omission the true owner has forfeited his right to recover back his possession. It is therefore incumbent upon the party resisting the claim of the true owner to adduce strict proof of the equities which have arisen in his favour and of the laches on the part of the owner which have led him to advance the money.

It has been pointed out in *Greenwood v. Holquette* (6) that S. 108, Contract Act, will apply only to cases where the intermediate possessor is entitled to a legal dominion over the property and not to cases where he has simply the custody of the property; and it is further pointed

(2) [1907] 29 All. 579=(1907) A. W. N. 181=4 A. L. J. 671.

(3) [1911] 12 I. C. 207=35 Mad. 636.

(4) [1909] 4 I. C. 652.

(5) [1910] 5 I. C. 457.

(6) [1874] 12 B. L. R. 42=90 W. R. 467.

(1) [1909] 3 M. L. T. 324.

out that the person in possession, in order that he may give a good title must have a qualified ownership over the property, and if the property had been given to him for a particular time for a stated purpose, such possession will not enable him to give a good title. That is also the view taken by Sir Lawrence Jenkins, C. J., in *Seager v. Hukma Kessa* (7). The learned Chief Justice points out that, unless there is judicial possession in a person, he cannot confer any title on a third party. The only Madras case cited in argument is *Naganada Davay v. Bappu Chettiar* (8). That case concurs with the view taken in *Greenwood v. Holquette* (6). The observations in the judgment are opposed to the contention of the learned vakil for the petitioner that under S. 178 all that is needed is physical possession in the pawnor and bona fide on the part of the pawnor, whereas under S. 108, it is necessary to show further that the pawnor was the ostensible owner of the article. The case of *Naganada Davay v. Bappu Chettiar* (8) was, no doubt, one of gratuitous bailment, but the principles laid down by the learned Judge apply to cases of entrustment for a particular purpose. It has been strenuously argued before me that the possession of Kolandasami was that of an agent for sale and that he had a right to retain possession of the jewel, and he cannot be said to have come into possession of the property by means of any offence or fraud. I have gone through the evidence fully, and I am satisfied that the statement in the plaint that Kolandasami was given the jewel only for the purpose of showing it to intending purchasers has been established. The sale price was to be settled in the presence of the plaintiff and I cannot accede to the contention that Kolandasami was an agent for the sale of the jewel. I have therefore come to the conclusion that this plea of the defendant that he has got a right to be paid back his money before he can be asked to deliver the jewel is unsustainable. I hold that upon both the points the Subordinate Judge was right and I dismiss the petition with costs.

As regards the memorandum of objections, I do not think that the plaintiff can claim any costs against defendant 3. He acted honestly throughout. As

defendants 1 and 2 are not before me I do not think it necessary to vary the order of the Subordinate Judge in this respect. The memorandum of objections is also dismissed. No costs.

S.N./R.K.

Petition dismissed.

A. I. R. 1914 Madras 472

BENSON AND SUNDARA AIYAR, JJ.

Muthuswami Naidu — Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 443 of 1911 and Criminal Revn. Petn. No. 334 of 1911, Decided on 19th April 1912, from judgment of Sess. Judge, Madura, in Criminal Appeal No. 16 of 1911.

Penal Code (45 of 1860), S. 499—Complaint to Magistrate containing defamatory statements is absolutely privileged.

A defamatory statement contained in a petition of complaint presented to a Magistrate concerning the person who is charged therein is absolutely privileged and no prosecution lies under Ss. 499 and 500, against the persons making it: (*Case law discussed*); *Bench of British North Americans v. Strong* (1876) 1 A. C. 307, Dist. [P 474 C 1]

S. Swaminathan—for Petitioner.

J. L. Rosario - for the Crown.

Order.—The question for decision in the revision petition is, whether a defamatory statement made by one person regarding another in a complaint presented by the former against the latter is absolutely privileged.

In *Potaraju Venkata Reddy v. Emperor* (1), a Full Bench of this Court has expressed the opinion that neither party, witness, counsel, nor Judge can be held to be liable for defamation on account of words spoken or written in any proceeding before a Court recognized by law and that such statement must be regarded as absolutely privileged. The learned Chief Justice refers in the course of his judgment to the decision in *Golap Jan v. Bholanath Khetry* (2), where it was held that statements made in a complaint to a Magistrate were protected by absolute privilege. The same view was held by the Queen's Bench Division in *Lilley v. Roney* (3). The defamation in that case was contained in a letter of complaint addressed to the Registrar of the Incorporated Law Society against a solicitor, the Society being a body

(7) [1900] 24 Bom. 458=2 Bom. L. R. 403.

(8) [1904] 27 Mad. 424=14 M. L. J. 69.

(1) [1912] 14 I. C. 659=13 Cr. L. J. 275.

(2) [1911] 11 I. C. 311=38 Cal. 880.

(3) 61 L. J. Q. B. 727.

having power to inquire into the conduct of solicitors. In *Bench of British North Americans v. Strong* (4), the Privy Council, no doubt, expressed the opinion that a statement in a notice of action would not be entitled to more than a qualified privilege. But this is apparently because the notice is not a part of the proceedings before the Court. We do not think that a statement in a complaint which initiates a proceeding should be held to be entitled to less privilege than other statements made by parties in subsequent stages of the proceedings. If the complaint is false, then the defendant would be entitled to prosecute the complainant for preferring a false charge. We think the proper rule to lay down is that a statement contained in a complaint should be held to be absolutely privileged. We therefore set aside the conviction of the accused. The fine, if already paid, must be refunded.

S.N./R.K.

Conviction quashed.

(4) [1876] 1 A. C. 307.

A. I. R. 1914 Madras 473 (1)

SANKARAN NAIR, J.

In re Ambu and others—Accused.

Criminal Revn. Nos. 702 to 707 of 1913 and Criminal Reference Nos. 98 to 103 of 1913, Decided on 4th November 1913, made by Dist. Magistrate, South Canara, on 21st October 1913.

(a) Contract Act (1872), S. 23—Contract to work eight hours a day for 12 years for wages not above market rate is illegal.

A contract to work eight hours a day for 12 years for wages not shown to be above the market rate, and to live in any house that may be provided, being otherwise a form of slavery, is illegal. [P 473 C 1]

(b) Workman's Breach of Contract Act (1859), S. 1—Where advance made to workman is merely loan, Act does not apply.

Where an advance made to a workman is merely a loan, Act 13 of 1859 does not apply. [P 473 C 1]

Order.—I agree with the District Magistrate. The contract by the accused to work for 12 hours every day from 7 to 12 A. M. and 2 to 5 P. M., and to live in any house that may be provided for them, for wages at a rate that is not shown to be so far above the market rate as to be a sufficient compensation for submission to what is otherwise a form of slavery is clearly illegal. Moreover, the advance is merely a loan. Act 13

of 1859 has no application. The Magistrate's orders are set aside.

S.N./R.K.

*Orders set aside.***A. I. R. 1914 Madras 473 (2)**

SUNDARA AIYAR AND SPENCER, JJ.

Ramien—Plaintiff—Appellant.

v.

Veerappudian and others—Defendants—Respondents.

Second Appeal No. 1480 of 1910, Decided on 2nd January 1911, from decree of Dist. Judge, Tanjore, in Appeal Suit No. 624 of 1909.

(a) Evidence Act (1 of 1872), Ss. 4 and 90—Mufassil practice is to mark documents on prima facie proof—Appellate Court can reject admitted document if not sufficiently proved.

The mufassil practice in the Madras Presidency is to mark a document when prima facie evidence of the custody and of the date of it are given, allowing the parties to let in sufficient evidence subsequently. [P 474 C 1]

It is open to the appellate Court to refuse to draw a presumption under S. 90, and to reject the document altogether, if there is no evidence to support it, though the Court of first instance has drawn the presumption under S. 90. [P 474 C 1]

(b) Civil P. C. (5 of 1908), S. 97—Passing of final decree is no bar for filing appeal on preliminary decree.

The right of a party to appeal against a preliminary decree is not affected by the subsequent passing of the final decree: 12 I. C. 664, *Foll.*; 10 I. C. 514, *Diss. from*. [P 474 C 2]

(c) Civil P. C. (5 of 1908), O. 41, R. 27—Evidence in appeal not allowed unless Court prevented its giving.

A party cannot be allowed an opportunity of advancing further evidence in appeal unless he has been prevented by anything done by the Court from adducing all the evidence he could. [P 474 C 1]

G. S. Ramachandra Aiyar—for Appellant.

S. Swaminathan—for Respondents.

Judgment.—Two points are argued in this second appeal. The first point is that as the District Munsif presumed the genuineness of Ex. A, the appellate Court had no power in law to hold that it should not be presumed to be genuine and reject it. Reliance is placed in support of this argument on S. 4, Evidence Act, which lays down that when the Court may presume a fact, it may either do so or call for proof of it. The contention apparently is that the appellate Court was bound either to hold Ex. A to be genuine until it was disproved or at least to call for proof. This argument entirely ignores the practice prevailing in the Courts of this Presidency in the

trial of suits. When prima facie evidence of custody and of the date of a document purporting to be 30 years old is given, the Court generally re-marks the document on the footing that there is sufficient evidence to justify its being marked as an exhibit at that stage. It is only subsequently that the opponent exercises his right of adducing evidence of circumstances which entitle him to say that the presumption under S. 90, Evidence Act, should not be drawn with respect to the document. And the Court generally arrives at its conclusion on the matter after the evidence on both sides has been given. It is not shown that in this case, the District Munsif ever recorded a judicial opinion as to whether he would presume Ex. A to be genuine before he wrote his judgment in the case. Nor is it urged that the plaintiff asked for a ruling as to whether the Munsif was prepared to presume the document to be genuine, or whether he would require it to be proved. It is therefore not correct to say that the plaintiff was prejudiced by any ruling on the part of the District Munsif or prevented from adducing all the evidence that he could to prove the document or to ask the Court to presume its genuineness. There is no foundation for the argument that, in such circumstances, the appellate Court has not got the same power to decide whether the document should be presumed to be genuine or not, as the Court of first instance has. The plaintiff could not require an opportunity of advancing further evidence unless he was prevented by anything done by the Court, from adducing all the evidence he could. The cases in *Shafiqunnissa v. Shaban Ali-khan* (1) and *Srinath Patra v. Kuloda Prasad Banerjee* (2), cited for the appellant, do not give him any real support. In the former case the Judicial Committee of the Privy Council merely drew attention to the provisions of S. 90 and S. 4, Evidence Act, and the second case goes no further. We are of opinion that there is no substance in this contention.

The second point urged is that as the final decree for redemption was passed by the District Munsif before the appeal against the preliminary decree was presented in District Court, the appeal was not competent, and that the defendant

was entitled to appeal against the final decree, or, at any rate, appeal against the final decree also. This question has been fully considered by this Court in *Lakshmi v. Marudevi* (3), where it was held that the right of a party to appeal against a preliminary decree is not affected by the subsequent passing of a final decree. A later decision of the Calcutta High Court has now been brought to our notice : *Janki Nath Roy Chowdhry v. Promotha Nath Roy Chowdhry* (4). But this case does carry the question further than the previous decisions already considered in the Madras case, and we see no reason to depart from the view adopted in *Lakshmi v. Marudevi* (3). This contention must also be overruled.

In the result the second appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(3) [1911] 12 I. C. 664.

(4) [1911] 10 I. C. 514.

A. I. R. 1914 Madras 474

MILLER, J.

W. A. Beardsell & Co.—Petitioners.

v.

Nilagiri Abdul Gunni Saheb and another—Accused.

Criminal Revn. No. 752 of 1911 and Criminal Revn. Petn. No. 552 of 1911, Decided on 4th April 1912.

Criminal P. C. (5 of 1898), S. 195 (1) (c)—Prosecution requires insolvency Court's sanction though document is first produced before Official Assignee who is not a Court.

Where on the petition of a creditor to adjudge a debtor insolvent, a vesting order was made by the Court and the debtor produced before the Official Assignee a false pro-note alleged to have been executed by him to a near relation, which was subsequently produced before the insolvency Court, and the creditor applied to the Magistrate to prosecute the debtor for making a false document.

Held: that the sanction of the insolvency Court was necessary for the said prosecution.

[P 476 C 2]

The scope of S. 195 cannot be restricted to cases in which commencement of the proceeding precedes the completion of the offence.

[P 477 C 1]

An Official Assignee is not a Court and his sanction does not meet the requirements of S. 195.

[P 477 C 1]

Obiter : The production of a document before an Insolvency Commissioner is sufficient to attract to the case the provisions of S. 195 (1), (c); 4 Bom. L. R. 268, Ref.

[P 477 C 1, 2]

S. Swaminathan and Messrs. Short, Bewes & Co.—for Petitioners.

W. Barton and A. E. Rencontre—for Accused.

(1) [1904] 26 All. 581.

(2) [1905] 2 C. L. J. 592.

Facts.—The facts of the case are clear from the following petition of complaint:

I, William Hamilton Hall Johnstone, Merchant, residing at No. 267, Ungappa Naick Street, George town, Madras make oath and say as follows:

I am the duly constituted agent and attorney of Messrs. N. A. Beardsell & Co. the complainants above named.

Nilgiri Abdul Ganni Saheb, accused 1 above named, was a partner in the firm of Messrs. P. M. Inayathulla Sahib & Co., Piecegoods Merchants, carrying on business at No. 93 Godown Street, Madras, until the said firm was adjudicated insolvent in October 1910.

The said firm of P. M. Inayathulla Saheb & Co., of which accused 1 was a partner, had extensive dealings with the complainants' firm such dealings consisting in the firm of which accused 1 was a partner giving orders to the complainants' firm for importation of piecegoods from Manchester. The firm of which accused was a partner became liable to the complainants' firm in the course of the year 1910 to a very large extent, viz. Rs. 42,000, on account of goods which they had taken delivery of and there was also Rs. 16,000 due for interest on value of goods received on account of accused 1's firm but which had not been delivered over to them. Accused 1's firm was indebted to various other creditors in divers sums.

The firm of accused 1 having been reported to be in financial difficulties and the several demands made by the complainants having been ignored, the complainant's solicitors wrote to the said firm of P. M. Inayathulla Saheb & Co., on 30th September 1910 to furnish security to the complainant's satisfaction in respect of the large debt owing to them. The firm of which accused 1 was the partner first refused to give any security but later on through their vakil were making promises of furnishing such security and thereby gaining time but they did not in fact furnish any security. Thereupon on 21st October 1910, the complainants filed a suit in the High Court of Judicature at Madras upon one of the pro-notes executed by the firm of P. M. Inayathulla Saheb & Co., for a sum of Rs. 20,364-11-2 being the amount of principal and interest secured by a pro-note which was executed within six months from the date of suit under the

summary procedure under Chap. 37, Civil P. C. relating to negotiable instruments.

About the said 21st October 1910 a number of attachments before judgment were also obtained by some of the creditors of the firm of P. M. Inayathulla Saheb & Co., and goods having been removed to the Court of Small Causes, Madras, a petition was presented by the complainants to the High Court of Judicature at Madras to adjudicate the firm of P. M. Inayathulla Sahib & Co., as insolvents and on 27th October 1910, the Official Assignee was appointed receiver to take charge of the estate of P. M. Inayathulla Saheb & Co., and a notice was directed to go to accused 1 and his partners. After service of notice on them, they were adjudged insolvents on 21st November 1910 and a vesting order was made on that day.

That at or about the time of the presentation of the adjudication petition against the said insolvent's firm of which accused 1 is a partner in October 1910 or some time subsequent thereto, for the purpose of defeating his general body of creditors of whom the complainants are the largest, accused 1 dishonestly and fraudulently created a pro-note bearing date 5th March 1908 in favour of accused 2 who is his sister's son for Rs. 8,000 and a letter also bearing the said date, viz., 5th March 1908 by which accused 1 created an equitable mortgage of all his immovable properties in favour of said accused 2 and in the said letter is also recited that at the time of the execution of the said pro-note and letter alleged to have been executed on 5th March 1908, he, the said accused 1 had received a sum of Rs. 2,500.

In the course of certain proceedings in the insolvency of the firm of P. M. Inayathulla Saheb & Co., held before the Hon'ble Sankaran Nair, J., in the last week of August 1911 and 4th September 1911, it became evident that from the documentary and other evidence adduced therein on the said 5th March 1908 when the said pro-note and the letter creating the equitable mortgage were alleged to have been executed, accused 1 was not in Madras and that he was in fact in Cuddapah. About 20th February 1911 accused 2 filed an affidavit before the Official Assignee of Madras in which he stated that the said pro-note for Rs. 8,000 was executed on 5th March 1908 at Madras and

the title deeds were deposited with him on the said 5th March 1908 by accused 1 at Madras and on the strength of the said pro-note, letter of security and deposit of title deeds, accused 2 claimed before the Official Assignee, that he, accused 2, was entitled to recover Rs. 9,900 for principal and interest on the security of the immovable property enumerated and described in the letter of collateral security and comprised in the said title deeds said to have been deposited on 5th March 1908 by accused 1 with accused 2 in Madras.

Whereas in the said letter of security signed by accused 1, it is stated that he received Rs. 2,500 on the said 5th March 1908, accused admitted that on the said 5th March 1908 he did not receive the sum of Rs. 2,500 or any other sum.

I say that by creating documents purporting to have been made on 5th March 1908 and letter of security and pro-note executed at Madras on a date when accused 1 was not in Madras but was in fact in Cuddapah, accused 1 made a false document and that accused 1 made the said false document with intent to cause damage and injury to his creditors of whom the complainants are the largest and to support a false claim by accused 2 for a sum of Rs. 9,900 said to be charged on the said immovable properties of accused 1 and that the fraud may be committed.

I therefore charge accused 1 with offences of forgery under S. 465, I. P. C., with forging documents purporting to be valuable securities contrary to S. 467, I. P. C., and I charge accused 2 with aiding and abetting accused 1 in committing the said offences and with fraudulently and dishonestly using as genuine that which accused 2 knew or had reason to believe to be forged documents contrary to Ss. 109 and 471, I. P. C.

I therefore pray that summons may be issued for the appearance of both the accused and that they may be dealt with according to law.

The Magistrate, in dismissing the complaint, passed the following order.

It is contended for the accused that the alleged forged documents having been produced before the Hon'ble Sankaran Nair, J., in the insolvency proceedings of accused 1's firm by a party to the proceeding the sanction of the insolvency Court to prosecute the accused is necessary under S. 195 (1) (c), Criminal

P. C. It appears that the alleged forged documents were filed as Exs. A and B, in the insolvency Court and that the offences complained of are in relation to the proceedings in that Court. I cannot therefore take cognizance of the offences without the previous sanction of the insolvency Court. The accused are discharged.

The complainants moved thereon the High Court in revision on the following grounds:

The learned Magistrate erred in holding that because the alleged forged documents were produced before the Hon'ble Sankaran Nair, J., in the insolvency proceedings of accused 1's firm by a party to the proceedings, the sanction of the insolvency Court was necessary under S. 195 (1) (c), Criminal P. C.

The offences complained of were complete before the said documents were produced before the insolvency Court and the mere fact that subsequent to the completion of the offences, the same documents were also produced and marked as exhibits in certain proceedings would not render necessary a sanction, without which a complaint could have been instituted before they were produced in the insolvency Court.

The document complained of purported to have been executed on 25th March 1908, at Madras by accused 1, whereas accused 1 was, as a matter of fact, away from Madras on that date. On the strength of such forged document, a claim supported by an affidavit was made before the Official Assignee by accused 2; when such claim was made, the offences charged against both accused 1 and 2 were complete which could have been investigated by the learned Magistrate without any sanction.

Order.—I think the Magistrate was right in holding that the sanction of the Insolvency Commissioner is necessary. Taking it that all the offences charged were complete when the claim was made before the Official Assignee, still at that time both accused 1 and 2 were parties to the insolvency proceedings in the High Court initiated by a petition of the complainants. The order of adjudication does not transfer the proceedings from the Court to the Official Assignee.

So that even if it is necessary under S. 195 (1) (c), Criminal P. C., that the proceeding should have commenced

before the offence is complete, that requirement is fulfilled in this case. The offence of forgery is complete, it may be said, as soon as the false document is made and, in that view, it cannot be right to restrict the scope of S. 195, Criminal P. C. to cases in which the commencement of the proceeding precedes the completion of the offence, for the section in that case, would not apply to a great many cases to which it was obviously intended to apply and which are covered by its language. As I understand the case, the view suggested on behalf of the petitioner is that, in order that S. 195, Criminal P. C., may apply, the proceeding must have commenced before any action has been taken or use has been made of the false document. But even accepting that view, which receives some support from *Noor Mahomad v. Kaikhosru* (1), the insolvency proceeding had been commenced before any action was taken on the documents alleged to be forged. It was suggested by Dr. S. Swaminathan that, if the production of the document before the Official Assignee is taken to be their production in the "proceeding," then the Official Assignee must be considered to be the Court, and his sanction and not that of the insolvency Court is what is required. I do not think so. The Official Assignee does not become a civil Court merely because he has a wide discretion in deciding on claims of persons alleging themselves to be creditors of the insolvent or because persons aggrieved by decisions of his, can appeal to the Court from those decisions, and the provisions of the Insolvency Act, do not suggest that he ought to be considered a Court subordinate to the "Court" which, by S. 3 and 6, Insolvency Act, is the High Court or some officer appointed under S. 6, Insolvency Act.

The insolvency proceeding from the date of the petition which initiates it is before the Court, and the Court controls and directs the actions of the Official Assignee, and, I think, in these circumstances, that it is the Court whose sanction is required and not the Official Assignee. I do not say that the Magistrate is wrong in his view that the production of the document before the Insolvency Commissioner is sufficient to attract to the case the provisions of

S. 195 (1) (c), Criminal P. C. But, in my view, it is unnecessary to decide that point.

The petition is dismissed.

S.N./R.K.

Petition dismissed.

A. I. R. 1914 Madras 477

BENSON AND SUNDARA AIYAR, JJ.

Pattai kara Manakka! Kuppen—Appellant.

v.

Chvorakapatti Munde Kottil and others—Respondents.

Second Appeal No. 1516 of 1910, Decided on 1st March 1912, from decree of Sub-Judge, South Malabar, in Appeal Suit No. 28 of 1910.

(a) Trusts—Demise as trustee—Demisor ceasing to be trustee cannot recover possession from demisee—Demisee can deny demisor's right on ground that he was not trustee at date of suit.

If a person demises certain property as the trustee of a temple, he cannot, after he has ceased to be the trustee, claim to recover possession from the demisee. [P 478 C 2]

In such a case, the demisee is estopped only from denying the title of the temple, but is not estopped from denying the demisor's right on the ground that he was not the trustee at the date of suit. [P 478 C 2]

(b) Adverse Possession—Trusts—Trustee cannot acquire title by—Animus possidendi is deciding factor.

Where a person purports to hold the property as a trustee, he cannot, by such possession, acquire a right to the property by prescription for himself against the beneficiaries. [P 479 C 2]

In determining what right adverse possession would confer on the holders, the animus possidendi is the decisive factor. The character in which possession is held must determine the right which the possession would confer: (Case law referred.) [P 480 C 1]

(c) Trusts—Person acting as trustee cannot deny his right to so act—Evidence Act (1 of 1872), S. 115.

A person purporting to act as trustee cannot be allowed to say for his own benefit that he had no right to act as trustee. He is estopped from taking advantage of the lapse of time: (Case law referred.) [P 480 C 2]

(d) Adverse possession—Trusts—Misappropriation of rents by trustees does not give him prescriptive title.

The appropriation of rents of property attached to a trust by the trustee will not give him a prescriptive title, as he will have to account for the amounts misappropriated: *Shaw v. Keighorn Ir. R.* 3 Eq. 574, Ref. [P 481 C 1]

(e) Trusts—Right to trust property goes with trusteeship.

The right to property attached to a trust must go with the right to trusteeship: (Case law referred.) [P 481 C 2]

T. R. Ramachandra Aiyar—for Appellant.

J. L. Rosario—for Respondent.

(1) [1902] 4 Bom. L. R. 268.

Judgment.—The suit out of which this second appeal arose was instituted by Pattaikara Pramathen Kupen Nambudripad, the manager of a Nambudri illom, to recover possession of certain lands demised on kanom in 1866 to defendant 1 by the plaintiff's father. At the time of the suit the lands were in the possession of defendant 2. The original demisee, defendant 1, assigned his rights to one Krishnan Nair in 1894. He subsequently, in 1901, attorned to one Kodalur Nambudri, who claimed the lands as the property of a temple, Kisuthri Kovil Devasom. Defendant 2, subsequently obtained an assignment of the rights of Krishnan Nair. Defendant 2 denied the plaintiff's right to redeem the mortgage and set up the right of the devasom to the lands and his holding under the devasom. He denied the genuineness of the demise sued on, but both the lower Courts have held it to be genuine. In view of the finding of the appellate Court, it is unnecessary to refer to certain other contentions raised by defendant 2. In the kanom deed, Ex. 7, the lands in question are described as belonging to the temple and the counterpart kychit Ex. A provides that the annual rent should be paid at the devasom office. Both the lower Courts have found that the lands belong to the Kisuthri Kovil Devasom. The District Munsif gave the plaintiff a decree for possession. He said: "I find that the plaintiff's properties are attached to the Kisuthri Kovil Devasom properties and belong to the plaintiff, and that they are held under the plaintiff's kychit Ex. A. He was of opinion that defendant 2, who was an assignee from the assignee of the original kanomdar, was estopped from denying the plaintiff's title to recover the properties and was bound to surrender them. One of defendant 2's contentions was that it had been finally decided between the plaintiff and Kodalur Nambudri that the latter was the trustee of the temple and not the former, but the District Munsif decided this issue in the negative in plaintiff's favour."

On appeal the Subordinate Judge held that the plaintiff's claim to the trusteeship of the temple was negatived long before the suit, and that he was not the present trustee of the temple. He also held that, as the lands were demised by

the plaintiff's father as the property of the temple, and as the plaintiff was not the present trustee thereof, he could not claim to recover the land and dismissed the suit. The District Munsif's judgment is rather confused; while holding that the lands belong to the temple, he also observes that they might have been kept apart as property belonging to plaintiff's family when the temple itself was made over to the Kodalur Nambudri in 1848 by a member of the plaintiff's family. It is not quite clear whether he intended to decree the lands to the plaintiff as the private property of his illom or as the property of the temple. His judgment must be regarded as based on his finding that defendant 2 was estopped from denying the title of the plaintiff from whose father the kanom was originally obtained by defendant 1. It is quite clear that, if the lands still belong to the temple, and if the plaintiff is no longer its trustee, the principle of estoppel would not apply inasmuch as the demise was made by the plaintiff's father as trustee of the temple, the temple being the virtual demisor. Defendant 2 could be estopped from denying only the title of the temple and would not be estopped from denying the plaintiff's right on the ground that he was not the trustee at the date of suit.

Mr. T. R. Ramachandra Aiyer, the learned vakil for the appellant, contends that the temple itself is treated in the demise as the property of the demisor, and that therefore the plaintiff's father must be treated as having demised the property as his own. This proposition clearly cannot be upheld. Even assuming that there is foundation for the appellant's argument, that the temple was a private one in which the public had rights, it is quite clear that it was still trust property, though the beneficiaries might be only members of the Pattaikara family. The lands demised would also be trust property attached to the private temple. It is argued that the stipulation for payment of rent at the temple office merely described the place where the rent was to be delivered and did not indicate the ownership of the temple over the lands, but taken along with the clear description of the lands in the kanom deed as belonging to the temple, we have no hesitation in confirming the finding of the Subordinate Judge that

the lands in question were demised by the plaintiff's father as the trustee of the temple. No attempt has been made at the hearing to dispute the correctness of the finding that the plaintiff, at the date of the suit, had no right whatever over the temple. It would therefore follow that the decree dismissing the suit must be upheld.

Mr. Ramachandra Iyer urges two contentions in support of his argument that the plaintiff is entitled to recover the property, first, that the right of the temple and of the Kodalur Nambudri trustee thereof to the property is extinguished by limitation, and that the plaintiff has acquired a right thereto by adverse possession. Secondly that, assuming the property to have been originally temple property, it ceased to be such in 1848, and that it has since remained as private property. It will be convenient to deal with the latter contention first. Defendant 2, in his written statement, stated that in 1814, at a division between the karnavan of the Pattaikara Mana and an adopted son of his, subsequent to the birth of a natural born son, the temple was assigned to the adopted son and that this person sold the temple with its properties to Kodalur Nambudri in 1848. The demise in question in this suit, it will be remembered, was in 1866 by the Pattaikara Nambudri subsequent to the transfer of the devasom to the Kodalur Nambudri. The argument is that the temple, being a private one in which the members of the Pattaikara Mana alone had any beneficial rights, the trust ceased to exist when it passed away to the Kodalur Nambudri in 1848. To begin with, this argument is based on the assumption that the temple was a private devasom and not a public one. The District Munsif, no doubt, observes in para. 14 of his judgment: "It is admitted that the devasom was a private property of the plaintiff mana." But the Subordinate Judge says: "There is no admission of the defendants on record that the devasom was a private property of the plaintiff's mana and set apart to an adopted son after the birth of a natural born son as stated by the District Munsif in para. 11 of his judgment." Evidently the defendants denied in the Court of appeal that they made any admission regarding the private character of the temple. We cannot, in the cir-

cumstances proceed on the assumption that the temple was a private institution. But assuming that it was such, we cannot assume that the trust ceased to exist when the Kodalur Nambudri obtained a transfer of the temple. Admittedly, there were disputes about the temple between the Pattaikara Mana regarding the right of management of the temple and the question was finally decided in favour of the Kodalur Mana. This is not reconcilable with the cessation of the temple as a religious institution with properties attached to it. Even in this suit, the plaintiff contended before the Munsif that he was the manager of the temple after the transfer to the Kodalur mana. The presumption would be, even if the temple was a private one, that the members of the Kodalur Mana at least would all be entitled as beneficiaries to the temple and its properties. The temple would still continue to own the lands attached to it, though the beneficiaries might have changed by the transfer to the Kodalur mana. It is not shown that the plaintiff lands ceased to belong to the temple by their being severed from it by any valid act on the part of the trustee. The demised property must therefore still be regarded as belonging to the temple and vesting in its trustee, unless the right of the temple has been extinguished by limitation.

It is therefore necessary to deal with the contention that the plaintiff has acquired a right to the property by adverse possession. Mr. Ramachandra Iyer argues that, as the plaintiff and his father have always continued to remain in possession of the lands, the temple has lost its right under the statute of limitation. But the demise in question was made by the plaintiff's father as the representative and trustee of the temple. In 1866, when the demise was made, the demisor was evidently claiming to be the trustee and the litigation which negatived his right ended only in 1894. We must hold that the demisor purported to deal with the lands as trustee of the temple. As a matter of fact, he has been held to be not a trustee now. He never succeeded in acquiring the right of trusteeship by adverse possession. But, when a person purports to hold the property as a trustee, he cannot by such possession, acquire a right to the property by prescription for himself against the bene-

ficiaries. In determining what right adverse possession would confer on the holder, the animus possidendi is the decisive factor. The character in which possession is held must determine the right which the possession would confer. Thus, a person, who has been in possession for the statutory period in the assertion of a kanom right, would acquire only a kanomdar's interest by limitation, *Madhava v. Narayana* (1). Similarly, one who asserts the right of a permanent lessee would acquire that right: see *Thakore Fatesingji v. Bamanji Ardeshir Dalal* (2). Where a person takes wrongful possession of land and keeps it for the prescribed period of limitation claiming to be himself entitled in fee or not setting up any title at all, he gains the estate for his own benefit, but if he enters claiming a limited interest under some instrument, it does not follow that he can by possession, till the rightful owner is barred, claim the whole estate in perpetuity. Thus, if a man obtains possession of land claiming under a will, he cannot afterwards set up a title to the land against the will though it did not operate to pass the land in question, and if he remains in possession till 12 years have elapsed and the title of the testator's heir be extinguished, he cannot claim by possession an interest in the property different from that which he would have taken if the property had passed by the will: *Bosanquet and Marchant on Limitation*, p. 498. The nature of an inchoate possessory title may be stated as follows: If a stranger, upon entering, claims an existing particular estate in the land as a life estate, he is seized of that estate. If he only claims an existing term, he is possessed of that term and his possessory title will devolve as personalty: *Lightwood's Times Limit on Action*, p. 125. The same principle is applicable where a person is in possession as a trustee and not for his own benefit because his possession in such a case is really that of the beneficiaries under the trust.

In *Secretary of State v. Krishnamoni Gupta* (3) the Judicial Committee of the Privy Council held that if a person is in possession as the tenant

of another of lands which really belong to himself, he would lose his right by continuing to hold as tenant for the statutory period, because in reality his possession is that of the landlord: *Kernaghan v. M'Nally* (4). It was held in a case where wrongful possession was held by a person as cestui que trust under a will, which did not devise the property, that his possession would be regarded as the possession of the trustee and would enure to the benefit of all who would take it if the property had really been devised to him.

A person purporting to act as trustee cannot be allowed to say for his own benefit that he had no right to act as trustee and is estopped from taking advantage of the lapse of time. In *Lyell v. Kennedy* (5) this principle was affirmed by the House of Lords. There a person was managing certain land as the agent of a life-tenant. After the death of the life-owner, he continued to receive the rents and pay them into the Bank as he was doing before, not informing the tenants in actual occupation but stating to several persons that he was acting as agent and receiver for the true owner, whoever he might be. After the expiration of 12 years from the death of the life-tenant, he claimed the property on his own account. The assignees of the heir brought an action against him to recover possession of the land and for an account of the rent and profits. The House of Lords held that an agent could not claim any right by virtue of his possession as he purported to hold on behalf of the true heir, whoever he might be. Lord Selborne regarded the principle as well established. After referring to earlier cases, *Rackham v. Siddall* (6) and *Life Association of Scotland v. Siddall* (7), his Lordship observed: "The principle of those decisions, as established by Turner, L. J., in the latter case, was that a person who had assumed to be a trustee could not be heard to say for his own benefit that he had no right to act as a trustee." Mr. Lewin, in his learned and accurate treatise on the Law of Trusts, thus puts it: "If a person, by mistake or

(1) [1886] 9 Mad. 244.

(2) [1903] 27 Bom. 515.

(3) [1902] 29 Cal. 518=6 C.W.N. 617=4 Bom. L.R. 537.

(4) 12 Ir. Ch. R. 9.

(5) [1889] 14 A. C. 437=59 L.J.Q.B. 263=62 L.T. 77=38 W.R. 353.

(6) [1849] 1 Mac. & G. 607=2 Hall. & Tw. 44.

(7) [1860] 3 De. G. F. & J. 58=4 L. T. 311=9 W. R. 541.

otherwise, assumes the character of trustee, when it really does not belong to him and so becomes a trustee de son tort, he may be called to account by the cestui que trust for the moneys he received under colour of the trust. In *Soar v. Ashwell* (8), the same rule was acted upon by the Court of Appeal. Lord Bowen says, referring to the case of *Life Association of Scotland v. Siddall* (7): "This exclusion of the doctrine is based on the obvious view that a man who assumes without excuse to be a trustee ought not to be in a better position than if he were what he pretends. Kay, L. J., said: "The result seems to be that there are certain cases of what are, strictly speaking, constructive trusts in which the statute of limitation cannot be set up as a defence. Amongst these are cases where a stranger to the trust has assumed to act and has acted as a trustee."

It is clear from the above-mentioned cases that the law will not permit the plaintiff in this case to say that he held in any character other than that of trustee of the temple. It is not alleged that at any time subsequent to the demise, he repudiated the character of trustee and claimed to hold the land for his own benefit. Mr. Ramachandra Aiyar urges that he did not apply the rents of the property for the benefit of the temple, but took them himself, but this cannot better his position. It would only have the effect of making him liable to account for the rents which he, having collected in the character of trustee, misappropriated for his own benefit. It was observed in *Shaw v. Keighorn* (9): "I think it is necessary to go beyond the mere circumstance that some one not entitled to the rent has received and kept it. The section requires not only that the rent should have been received by a person other than the person rightfully entitled, but that it should have been received under some claim of title and that a wrongful one. For example, if rent were received by a person falsely pretending to be agent to the rightful owner and who never accounted for it, this would not bar the rightful owner."

We must therefore hold that the plaintiff did not acquire any title to the property by adverse possession as against

the temple. The right to the property must go with the right to the trusteeship: see *Gnana Sambanda Pandara Sannadhi v. Velu Pandaram* (10). Also the judgment of this Court in *Ambalam Pakkiya Udayan v. J. M. Bathe* (11). We dismiss the second appeal with costs.

S.N./R.K.

Appeal dismissed.

(10) [1903] 23 Mad. 271=27 I. A. 69 (P.C.).

(11) [1912] 13 I. C. 599.

A. I. R. 1914 Madras 481

BENSON AND SUNDARA AIYAR, JJ.

(Kommeneni) Chinna Veerayya - Plaintiff—Appellant.

v.

(Kommeneni) Lakshminarasamma and others—Defendants—Respondents.

Second Appeal No. 1519 of 1910 and Civil Misc. Petn. No. 2053 of 1911, Decided on 16th January 1912, from decree of Tempy. Sub-Judge, Guntur, in Appeal Suit No. 154 of 1906.

Hindu Law — Reversioner — Declaratory suit abates on plaintiff's death—Civil P. C. (1908), O. 22, R. 3.

Where a suit is really one for a declaration that a deed of relinquishment is invalid as against the reversionary interest of plaintiff, it abates on the death of the plaintiff and the cause of action does not survive to the next reversioner: 27 Mad. 598, Foll.; 5 I. C. 42, Expl. (Case law discussed.) [P 481 C 2; P 482 C 1]

P. Nagabhushanam—for Appellant.

L. A. Govindaraghava Iyer—for Respondent.

Judgment.—The prayer in the plaint, according to its terms, is for a declaration that defendant 3 is not the illatom son of defendant 1's father-in-law, as well as for a declaration that defendant 1's deed of relinquishment in favour of defendant 3 cannot affect the plaintiff's rights as reversioner. Defendant 3 raised various legal objections to the maintainability of the suit for a declaration that defendant 3 was not the illatom son of defendant 1's father-in-law. To overcome these objections, the plaintiff contended that his suit was really only one to declare the deed of relinquishment invalid as against his reversionary rights. This contention was upheld and the suit was allowed to go on as one relating merely to the validity of the relinquishment. We cannot therefore now regard it as one relating to defendant 3's rights as an illatom son. This Court decided that a suit by a reversioner for a declaration that a deed of alienation or other instru-

(8) [1893] 2 Q. B. 390=63 L. T. 595=42 W. R. 185=4 R. 602.

(9) Ir. R. 3 Eq. 574.

ment executed by a widow will not affect his reversionary rights, abates on the death of the plaintiff and that the cause of action does not survive to the next reversioner; *Sakyahani Ingle Rao Sahib v. Bhavani Boyi Sahib* (1). In *Muthusawmi Mudaliar v. Masilamani* (2), the cause of action was held to survive but that was on the ground that the plaintiff in the suit asked for a declaration on behalf of himself and other reversioners. We are bound by *Sakyahani Ingle Rao Sahib v. Bhavani Bayi Sahib* (1), which was not overruled by *Chiruvolu Punnamma v. Chiruvolu Perraju* (3). The Privy Council has held, in *Mahamed Umar Khan v. Mahomad Niaz-ud-din Khan* (4) that Art. 118, Lim. Act, is not applicable to suits for possession: see *Muhammed Umar Khan v. Muhammad Naiz-ud-Din Khan* (4) which refers to and explains *Thakur Tribhuvan Bahadur Singh v. Raja Rameswar Baksh Singh* (5). The right of the present petitioners, who wish to prosecute the second appeal as legal representatives of the original plaintiff, to recover the property on the death of defendant 1 will not therefore be affected by their not being admitted as plaintiff's representatives, and we must reject their application to be permitted to continue the appeal. The order of the admission Court passed on 26th October 1911 on the application is set aside.

The second appeal abates. We make no order as to the costs of the Civil Miscellaneous Petition. The respondents will be entitled to their costs of the second appeal out of the estate of the deceased plaintiff.

S.N./R.K. *Decree set aside.*

- (1) [1904] 27 Mad. 588.
- (2) [1910] 5 I. C. 42=33 Mad. 342.
- (3) [1906] 29 Mad. 390=16 M. L. J. 307.
- (4) [1912] 13 I. C. 344=39 Cal. 418=39 I. A. 19 (P. C.).
- (5) [1906] 28 All. 727=9 O. C. 377=33 I. A. 156 (P. C.).

A. I. R. 1914 Madras 482

BENSON AND SUNDARA AIYAR, JJ.
Secy. of State—Appellant.

v.

Kannapalli Vencataratnammah and another—Respondents.

Civil Appeal No. 15 of 1907, Decided on 25th April 1912, from decree of Dist. Judge, Ganjam, D/- 20th August 1906, in Original Suit No. 47 of 1905.

(a) Deed—Construction—"Besides poramboke" in margin of inam title-deed, does not necessarily mean right to all poramboke—It depends on evidence.

Where an inam title-deed contained the following recital: "I acknowledge your title to a personal inam consisting of the right to the Government revenue of land claimed to be acres situated in the village of L" and the words "besides poramboke" were inserted in the margin:

Held: (1) that the insertion of the words "besides poramboke" need not necessarily be taken to be an acknowledgment by the Government of the inamdar's title to all kinds of poramboke and that the effect to be given to those words must depend on the evidence in each case and the circumstances attending the grant: (*Case law referred.*) [P 489 C 1]

(b) Madras Irrigation Cess Act (7 of 1865), S. 1—"Besides poramboke" includes right to channels and tanks not controlled by Government.

Where the channels or tanks in the village grant had no connexion with a Government source of irrigation and were not controlled by the Government to any appreciable extent the effect of the words "besides poramboke" is to invest the property in the channels and tanks in the inamdar. [P 489 C 1, 2]

P. S. Sivaswami Aiyar—for Appellant.

P. Narayanamurthy—for Respondents.

Order—To enable us to decide this appeal satisfactorily, we consider it desirable to allow the parties to adduce further evidence on the following point: (1) What, if anything, passed to the grantee under Ex. 20 under the words "besides poramboke" and whether she obtained a right to the channels conveying water to the tanks irrigating the lands of the Lakkamdiddi village or to these tanks themselves.

The lower Court has not dealt with this point in its judgment, but appears to have assumed that the Government did not reserve the channels and tanks at the time of the inam settlement.

We request the District Judge to take the additional evidence that the parties may adduce and to submit the same together with his opinion on the effect of such evidence within one month after the re-opening of the District Court after the recess.

(In pursuance of the above order, the District Judge of Ganjam submitted the following:)

Finding.—In obedience to the High Court's order of 13th February 1911, I have taken the additional evidence adduced by the parties and I submit the same along with my following opinion on the effect of such evidence on the point: What, if anything, passed to

the grantee under Ex. 20 under the words "besides poramboke" and whether she obtained a right to the channels conveying water to the tanks irrigating the lands of the Lakkamdiddi village or to those tanks themselves.

The additional evidence consists of the documents G. to N. on plaintiff's side and of the documents 21-(a), 22-(h) on defendant's side as also the oral evidence of one additional witness on defendant's side. The oral evidence of the witness is of very little use. He speaks to the payment of water-cess by him and his co-inamdars to the Government for water supplied to raise second crops on the excess area over the mamool area cultivated in the village of Gokayavalasa. He also speaks to the inamdars of the neighbouring village of Satyavaram being under a similar liability. The liability of these two villages for water-cess on excess area for second crop cultivation depends on the ownership of the water flowing through the Komarthy branch of the Polaki main channel and the ownership of the beds of the Komarthy branch channel and the Polaki main channel. The witness clearly admits in his evidence that the Government D. P. W. is in charge of the Polaki and Komarthy channels, that is that the inamdars have no possession or control over those channels and the beds of those channels. Ex. 22 series are accounts of water-cess collected from the inamdars in those two villages. These accounts also might be set aside as of little value in coming to a conclusion on the question whether the inamdars of the plaint inam village of Lakkamdiddi are entitled to the beds of the plaint Yellamanchilli channel and its sub-channels so far as those beds lie within the limits of the inam village of Lakkamdiddi. The Yellamanchilli channel branches off from the Garebula Gedda hill stream, whereas the Komarthy channel branches from the Government Polaki channel and irrigates Government villages also. This jungle stream (Garebula Gedda) in its upper portion (above the surplus weir) is used only for the irrigation of zemin and inam lands.

I shall therefore consider the other additional evidence taken in the case and comment upon it in the light of the other facts of the case. The plaint village of Lakkamdiddi was one of the villages in

the Chicacole haveli. Before 1766, the haveli belonged to the Mogul Emperor. The Emperor issued a firman granting the management of the Circars to the East India Company. The East India Company leased the haveli lands in Chicacole in 1767 to one Sitaramraz, the brother of Viziaranraz, the then zamindar of Vizianagram: see District Manual, p. 212. This Sitaramaraz seems to have at once granted the plaint village of Lakkamdiddi within the Chicacole haveli as an Agraharam inam to a Brahmin named Kannepalli Ramavadhanulu for subsistence. The village consists of no vrittis because it was Yekabhoga Agrahar or an Agrahar that was in sole possession of a single individual up to 8th February 1861 on which date Kannepalli Venkata Narasoo (the holder of the inam) died leaving a childless young widow by name Kannepalli Venkataratnamma: see recitals in Ex. 16.

In 1802 the District of Ganjam consisted of four havelies (including the Chicacole haveli) and 21 zamindaris. The haveli lands were resumed by the Government from the temporary lessees and sold in lots in 1803 and 1804 to the highest bidders on permanent settlement. Twenty proprietary estates were formed by the sale of the Chicacole haveli lands in 1803. One of them is Jarjangi and another is Urlam. The plaint Agraharam village of Lakkamdiddi is within the proprietary estate of Jarjangi (or Jarjangi Gangaram). The proprietors of these twenty estates were entitled to get only kattubadi or a fixed low rent from the inamdars of the inam villages included in their proprietary estates, though they were, of course, full proprietors of the ordinary zeroyati lands in their estates. The Government also seem to have reserved to themselves the "reversionary right in the inam tenures included in these proprietary estates when the Government granted sanads to the proprietors for their respective estates" see p. 149 of Ex. N). The kattubadi rent paid by the inamdar to the proprietor is also called Shrotriem when paid by Brahmin inamdars for their Agraharam inams. The words Agraharam and Shrotriem inam seem to be used in the same sense. In the inam settlement papers (Ex. N p. 330) Shrotriem is stated to be "a general term for all favourably assessed villages held

by Brahmins": see also Wilson's Glossary, 1855 edition, p. 11). Again at p. 154 of Ex. N, Agrahams are treated under "whole village inam" and are said to mean villages "granted to Brahmins." There can be no doubt that Lakkamdiddi was an Ekbhog Agraharam "whole village inam" enjoyed by Brahmin inamdars and has been paying a favourable kattubadi or jodi of Rs. 212-8-0 to the Jarjangi estate proprietors from 1803 up to date, the inam having been created about 1½ centuries ago. (There seems to have been an account called the gudikat account prepared in Fasli 1226 of the inam lands included in the proprietary estates.) Besides the major whole village inams (or sometimes, carved out of such inams) there are minor inams which relate to grants of defined extents of lands as contrasted with grants of entire villages: see the distinction between whole inams and minor inams in para. 29, p. 155 of Ex. N.

The rights of Government over the lands of these inam villages seem not to have been ever defined unambiguously. A reversionary right to resume the inams on failure of direct lineal heirs seems to have been always asserted by Government. In *Gunnaiyan v. Kamakchi Ayyar* (1) Sir V. Bhashyam Iyengar, J., says at p. 345: "According to the theory of the common law of the land succession" (to inams grants) "is or at any rate is supposed to be limited to the undivided brothers and to the direct lineal heirs including a daughter's son of the last incumbent as also his widow and failing them, to the direct lineal heirs of the original grantee. And under that law, it is or it is supposed to be, competent for Government to resume personal inams when the reversion falls in by reason of the extinction of direct lineal heirs of the body of the original" grantee. . . . The question as to whether the Crown has such prerogative reversionary right in the case of hereditary personal inams has never been subjected to the test of a judicial decision, for the simple reason that claims in respect of personal inams, which have not been enfranchised are exempt from the cognizance of civil Courts and can be adjudicated upon only by the Governor in Council or other executive authority The Government of course was not bound to exercise

its right of resumption and it was open to it to exercise it only partially and surrender its reversionary rights. The declared policy of Government, when the Inam Commissioner was appointed in 1859, and rules framed for his guidance was to waive its right of resumption and enfranchise personal inams and convert them into ordinary heritable property and forego its reversionary right in consideration of the holder of the inam agreeing to pay a "quit-rent the rates of which varied with reference to the value and prospect of the reversionary claim of the Government in each case."

In 1854, Jarjangi was the sixth of the 28 proprietary estates then existing within the Ganjam District. The Government wished to give up their reversionary interests in the whole village inams and similar inams (excluding service inams) situated within the limits of the zamindaris and of the proprietary estates in the Ganjam District after fixing a permanent quit-rent based on the value of the cultivated lands in the inam village porambokes as such yielding no income and having no market value. The Deputy Collector, Sudarsana Row, as Inam Commissioner, was directed to fix such values that is, to find out the net income of the villages. He prepared the register Ex. 16 for the plaint inam village of Lakkamdiddi. The total area of the village was taken from the old gudikat account of Fasli 1226 as 266 1/2 graces or 533 acres (2 graces making one acre). The 533 acres were classified as follows:

	Acres.
Poramboke consisting of tanks, villages sites, paths, channels, burial grounds, pasture lands, etc.	116
Personal and service inams which were not settled then	34
Waste	8
Remaining cultivated and cultivable lands	375
(249 acres cultivated wet, 13 acres cultivated tope, and 113 acres cultivated dry).	

The whole village was an Ekbhog inam (as already said) till the middle of the 19th century (though a few minor personal and service inams aggregating 34 acres had been created). Then 1/10th of the village area seems to have passed to one Ravi Janaki Ramayya by a Court auction sale. The 375 acres was afterwards enjoyed by Kanne-

palli Venkatarathnamma and by this Ravi Janakiramayya in the proportion of 9/10ths and 1/10th accordingly, that is, about 340 acres by Venkataratnamma and 35 acres by Janakiramayya.

The Inam Deputy Collector recommended that in the "particulars to be entered in the title-deeds" (or deeds) to be issued for the village, 340 acres should be entered in the name of Kannepalli Venkatarathnamma and 35 acres in the name of Janakiramayya: see Ex. 16. Venkatarathnamma was to pay Rs. 297 as quit-rent at the highest rate of 1/2 to 3/4 because Government's reversionary rights would fall in as soon as she died, while Ravi Janakiramayya was charged a quit-rent of only Rs. 9 (at 1/8th rate as Government's reversionary expectancy was very remote).

Two separated title-deeds were issued accordingly to K. Venkatarathnamma and Janakiramayya in 1867. Neither of these is forthcoming now. Venkatarathnamma lost her title-deed of 1867 and Ravi Janakiramayya is dead and his grandson, who was summoned to produce his title-deed of 1867, could not or would not produce it. The settlement proceedings began in 1859. The order confirming the Inam Deputy Collector's recommendations was passed in February 1865 and the title-deeds were issued in February 1867. The form of grants then obtaining in respect of whole village inam title-deeds appears from Exs. K, K-7, K-10, K-11, L-1, 2 (a) and 2/1 (b). The form in page 1 first sets out the grantee's present title (which is acknowledged in para. 1 of page 1 by the Governor in Council and is then followed by the Government's proposal (in paras 3 and 4) to give up their reversionary rights in consideration of a quit-rent. Then on page 2, the conversion into free hold in favour of the grantee is entered as the grantee had agreed to pay the quit-rent demanded. It is the entry on page 2 that extinguishes the Government's reversionary claims. The form in page 1, paras 1 to 3 is as follows:

On behalf of the Governor in Council of Madras, I acknowledge your title to the Shrotriem village of—claimed to be of—acres of dry land and—acres of wet land besides poramboke.

This inam is subject to a jodi or quit-rent of—and is hereditary, but it is not otherwise transferable; and in the event

of failure of lineal heirs, it will lapse to the state.

On your agreeing to pay an annual quit-rent of—inclusive of the jodi already charged on the land as above said, your inam tenure will be converted into a permanent free hold.

I take it that Kannepalli Venkatarathnamma got her title-deed in February 1867 in this form for 9/10ths of the area of the Shrotriem whole village inam of Lakamdiddi (340 acres of dry and wet lands "besides poramboke") and Ravi Janaki got a similar title-deed for 35 acres "besides poramboke." It is to be observed that in the case of minor or subsidiary inams, the title-deeds issued about that time do not contain the manuscript additional words "besides poramboke:" see Exs. K-8, K-9, K-12, and K-13 which relate to small defined extents of 1 acre, 6 acres, 2 acres and 71/100 of an acre which had been granted as inam.

As I said before, the major inam title-deeds issued between 1863 and 1867 were in the form of Exs. K-1, K-7, etc. Ex. 21 (a) and Ex. 21 (b) filed on defendant's side also contain the additional words "besides poramboke" as they are also grants of the whole Shrotriem villages of Gokayavalasa and Satyavaram and not minor grants of small areas within a whole village. In December 1867 the Madras Government evidently wanted to introduce a bill in respect of the form of title-deeds for the various descriptions of inams (see pp. 86 to 94 of Ex. N showing the old forms). The Inam Commissioner then suggested (in January 1868) that in para. 1 in the form of title-deeds, the words "claimed to be of" should be substituted by the words "claimed to consist of the right of receiving the rent or tax payable to Government on." In July 1868, the Advocate-General thought that the Government of Madras had no right to issue deeds in its own name and suggested (among other changes) that in para. 1, the words "acting on behalf of the Secretary of State" should be introduced after the words "the Governor in Council of Madras" and that all title-deeds should be re-issued with the necessary alteration (see pp. 82 to 302). of Ex. N which deal with these matters. At last, Act 8 of 1869 was passed giving effect to the views of the Inam Commissioner in his letter of January

1868; and all title-deeds subsequently issued omitted the use of words which might enable all kinds of inamdars to claim proprietary rights in the soil which they "would not otherwise possess," and it made clear that only the rights of Government were intended to be granted and that no proprietary rights in the soil (which did not already exist in any particular inamdar) were intended to be newly given.

Kannapalli Venkatarathnamma evidently wanted about 1898 a renewal of her lost title deed of 1867 to 9/10ths. of the area of the Lakkimiddi major inam village. Ex. 20 was issued to her accordingly on 20th June 1898. This title-deed was issued in a form which varies from the old form of 1864 to 1867 in the following particulars: (a) The words "acting on behalf of the Secretary of State" have been inserted in para. 1 as per the opinion of Mr. John Bruce Norton (Advocate-General in 1868). (b) In the same para 1, instead of the bare words "right to land claimed to be 108'38 acres of dry, 218'53 acres of wet and 13 acres of garden besides poramboke and situated in the Jarjangi proprietary Shrotriem portion of the village of Lakhamiddi," the words "right to the Government revenue on land, &c., have been substituted. In other respects, the title-deed follows the old form including the insertion of the manuscript words "besides porambokes" after the mention of the area of dry, wet and garden lands.

I think that there can be no reasonable doubt that the words "besides poramboke" were intended to have the same meaning and implication in the renewed title-deed of 1898 as they had in the old title deed of 1867. What then was the meaning of the words in the old form of the title deeds relating to major inams (see Exs. K-1, K-7, K-10, K-11, 21-(a) and 21-(b) which all contain the words "besides poramboke"), read specially in the light of the fact that these manuscript words were not inserted in minor inam title-deeds like Exs. K-8, K-9, K-12, and K-13? One very significant entry appears in Ex. K-2 (the Lukulam Register prepared in 1862). The Inam Commissioner first mentions the gudikat extent of the lands in Lukulam for purposes of valuation. He then deducts the extent of poramboke in

favour of the inamdar. [Poramboke consisting of (a): the bed of the river Vamsadhara, (b) path, (c) pasture land, (d) burial grounds, (e) channels, (f) sandy deserts, (g) sandy heaps in the bed of the river, (h) tanks and (i) village sites]. Then he makes this important note: "The Agraharanmdars have nothing to do with the bed of the river, that is, he denies their title to the items which I have marked (a) and (f) out of the poramboke items, but it does not say that the Agraharamdars have no right to the other poramboke areas items (b) to (f), (h) and (i) which include the "channels" (e) and "tanks" (h).

My predecessor, Mr. Ayling, (now Ayling, J.), in his judgment in the suit has taken it as clear "that the Government did not reserve the channels and tanks" in the village (there are six tanks supplied by the channels) "at the time of the inam Settlement." In the Urlam Case which seems to me to be a weaker case for the plaintiff than the present case: see the judgment reported in *Kundukuri v. Secretary of State* (2). His Lordship, Miller J., (with whom Munro, J., concurred) remarks as follows: "We have not been shown anything in the evidence to indicate that any channels or works in the haveli lands were so reserved" by Government at the time of the permanent settlement of 1803 and 1804 with the proprietors purchasers, "nor does it seem probable that the Government would at that time have deemed it necessary to reserve a channel."

* * * * * "On the whole, the evidence seem to me to support the contention that the beds of the channels were not reserved by the Government at the permanent settlement, but passed with the lands to the respective purchasers in so far as they lay within the limits of the land purchased by each to the same extent and in the same way as the tank beds, village sites and other poramboke lands." In the present case it cannot be contended that the Government have any rights in the house sites in the village, and it seems to me that they have none in the channel beds and tanks also. If the Jarjangi proprietor purchased the whole estate of Jarjangi, including the channel beds and tank beds, etc., the Government lost all right

in the channel beds even if the inamdars were not the owners under their original grant of 1767 which was confirmed in 1867. The Government must have intended by the insertion of the words "besides poramboke" in the major inam title-deeds issued between 1863 and 1867 to acknowledge the title of the inamdars to the poramboke lands along with the cultivated dry, wet and garden lands. The change of the form of the title-deed, by which change, the title only to the Government revenue payable on the cultivated lands (instead of the title to the lands themselves) was acknowledged, retained the words "besides poramboke" (just after mentioning the area of the cultivated lands). This made the whole sentence in the new form to read rather awkwardly (if not ungrammatically), but the intention of the Government to acknowledge the inamdar's title (in the case where the original inam grant was of a whole village) to the poramboke lands in the village seems to me reasonably clear.

The insertion of the words cannot mean that only the Government right to revenue from poramboke land is given to the inamdar, because poramboke lands (like channel beds, etc.), are not assessed to revenue. Why the words "besides poramboke" were not inserted in the printed forms of the title-deeds themselves and why they are added in every title-deed in manuscript both in the old and new forms is not indicated by the evidence. I am invited by the learned Government Vakil (Mr. W. L. Venkataraniyah) to interpret the words "besides poramboke" as meaning excluding poramboke or "the Government reserving to itself the poramboke." I can only remark that such an interpretation is, to say the least, entirely far-fetched. In Webster's Dictionary, two of the meanings of "besides" are given as "over and above" and "in addition to" and that is the meaning in ordinary parlance and not the meaning of exclusion or reservation. The Inam Commissioner, in preparing the register for whole inam villages, excluded service inams, minor personal inams and poramboke from the area of a whole inam village in order to ascertain the income derivable from the village. Then, when title-deeds were issued to the whole village inamdars, the

service inams area and the minor personal inams area were alone deducted from the grant (because they belonged to other than the whole village inamdars, and those lands had to be settled with those minor inamdars separately), but the poramboke area was recognized in the major inamdar's title-deeds as belonging to them by the addition of the words "besides poramboke," that is, that the poramboke area was to be included in the area, the title to which in the inamdars was acknowledged by Government.

In the result, my opinion is that by the words "besides poramboke," the Government acknowledged the title of the inamdars of the whole inam village to the channel beds and tanks in dispute.

(This appeal coming on for hearing after the return of the finding of the lower Court the Court delivered the following):

Judgment.—The District Judge (Mr. Sadasiva Aiyar) has submitted the fresh evidence adduced both by the plaintiff and the Government and has expressed his opinion that by the words "besides poramboke" in the inam title-deed Ex. 20, given to the inamdar proprietor of the village, the Government acknowledged the title of the inamdar to the channel beds and tanks in dispute. The claim of the Government to water cess cannot be maintained unless the water irrigating the village flows directly or indirectly from any river, stream, channel, tank or work belonging to or constructed by Government. According to the former District Judge's finding the Garebula Gedda, which irrigates the lands in the village takes its rise in the Parlakimedi zamindari and does not pass through any Government lands before it irrigates the plaint village, and the Government has not exercised any control over the Gedda. But it was contended, at the former hearing of the appeal, that although there is no evidence that the channel or stream and tanks irrigating the village belong to Government, it must be presumed that the ownership thereof is vested in it by virtue of S. 2, Act 3 of 1905 (Madras Land Encroachments Act) which enacts (we quote only the necessary portion of the section) that "a bed of the sea and all harbours and creeks below high water mark and of rivers, streams, nalas, lakes and tanks

and all canals and water-courses and all standing and flowing water and all lands wherever situated, save in so far as the same are the property of any zamindar, poligar, mittadar, jaghirdar, shrotriendar, or inamdar or any person claiming through or holding under any of them, are and are hereby declared to be the property of Government, except as may be otherwise provided by any law for the time being in force, subject always to all rights of way and other public rights and to the natural and easement rights of other land owners and to all customary rights legally subsisting." It is contended for the plaintiff, the inamdar, that the section does not really alter the law as previously understood and the channels passing through the whole inam village cannot be presumed to be the property of the Government. We consider it desirable to call for a finding on the question whether, by the grant of the inam to the inamdar, the title to the channel irrigating the village belonged to the inamdar.

The original inam title-deed which was granted by the Government in 1867 has not been produced. It is stated to have been destroyed. A fresh title deed which was granted in 1898 has been produced and is marked as Ex. 20. An extract from the inam register, Ex. 16, has also been produced. It appears from it that the inam was originally granted in 1767 to one Kanna Pillai Ramavadhanulu as personal hereditary inam by Sitaramraz. Sitaramraz was the brother of Viziamramraz, the then zamindar of Vizianagaram. He was a renter under the East India Company which had obtained a firman from the Moghul Emperor granting the management of the Sircars to the Company. The village in question was included in the Chicacole haveli in 1802. The Government sold its haveli lands in 1803-04 to the highest bidder on permanent settlement and 20 proprietary estates were formed by the sale of the Chicacole haveli. The village in question is situated in one of the zamindaris so formed named Jarjangi. The inam village was excluded from the permanent settlement of the Jarjangi estate. The proprietor of the estate was entitled only to get the kattubadi fixed on the village, the right of resumption of the inam being reserved by the Government. The Government subsequently

recognized the inam granted by Sitaramraz and settled the inam with the inamdars and granted a patta to them. The inam register, Ex. 16 does not show that the Government intended to exclude any portion of the inam which had been originally granted in 1767. Ex. 16 shows the mode in which the quit-rent payable for the village was fixed; the poramboke consisting of channels, tanks, village sites, pattis, burial ground, hills as well as jungle and pasture lands together amounting to 116 acres, was excluded from the total acreage of the village. The assessment was fixed on the cultivated dry and wet lands. Ex. 20, the inam patta of 1898, shows that the Government acknowledged the title of the inamdar to the whole village. It states: "I acknowledge your title to a personal inam consisting of the right to the Government revenue of land claimed to be 108'38 acres of dry, 218'53 of wet and 13 acres of garden land situated in the Jarjangi proprietary Shrotriem portion of the village of Lakkimdiddi of Chicacole, District of Ganjam." The words "besides poramboke" are inserted in the margin, the extent of this poramboke being as appears from Ex. 16, 116 acres.

The District Judge assumes that the original title-deeds must have also acknowledged the inamdar's title to the Shrotriem village said to consist of a certain extent of dry and wet land besides poramboke. This assumption is based on the form of grants issued in respect of whole village inams as appearing from the title-deeds granted by the Government for other villages produced on behalf of the plaintiff. It is unnecessary to consider whether this assumption was safely made. It is contended on behalf of the Government that the object of the inam title-deed was only to recognize the inamdar's title to the Government revenue or melvaram of the village and, in cases where the inam was enfranchised, to give up the Government's right of resumption, that as no melvaram was levied or payable on porambokes there could have been no intention to recognize the inamdar's title to any poramboke by the grant of the title-deed. We do not decide in this case that the mere insertion in the margin of the title-deed of the words "besides poramboke" must necessarily be

taken to be an acknowledgment by the Government of the inamdar's title to all kinds of poramboke. It was held in *Papala Narayansawami v. Pensalai Kanniappa* (3), by this Court that such is not the necessary effect of the insertion of those words. The question in that case related to the bed of a stream. The inam there was granted by the British Government in 1802 in lieu of certain lands held as emoluments of the office of Nattuvar which had been resumed by the Government. No boundaries were stated in the documents relating to the grants and no mention was made of the river or river-bed. The Court held that notwithstanding the insertion of words "besides poramboke" in the margin of the title-deed, the documents in the case showed that it was not intended to acknowledge the inamdar's title to the bed of the stream. In *Ambalavana Pandara v. Secretary of State* (4), it was held that a grant of a village "with all wells, tanks and waters within the boundaries" did not pass to the grantee any artificial water-course then existing which irrigated the village granted and other lands. There was no mention in the grant of the channel although the existence and importance of the channel as a separate entity were present to the mind of the grantor and although tanks and wells were separately mentioned.

It was held that the omission of channel was intentional and that from that circumstance it was clear that it could not have been the intention of Government to recognize the inamdar's title to the channel or its bed. The effect to be given to the insertion of the words "besides poramboke" must depend on the evidence available in each case and the circumstances attending the grant. In this case, it is extremely unlikely that when the whole of the village was granted in 1767 by Sitaramraz, it was not intended to convey to the grantee all the wastes and porambokes in the village. The British Government accepted that grant and recognized the inamdar's title under it. The channel was not one which passed through any Government property before it reached the village of Lakkimiddi. It is apparently not a large stream connected with

any system of irrigation maintained by Government and, as found by the former District Judge, the channel was not controlled by the Government to any appreciable extent. There was no intention on the part of Government at any time to derogate from the grant made in 1767. Both of the learned District Judges who dealt with the case proceeded on the footing that the channel and other poramboke in the village belonged to the inamdar. On the whole, we see no reason to dissent from that conclusion. It has, therefore, not been proved that the water irrigating the village belongs to Government. In the result we dismiss the appeal with costs. The memorandum of objections has not been argued and is also dismissed with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 489

MILLER AND SADASIVA IYER, JJ.

Ariyaputhira Padayachi and others—Appellants.

v.

Muthukumarasawmy Padayachi and others—Respondents.

Second Appeal No. 2044 of 1910, Decided on 2nd May 1912, from decree of Dist. Judge, South Arcot, in Appeal Suit No. 359 of 1909.

(a) **Transfer of Property Act (4 of 1882), Ss. 54 and 118—Price—Meaning not restricted to coin—Exchange of two things by fixing values is sale.**

The word "price" in S. 54 is not restricted to money or current coin, but it includes whatever the vendor accepts as tantamount to such price. [P 492 C 1]

If two persons mutually exchange two things and mutually fix the values of the exchanged things in current coin and exchange them as of equal value, they must be held to have effected sales and paid prices and not merely to have effected an exchange or barter. [P 492 C 1]

(b) **Transfer of Property Act (4 of 1882), Ss. 54 and 118—Transfer of land for money due is either sale or exchange—Purchase by mortgagee by relinquishing part of security and debt without registration is invalid—Mortgagee cannot claim adverse possession.**

A conveyance of land in consideration of moneys already due to the vendee by the vendor is either a "sale" under S. 54 or an "exchange" under S. 118: 13 M. L. J. 500, not Appr. and 4 I. C. 833, Ref. [P 492 C 1]

Where a usufructuary mortgagee gave up his right to possession in part of the land mortgaged and the mortgage money due to him, and in consideration thereof purchased orally the equity of redemption in another part of the land from the mortgagor:

(3) [1912] 1 M. W. N. 496=14 I. C. 291.

(4) 28 Mad. 539=15 M. L. J. 251.

Held: (1) that the transaction amounted to a sale under S. 54 and was invalid for want of registration; [P 493 C 1]

(2) that the mortgagee continued to remain in possession only as mortgagee after the said oral sale, and that the mortgagor was entitled to redeem the property within the statutory period;

(3) that the mortgagee could not assert a title by adverse possession as from the date of the oral sale. [P 493 C 1]

(c) **Limitation Act (9 of 1908), Arts. 144 and 148—Suit for redemption—Mortgagee cannot invoke Art. 144.**

Article 144 cannot be invoked by the mortgagee if the mortgagor was not barred by Art. 148 from redeeming and recovering possession of the mortgaged property: (*Case law referred*). [P 493 C 2]

(d) **Evidence Act, (1872) S. 92—Oral evidence.**

Oral evidence is not admissible to prove the discharge of the mortgage by an invalid oral sale: (*Case law referred*). [P 493 C 2]

T. Narasimha Iyengar—for Appellants.

C. V. Ananthakrishna Iyer and *C. Narasimhachariar*—for Respondents.

Miller, J.—I think the transaction alleged in this case to have taken place in 1892 may properly be held to be an exchange of property within the meaning of S. 118, T.P. Act, if it is not a sale. By it the mortgagee gave up his right to possession in part of the land mortgaged and the mortgage money due to him and received the equity of redemption in another part of the land. Even if this transaction was made by way of a compromise of disputes, it is not suggested that it amounted merely to an acknowledgment or adjustment of existing rights and the operations amounted, I think, to transfers of ownership in immovable property. The arrangement was therefore invalid for want of a registered instrument and could not affect the title.

It is however contended that it may be proved as showing the intention of the parties to discharge this mortgage at that time, and so, as showing change in the nature of the mortgagee's possession, after the date of the arrangement, so as to make it adverse to the mortgagor. The intention to discharge the mortgage involves the intention to make certain transfers and it is impossible to say that if those transfers failed, both parties nevertheless intended to discharge the mortgage. The mortgagor therefore had 60 years for his suit under Art. 148, Sch. 2, Lim. Act, and he has come within that time.

The appeal therefore fails and is dismissed with costs.

Sadasiva Iyer, J.—I entirely agree in the conclusion of my learned brother and in the reasons given by him for the said conclusion. But out of respect for the strenuous arguments advanced with great acuteness by the appellant's learned vakil, I have thought it not improper to pronounce a judgment in my own words.

The facts and pleadings necessary to understand the contentions on both sides are shorty as follows: Plaintiff sues for redemption of the plaint Sch. A lands alone, though both Schs. A and B lands were usufructually mortgaged in 1885 by a registered instrument for Rs. 380-8-0. The plaintiff's allegation is that the Sch. B. lands were redeemed in 1893 by a payment of Rs. 200 and hence only Sch. A land remained to be redeemed on payment of the balance of Rs. 180-8-0. The contesting defendants (who represent the original mortgagee) pleaded: (a) that the Sch. A properties were "orally sold" to the mortgagee in consideration of Rs. 1,600 due to the mortgagee under the mortgage document of 1885 and some other document (the written statement itself using the word "sold"), (b) that thus the mortgage document of 1885 was discharged and the mortgagee became full owner of the Sch. A properties by the oral sale, while the mortgagor got back the Sch. B property free of the mortgage charge; and (c) that as the mortgagee and his assignees have been enjoying the Sch. A lands as owners by adverse possession from 1892, for more than 12 years before suit, they have got a good title by prescription under Art. 144, Sch. 2, Lim. Act. The lower appellate Court held the mortgage contract created by the registered document of 1885 could not be rescinded by the alleged oral agreement or sale of 1892, and that under S. 92, Evidence Act, oral evidence was inadmissible to prove any such agreement. On this ground the lower appellate Court confirmed the Munsif's decree, allowing in plaintiff's favour the redemption of the Sch. A lands. Defendants 2, 3 and 4 are the special appellants before us.

The contentions of the appellants' learned vakil were as follows:—(a) The oral sale of 1893 in respect of the Sch. A

lands set up by the appellants does not come under the definition of "sale" or "exchange" in the Transfer of Property Act, it is a peculiar "transfer" of property not covered by the T. P. Act, S. 54, and such a transfer could be effected by oral agreement and does not require a registered instrument to effect it, though the consideration for such a transfer and the value of the transferred property (roughly) have been Rs. 1,600.

(b) Even if the oral sale of 1892 is invalid to transfer the title to the Sch. A properties to the mortgagee, it operated as a discharge of the mortgage debt of 1885 charged on both Schs. A and B properties. Hence the mortgagee's possession of the Sch. A properties ceased from 1892 to be the possession of a mortgagee and became the possession of a trespasser, more than 12 years' possession before suit as trespasser has conferred full title as owner on the mortgagee, and his assignees. (c) Oral evidence can be given, notwithstanding S. 92, Evidence Act, to prove that the allegation of the mortgagor to pay money under the mortgage has been discharged; such oral evidence need not be restricted to the evidence of the payment of money or its equivalent in moveables or choses in action or other personal property. Oral evidence can be given of an invalid sale, (invalid for want of a registered written instrument evidencing it), and such invalid sale could validly operate as a discharge of the mortgage deed though ineffectual to transfer title.

As regard contention (a): I think it very improbable that the Legislature, when enacting by the Transfer of Property Act that a registered instrument is indispensable in the case of a transfer of land by sale (S. 54), transfer of land by exchange (S. 118), transfer of land by gift (S. 123), transfer of interests in land by way of lease (S. 107), and transfer of interests in land by way of mortgage (S. 59), where the interests transferred in any of these modes is a substantial interest, could have intended to exclude any transfers by act of parties of an interest in immovable property of over Rs. 100 in value from the necessity of being evidenced by a registered instrument, or could have intended to allow such transfer to be effected by oral agreement or by other than a registered instrument. I have very little doubt

that all such transfers *inter vivos* were intended to be included in the one or other of the transactions coming under the heads of "sale" (Ch. 3), "mortgage" (Ch. 4), "lease" (Ch. 5), "exchange" (Ch. 6), and "gifts" (Ch. 7). Any "transfers" made in the way of creation of trusts were provided for in the Trusts Act, S. 5, which says: "No trust in relation to immovable property is valid unless declared by a non-testamentary instrument in writing registered." S. 9, Act 4 of 1882 allowing "transfer of property" without writing except where a writing is expressly required by law does not weaken to any appreciable degree the patent conclusion derivable from a study of the Transfer of Property Act as a whole that the legislature was very anxious that all important transfers of landed property and even transfers of choses in action (S. 130) and transfers of intangible rights (S. 54) should be evidenced by registered instruments so as to prevent litigants from letting in oral evidence as to alleged transfers about the truth or falsehood of which oral evidence it is almost impossible for Courts to come to a satisfactory conclusion in most cases.

(b) So far as transfers of land by conveyance (that is, excluding transfer by mortgages and leases) are concerned, I think that if they are not settlements or declarations of trusts, they were intended by the legislature to come within one of the headings "sale," "exchange" or "gift" in the Transfer of Property Act. "Sale" is defined in S. 54 as a transfer of ownership in exchange for a price paid or promised or partly paid and partly promised etc.

The appellants' *vakil* ingeniously argued that "price" means tangible money in current coin; it may be currency notes and does not mean any other valuable consideration. Thus, according to this contention, if I sell my land to another in satisfaction of Rs. 300 which I owe to him on a *pro-note*, the transaction is not a "sale" within the definition of the Transfer of Property Act, because I did not receive nor was I promised in future any current coin as "price." Of course in ordinary parlance, it is undoubtedly a "sale" and in this very case the appellants in their statements talked of the oral sale of 1893, in consideration of

moneys not paid or promised at time of sale, but of moneys due on prior debts. However I find in Bouveir's Law Dictionary that the word "price" signifies that "it consists in money to be paid down or at a future time; for, if it be anything else, it will no longer be a price nor the contract a sale but exchange or barter" and Shepherd, J., in his commentary on the Transfer of Property Act says "price" includes money. The startling result of this technical view is that many so-called sales of land, where the consideration is the satisfaction of old debts due to the vendee as creditor, are not "sales" at all under the Transfer of Property Act. Pushing the matter further, suppose the purchaser hands over Government promissory notes or a cheque on a Government bank or on the bank in which both parties have invested their money or currency notes instead of money, can it be said he does not pay "price" for his purchase? I do not think that such was the intention of the legislature by the mere use of the word "price" if the price is fixed in the conveyance in current coin. I think that the words "price paid" will cover cases where the vendor's claim for the receipt of the price is satisfied by giving him what he accepts as tantamount to such payment. For instance if he says in effect: "Here I owe you Rs. 300 under pro-note and you now owe me Rs. 300 as the price of the land I sell: Why should we go through the farce of your paying me Rs. 300 in current coin for the purchase money and my handing it back to you to repay your promissory note debt?" We shall take it that both processes have taken place. I think that in such a case, we must take it that the price was paid and the transaction is a sale through no coins were actually paid by the purchaser. If two persons mutually exchange two things (neither of which is money only) it may be an exchange or barter and not a sale. But if they mutually fix the values of the exchanged things in current coin and exchange them as of equal value, I think they might be held to effect "sales" and to pay prices and not merely to effect an exchange or barter.

Even if I am wrong in holding that a conveyance of land in consideration of the moneys already due to the vendee by the vendor does come under the defini-

tion of "sale" in S. 54, Act 4 of 1882, I think such transactions ought to be brought under the definition of exchange under S. 118, Act 4 of 1882, which makes all the provisions as to the mode of effecting transfer of land by sale, applicable to transfers of land by exchange also. "Exchange," according to the definition in S. 118, is a mutual transfer of ownership of things neither of which is money only. It seems to me that if a conveyance of land for a debt due by the vendor to the vendee is not a sale, it is clearly an exchange as the debtor-vendor transfers his ownership in land (which is not "money" and a fortiori not money only) while the vendee transfers the ownership in his chose in action (the debt due by the vendor) to the debtor-vendor so as to merge and extinguish the debt, the debtor and creditor becoming the same individual by the transfer of the debt to the debtor himself. Here also the chose in action so transferred in its turn is not money only. It is argued that the vendee creditor does not transfer his rights as creditor to the vendor debtor, but only treats the debt as discharged. This seems to be merely a play upon words, for the debt is relinquished in favour of the debtor, and the substance of the transaction is a transfer of the debt to the debtor. In fact, where a testator relinquishes by his will a debt in favour of the debtor, it is appropriately styled a gift by way of legacy of the debt to the debtor and where a mortgagee relinquishes his mortgage debt he frequently does it by executing a reconveyance of the mortgage interests created under the mortgage deed to the mortgagor.

If such transfers of land do not come under either the head of "sale" or "exchange," the extraordinary result would be that a conveyance of land worth even a lakh of rupees can be legally effected by oral agreement if the purchaser hands the money a few days before the oral conveyance and relinquishes his debt a few days afterwards as consideration for the oral conveyance. I refuse to believe that such a result could have ever been dreamt by the legislature. I have no doubt that all conveyances of ownership right in lands were intended to be brought under "sales" or "gifts" or "exchanges" and that a conveyance for a lakh of rupees due on a pro-note to the vendee

was not intended to be excluded from the necessity of being evidenced by a registered instrument.

Reliance is placed by the appellants' learned vakil on a case decided by this High Court but not reported in any authorized reports. It is found in *Thiruvengadachariar v. Ranganatha* (1), where it was held that when two brothers orally gave their lands to their sister in satisfaction of some claim of hers against them, the transaction was not a gift nor an exchange nor a sale under the Transfer of Property Act. With the greatest respect, I am clear in my mind that it was either a sale or a mutual "exchange" of two things neither of which was money only and I am therefore not prepared to follow this case. I know that where a compromise is not intended to create or effect merely a transfer of title but is only an acknowledgment of existing rights in lands, it is not a sale or exchange: see *Krishna Tanhaji v. Aba Shetti Patil* (2) and need not comply with the provisions of S. 54, Act 4 of 1882, in order to be treated as valid. But neither the present case nor that in *Thiruvengadachariar v. Ranganatha* (1) is such a case of compromise. I therefore, overrule the appellants' contention that a registered writing was not necessary to validate the alleged sale of 1892. I might here be permitted to express the wish that the British Indian legislature would pass an enactment making a registered writing indispensable for the validity of all settlements, partition, agreements and wills and authorities to adopt throughout British India, making very few exceptions in special cases (such as soldiers' and sailors' will). So that the flood of intricate and uncertain litigations on such questions might be brought within bounds, and the perjury in connexion with wills executed out of the Presidency towns and with partitions and adoptions might be put down to some extent.

The next contention of the appellants' vakil based on the Limitation Act is not sustainable, as, if the original mortgagee continued to hold possession as mortgagee, owing to the alleged sale of 1893 being invalid and ineffective to convey to him, the ownership in the equity of redemption in Sch. A proper-

ties, he cannot, by merely asserting possession as owner under the invalid sale convert his possession as mortgagee into possession as owner, even granting that the mortgagor knew and acquiesced in his assertion. The case in *Byari v. Puttanna* (3); *Ramunni v. Kerala Verma Valia Raja* (4); *Bhagvant Govind v. Kondi Mahadu* (5) and *Khairaj Mal v. Daim* (6), clearly lay down that Art. 144 cannot be invoked in favour of the mortgagee if the mortgagor is not barred by Art. 148 from redeeming and recovering possession of the mortgaged property.

The last contention about the inadmissibility of oral evidence to prove the alleged discharge of the mortgage of 1885 might be disposed of shortly. A mortgage might, even if created by a registered instrument, be proved to have been extinguished by letting in admissible evidence (including oral evidence) of payment of the mortgage amount or by letting in admissible evidence of any other transaction which operates as a mode of payment: see *Chamaru Shaha v. Sona Koer* (7). It has been similarly held in *Kattika Bapanamma v. Kattika Kristamma* (8), that while a subsequent oral agreement to modify the terms of a registered maintenance deed cannot be proved, the fact that in particular years the obligee was in possession of certain lands of the obligor and paid herself the maintenance amount out of the profits of the lands can be proved: see also *Karampulli Unni v. Thekku Vittil* (9) and *Goseti Subba Row v. Varigonda Narasimham* (10). Here the defendants do not seek to prove that by the payment of any money or by the receipt by the mortgagee of profits of other lands of the mortgagor, the claim of the mortgagee was paid up and thus the mortgage was extinguished, but they wished to prove an invalid oral conveyance (of which evidence is legally inadmissible) of the equity of redemption in a portion of the mortgaged property as having had the effect of the payment of the mortgage money. Oral evidence to prove a conveyance as equivalent to payment of money has not been

(3) [1891] 14 Mad. 38.

(4) [1892] 15 Mad. 166.

(5) [1890] 14 Bom. 279.

(6) [1905] 32 Cal. 296=32 I. A. 23 (P.C.).

(7) [1911] 11 I. C. 301.

(8) [1907] 30 Mad. 231=17 M. L. J. 30.

(9) [1903] 26 Mad. 195.

(10) [1904] 27 Mad. 368.

(1) [1908] 18 M. L. J. 503.

(2) [1909] 4 I. C. 833=34 Bom. 139.

allowed in any of the cases cited and could not be allowed. Receipt of mesne profits by possession of lands and receipt of moneys can be proved by oral evidence but not an oral sale of lands worth more than Rs. 100, nor can such oral sale be taken as equivalent to the payment of the value of the lands invalidly sold.

In the result the second appeal fails and is dismissed with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 494

SUNDARA AIYAR AND AYLING, JJ.

N. Ramakrishna Aiyar—Appellant.

v.

Seetharama Iyer—Respondent.

Second Appeal No. 1168 of 1910, Decided on 2nd May 1912, from decree of Dist. Judge, Trichinopoly, in Appeal Suit No. 256 of 1909.

Specific Relief Act (1 of 1877), S. 53—Injunction restraining interference with right of support—Proof of damage is not necessary—Easements Act (5 of 1882), S. 15.

In order to entitle a person to obtain an injunction restraining his neighbour from interfering with his right of support, it is not necessary to show actual damage: *Backhouse v. Bonami*, (1861) 9 H. L. C. 503 and *Corporation of Birmingham v. Allen*, (1877) 6 Ch. D. 284. Ref. [P 494 C 2]

*V. C. Seshachariar—*for Appellant.

*T. R. Vencatarama Sastri—*for Respondent.

Judgment.—In this case the plaintiff and defendant purchased adjacent houses. The wall between the two houses belongs to the defendant. The plaintiff has an upstairs shed in his house which is supported on one side by the defendant's parapet wall C D. The suit is, *inter alia*, to restrain the defendant from interfering with his right of support. Both the lower Courts have found that the plaintiff has been in enjoyment of the right of support for more than the period prescribed in S. 15, Easements Act. The plaintiff has been given a decree restraining the defendant from interfering with the plaintiff's right of support.

Two points have been argued in this second appeal. The first is that the shed is only a temporary one and not permanently attached to plaintiff's house and that no right of support can be claimed for such a structure. But this contention was not raised in the lower Court. The point of contest there was as to how

long the shed had been in existence and not the nature of the shed. It was not contended there that the shed should not be regarded as a permanent one from its very nature. *Maberly v. Dowson* (1), relied on for the appellant, is really of no use to him. In that case, which related to the right to light and air, it was found that the structure in question was only of a temporary nature. But here, as already pointed out, no such contention was raised. As a matter of fact, the shed seems to be of a permanent character with walls on three sides. It is however unnecessary to decide that point as it was not properly raised in the lower Courts.

The next contention is that as the defendant has not deprived the plaintiff of his support and as the plaintiff has sustained no damage by any act done by the defendant, the plaintiff has no cause of action and the decision in *Backhouse v. Bonami* (2) is relied on. That case related to interference with the natural right of support but not to disturbance of a right to support as an easement. The distinction between the two classes of cases is pointed out in *Backhouse v. Bonami* (2) by Lord Wensleydale at 513; see also Goddard on Easements, p. 401, Edn. 4. Moreover, it was held, in *Corporation of Birmingham v. Allen* (3), that actual damage is not necessary to entitle a person having the right to support to an injunction and the rule requiring damage was applicable only to an action for damages. The reason for holding that actual damage is necessary to sustain a suit for damages, where a natural right of support from the soil of an adjoining owner has been infringed, does not seem to be applicable where the disturbance is of a right by easement to superficial support.

The next question raised is whether the plaintiff is entitled to an injunction requiring the defendant to rebuild the cornice pulled down by him in F A. marked in the plan. The cornice was admittedly on the defendant's side and an appurtenance to his wall. The District Munsif disallowed the injunction on the ground that plaintiff failed to prove that any damage was caused to him. The

(1) 5 L.J. (o.s.) K.B. 261.

(2) [1861] 9 H.L.C. 513=34 L.J.Q.B. 151=7 Jur. (n.s.) 809=4 L.T. 754=9 W.R. 762.

(3) [1877] 6 Ch. D. 284=46 L.J. Ch. 679=37 L.T. 207=25 W.R. 810.

District Judge has not really reversed that finding. He merely says that "it is defendant's wall that is likely to suffer, but if it does, it will cause much harm to plaintiff's house and little to defendant's." It is admitted that there is no evidence on record that the wall is likely to suffer by the removal of the cornice. We set aside the District Judge's decree in so far as it modifies that of the Munsif and restore the Munsif's decree. The parties will bear their respective costs in this and in the lower appellate Court.

S.N./R.K.

Decree modified.

A. I. R. 1914 Madras 495

ABDUR RAHIM AND AYLING, JJ.

Thandan Valappil Easuf's son and another—Appellants.

v.

Kotuseri Valappil Koya's son and another—Respondents.

Second Appeals Nos. 1416 and 1639 of 1910, Decided on 30th April 1912, from decree of Sub-Judge, Palghat, in Appeal Suits Nos. 1030 of 1900 and 53 of 1910.

(a) **Mahomedan Law—Guardianship—De facto guardian—Alienations of minor's moveable or immovable property by de facto guardian for urgent necessity and beneficial to minor are valid.**

The de facto guardian of a minor can, under Mahomedan law, alienate the minor's property in cases of urgent and imperative necessity, whether the property be moveable or immovable. He can also do acts on behalf of the minor which, from their nature, must necessarily be beneficial to the minor. In other class of cases, there is no substantial difference between the power of such a person who has assumed the duties of guardian without lawful authority and of a legal guardian, though there are cases wherein the powers exercisable by a lawful guardian are not within the competence of other persons. [P 498 C 1, 2]

(b) **Mahomedan Law — Guardianship — Validity of alienations by de facto guardian without just cause depends on ratification by minor on attaining majority.**

According to the general principles of Mahomedan law, the sale of a minor's property by an unauthorized guardian, even if it was not made for a valid cause, i. e., for necessity, or under circumstances which would make the transaction purely advantageous to the minor, would, strictly speaking, be neither void nor voidable in the ordinary sense of the term. An alienation of the minor's property without any justifying cause is regarded as *maugut*, i. e., its validity will depend upon the minor accepting the transaction on attaining majority. It is not inoperative until it is avoided, nor is it invalid unless and until it is ratified. It is a transaction in a state of suspense. Its validity or invalidity is only determined by the

minor adopting or not adopting it after he has attained majority, though the effect of his decision will relate back to the date of the inception of the transaction. If he decides to adopt the transaction, it becomes valid from the inception, otherwise it will be treated as void and of no effect from the very commencement. [P 499 C 1, 2]

(c) **Mahomedan Law—Guardianship — Expenses for minor's sister's marriage or discharge of family debts are not just causes for alienation of minor's estate.**

A sale by a Mahomedan mother of her minor son's property to find money for the expenses of the minor's sister's marriage or for the discharge of family debts or for family purposes is not for a justifying cause according to Mahomedan law, and is therefore invalid: 16 Cal. 627, Dist.; (Case law referred.) [P 500 C 1, 2]

(d) **Mahomedan Law — Partition — Small shares directed by decree — Property can be sold.**

Where a decree directed the division of a shop into 54 shares, without making any provision for the sale of the shop in case such a division could not be conveniently effected:

Held: that it was competent to the Court to make the latter order at any time subsequently: 32 Bom. 103, Ref. [P 501 C 1]

T. R. Ramachandra Aiyar, T. R. Krishnaswami Aiyar and A. Nilakanta Aiyar—for Appellants.

C. V. Anathakrishna Aiyar—for Respondents.

Abdur Rahim, J.—In both these appeals one common question arises, whether the sale of a minor's property by his mother acting as de facto guardian is valid under the Mahomedan law, and, if so, under what conditions. In one case, Appeal No. 1416, the deed of sale alleges that the shop which was sold had been vacant as the municipality prohibited the selling of fish and flesh in that shop, that it was in a dilapidated condition and the mother of the minor, who is defendant 8, was unable to execute repairs. The sale proceeds, it is alleged, were applied to the discharge of certain debts contracted for the marriage of a sister of the minor and for other purposes. It was to meet the expenses of this marriage that money was required and the other facts mentioned apparently furnished the reason for selecting this particular property for sale. In Suit No. 4 of 1909, which has given rise to Second Appeal No. 1639 of 1910, the allegation in the plaint is that the minor's mother, who was managing the family affairs and maintained the children, utilized the money obtained by sale of certain mortgage rights belonging to

the minor for the discharge of proper family debts and for other family necessity. The Court of first instance and the appellate Court, relying on the authority of *Pathummabi v. Vittil Ummachabi* (1), *Durgozi Row v. Fakeer Sahib* (2) and *Abdul Khadar v. Chidambararam Chettiar* (3), have held in both the suits that the sales, even if the allegations as to the purpose be true, would not be binding on the minor in Mahomedan law.

The decisions of the Courts on the question how far the mother or other near relative of a minor, who is not a guardian of the minor according to Mahomedan law with respect to his property but has the custody and upbringing of the minor, is authorized to alienate the minor's property are more or less conflicting. There are two decisions of the Privy Council bearing on the question which must be noted first: one of these is reported as *Kali Dutt Jha v. Abdul Ali* (4). That was the case of a guardian, and, with respect to his power, their Lordships of the Judicial Committee approved of the statement of the law as contained in Macnaghten's Principles of Mahomedan law, Ch. 8, Cl. 14, but they upheld the transaction in question in that case on the ground that there was dispute as to the title of the minor to the property and therefore the rule laid down in Macnaghten did not apply, and also on the ground that the sale was for the benefit of the minor. In *Mata Din v. Sheikh Ahmad Ali* (5), the sale was effected by the minor's mother who had custody of the minor's person and was in possession of his property, in order to pay certain debts binding on the minor and their Lordships held that a person, by de facto guardianship, may assume important responsibilities towards the minor though he cannot clothe himself with legal power to deal with the estate. They declared the sale not binding although it was made for the payment of an ancestral debt as it was not made of necessity, nor was beneficial to the minor inasmuch as the facts of the case showed that the sale of the property was unnecessary. It is not clear what their Lordships' decision would

have been if the sale was made of necessity or was for the benefit of the minor.

Another question was raised before the Judicial Committee in that case, whether a sale under the circumstances found there would be void or voidable. Their Lordships refrained from deciding that question. It should also be noted that one of the members of the Committee, Mr. Syed Ameer Ali, observed with some emphasis during the argument that there was no warrant in the Mahomedan law for sale by the mother of her minor son's immovable property, even for necessity, but though much weight must, of course, be attached to this observation, it cannot be said that the decision of their Lordships was based on such broad and general grounds. In this Court it was held, in *Pathummabi v. Vittil Ummachabi* (1), that the principles of Hindu law relating to alienation by a Hindu widow are not applicable to alienations by the mother of a Mahomedan minor, although the sale for the purpose of paying ancestral debts by a co-heir in possession of all the effects of the deceased, if bona fide, would be binding on the other co-heirs. The principle of this ruling has been followed in *Durgozi Row v. Fakeer Sahib* (2) and *Abdul Khadar v. Chidambararam Chettiar* (3). In none of these cases was any definite opinion expressed on the general question, how far an alienation by a de facto guardian which is made for necessity or for the benefit of the minor is valid. Nor was this question decided in Second Appeal No. 1443 of 1907, an unreported judgment of Benson, J., and one of us. It was held in *Thattoli Kothilan Aliyumma v. Kunhammad* (6), that a guardian's powers in respect of the immovable property of the ward are very restricted in Mahomedan law and urgent necessity or clear benefit to the ward must be shown before an alienation by the guardian could be upheld. In laying down this proposition, the learned Judge followed the Privy Council ruling already mentioned *Kali Dutt Jha v. Abdul Ali* (4) and certain decisions of the Bombay and Calcutta High Courts.

In the Calcutta High Court the law seems to be in a somewhat uncertain state. The earlier decisions confined within very narrow limits the power of the de facto or de jure guardian in deal-

(1) [1903] 26 Mad. 734.

(2) [1907] 30 Mad. 197=17 M. L. J. 9.

(3) [1909] 3 I. C. 876=32 Mad. 276.

(4) [1889] 16 Cal. 627=17 I. A. 96.

(5) [1912] 13 I. C. 976=34 All. 213=15 O. C.

(6) [1910] 8 I. C. 1093=34 Mad. 527.

ing with a Mahomedan minor's property, while in more recent decisions this view has undergone considerable modification. In *Mt. Bukshun v. Mt. Doolhin* (7), a sale by a guardian of a minor's property was held not to be permitted by Mahomedan law except for urgent necessity. In *Bhutnath Dey v. Ahmed Hosain* (8), a mortgage by a person purporting to act as a guardian was held to be void as it was not shown that the money raised by the mortgage and utilized for paying arrears of rent could not have been raised otherwise than by mortgaging the minor's property. Similarly, in *Moyna Bibi v. Banku Bihar* (9), Rampini and Brett, JJ., set aside a sale by a de facto guardian because such a person has no authority to deal with the minor's estate, doubting whether even if the sale was for the manifest advantage of the minor it could be upheld under Mahomedan law. In *Mafazzal Hosain v. Basid Sheikh* (10) however Rampini and Woodroffe, JJ., decided that a sale for urgent necessity in order to pay the debts due by the deceased and for the maintenance of the minor was valid in Mahomedan law. Woodroffe, J., was inclined to place the validity of such a transaction also on grounds of justice, equity and good conscience inasmuch as it was not made out that it was prohibited by Mahomedan law. It should be noted that the learned Judges distinguished the decision in *Moyna Bibi v. Banku Bihar* (9), on the ground that in that case it was not shown that the transaction was for the benefit of the minor. Maclean, C. J., and Caspersz, J., in a case reported as *Ram Charan Sanyal v. Anukul Chandra Acharya* (11), followed the ruling of Rampini and Woodroffe, JJ., in the last-mentioned case and held that a sale by the mother as de facto guardian of her minor son is good and valid if it is found to have been made bona fide for the benefit of the minor. Referring to the case in *Moyna Bibi v. Banku Bihar* (9), they point out that the effect of that ruling is considerably modified by the ruling in *Mafazzal Hosain v. Basid Sheikh* (10).

In fact however they have laid down a broader proposition than what forms

the basis of Rampini and Woodroffe, JJ.'s judgment in *Mafazzal Hosain v. Basid Sheikh* (10), placing the ruling on general grounds of justice, equity and good conscience. But, with all deference to the learned Judges, there can be no doubt that the question must be determined in accordance with the provisions of Mahomedan law. Moreover, it is difficult to see how a man who chooses to buy a minor's property from a person who has no power to deal with it however bona fide his action may have been, can invoke any principles of justice and good conscience to support the transaction itself, though, no doubt, such considerations may be a good ground for the Court refusing to render any help to the minor when he seeks to recover the property except on the condition of his restituting whatever benefit he has derived from the transaction. The other principle indicated in the decision of Rampini and Woodroffe, JJ., and in other rulings, viz. that in Mahomedan law urgent necessity and benefit of the minor is a justifying cause of such a transaction, though the person who acted on behalf of the minor had no legal authority of a guardian, seems to be a more intelligible ground and requires careful consideration.

In the Allahabad High Court, in *Hasan Ali v. Mehdi Husain* (12), a sale by the mother was upheld on the ground that it was made for necessary purposes, namely the payment of ancestral debts and the charge of maintaining the minor. In *Hamir Singh v. Mt. Zakia* (13), a Full Bench of that Court held that a decree duly obtained against one heir, who is in possession of the entire estate of the deceased, is binding on the minor. In *Sitaram v. Amir Begam* (14), there are certain general observations of Mahmood, J., to the effect that the powers of alienation, such as those enjoyed by a Hindu widow, are not known to Mahomedan law, a Mahomedan widow being merely a co-heir with her children and has not the authority of a guardian with respect to their property: and Edge, C. J., in *Nizamuddin Shah v. Anandi Prasad* (15), set aside a mortgage executed by a Mahomedan minor's uncle, which was apparently not created for necessity on the

(7) [1869] 12 W. R. 387.

(8) [1885] 11 Cal. 417.

(9) [1902] 29 Cal. 413=9 C. W. N. 667.

(10) [1907] 34 Cal. 36=11 C. W. N. 71.

(11) [1907] 34 Cal. 65=11 C. W. N. 160.

(12) [1875-78] 1 All. 533.

(13) [1875-78] 1 All. 57.

(14) [1886] 8 All. 324.

(15) [1896] 18 All. 373.

ground that he had no power of alienation over the property.

Two decisions of the Bombay High Court were brought to our notice, reported as *Baba v. Shivappa* (16) and *Hurbai v. Hirajee Byramjee Shanja* (17). In the first case, a sale by the mother professing to act as guardian of her minor son, was set aside although it was made to discharge certain debts of the minor's deceased ancestor; and in the other case, a mortgage by the mother was declared not to be binding as it was made neither for absolute necessity nor for the benefit of the minor. Both the rulings enunciated the general principle that a mother, not a legal guardian, cannot bind the estate of the minor by any act of hers.

In this state of the rulings, it becomes necessary to examine the text-books on Mahomedan law to ascertain how a person who is not a legal guardian, but is in fact acting as guardian, is regarded in Mahomedan law.

We may take it that the powers of such a person cannot be greater than those of a guardian recognized by the law. The question is, whether they have any power at all to bind the minor's estate, or rather, in what circumstances, if any, dealings of a de facto guardian with the minor's estate will be upheld.

It seems to us to be quite clear from the authoritative pronouncement of Mahomedan jurists, as well as upon principles of Mahomedan jurisprudence, that while the general rule is that the dealings with such a person do not ipso facto bind the minor, the law recognizes certain exceptions to this rule. The exceptions are mainly based on the general principle of Mahomedan jurisprudence that necessity is a valid ground for relaxing a strict rule of law and the application of the principle, in cases where a minor has no legally appointed guardian, seems to be well recognized. The author of Hedaya (see Hamilton's Translation, Grady's edition), in laying down that a person who has the protection of an orphan may lawfully take possession of a gift made to the orphan in order to make the gift valid, observes: "Acts in regard to infant orphans are of three descriptions: (1) Acts of guardianship, such as contracting an infant in marriage, or selling or buying goods for him (here

we may point out that the proper translation of the word in the original, namely, * * * which is translated as "goods" should be animals for breeding purposes), a power which belongs solely to the walee or natural guardian whom the law has constituted the infant's substitute in those points. (2) Acts arising from the wants of an infant such as buying or selling for him on occasions of need.

Strictly speaking, the translation of the passage in the original Hedaya ought to be purchase of what the minor cannot do without and sale of it, or hiring a nurse for him for the like, which power belongs to the maintainer of the infant, whether he be the brother, uncle or (in the case of a foundling) the mooltakit or the mother, provided, she be maintainer of the infant; and as these are empowered with respect to such acts, the walee or natural guardian is also empowered, with respect to them in a still superior degree, nor is it requisite with respect to the guardian that the infant be in his immediate protection. (3) Acts which are purely advantageous to the minor, such as accepting presents or gifts and keeping them for him, a power which may be exercised either by a mooltakit, brother or uncle and also by the infant himself, provided he be possessed of discretion, the intention being only to open a door to the infant receiving benefactions of an advantageous nature to the infant, therefore he is empowered in regard to these acts, provided he be discreet, or any person under whose protection he may happen to be."

It should be observed that the sale and purchase, mentioned as belonging to the first category of enumerated transactions, which are stated to be within the power of a lawful guardian, but not of a person who is not such a guardian, but has in fact the custody of the minor, are in the nature of transactions entered into for purposes of profit. This text, however, be it also noted here, does not deal with the question, under what conditions such sales and purchases by the guardian will be binding on the minor. Stated in plain language, the law, according to the Hedaya, is this: a person who is in actual charge of the property and person of the minors is empowered to do acts which are of imperative necessity having regard to the wants of the infant and acts

(16) [1896] 20 Bom. 199.

(17) [1896] 20 Bom. 116.

which by their nature are necessarily advantageous to the infants; such acts are not confined to dealings with any particular form of property of the minor so far as it can be gathered from the language of the Hedaya and the other text-books which will be presently noticed and the very principle upon which the validity of such acts is based precludes the idea of any such limitation.

The rule enunciated by the Hedaya is accepted as good law by other jurists of the Hanafi School. Imam Zellai, in his well-known Commentary on Kanz, viz. Tabinul Haquors, Vol. 6, at p. 34, in the Chapter on Sales, also states the law in similar terms. He says that the power which the law allows to be exercised over a minor is of three kinds; (1) what must be advantageous to the minor, and such power exists in all who have charge of the minor, whether guardians or not; for example, the acceptance of a gift or alms, and such acts can be done by the infant himself if he is of the age of discretion; (2) what is absolutely injurious, such as divorcing the minor's wife or emancipating a slave: such authority is not recognized in anyone; (3) what is midway between the two, that is, what may be advantageous or hurtful to the minor, such as sale or hiring of property for the purpose of profit; such power is possessed only by the father, the grandfather and their executors, whether they have the actual custody of the minor or not, because their power to deal in this manner with the minor's property is by reason of their guardianship.

Therefore it is not a necessary condition of the exercise of such power by them that the minor should be in their actual custody. This is how it is stated in Alkafi: The hiring of a house belongs to the first category; and (4) giving the minor in marriage, this is a power possessed by all asha, or paternal kindred as it is usually translated, and also by zavilarham or distant kindred in the absence of paternal kindred. None others possess this power. In Majmaul Anhar, which is a commentary of Multakal Abhar, it is pointed out that according to Ashshafai and Malik, a *de facto* guardian can buy or sell for the minor only with the permission of the Judge; but the author does not doubt that the Hanafi law, which is the law governing the parties in this suit, is, as stated in the text

of Altagwa, in the same terms as in the Hedaya and Kanz. It is not necessary to refer to the Arabic text-books on this point, as there seems to be no difference of opinion so far as the Hanafi jurists are concerned and all the text-books repeat the statement of the law as cited above. The principle of the rule is also forcibly illustrated in the provisions of Mahomedan law regarding the powers of an executor in connexion with the question whether, where more than one executor have been appointed by the testator, one of them can act singly. The general rule is that one of the two joint executors cannot act alone. But an exception is recognized in such matters as are of urgent necessity and purely for the benefit of the estate. Thus, in the Hedaya (see Hamilton's Translation, Grady's edition, Vol. 4, Ch. 7, p. 699), the matters in which one of two executors can act singly are thus enumerated: payments of funeral charges or for purchasing victuals or cloths for an infant, the hiring of a nurse, the selling of goods of a perishable nature, preserving the property of the deceased. In all such matters, one of the joint executors is permitted to act alone on two grounds, urgent necessity or clear benefit and advantage to the estate.

We may also point out here that, according to the general principles of Mahomedan law, the sale of a minor's property by an unauthorized guardian, even if it was not made for a valid cause, i. e. of necessity, or in circumstances which would make the transaction purely advantageous to the minor, would, strictly speaking, be neither void nor voidable in the ordinary sense of the terms. An alienation of the minor's property without any justifying cause is regarded as *maugat* or dependent, that is to say, its validity will depend upon the minor accepting the transaction on attaining majority. It cannot be said to be inoperative until it is avoided nor can it be said to be invalid unless and until it is ratified. It is a transaction in a state of suspense; its validity or invalidity is only determined by the minor adopting or not adopting it after he has attained majority, though the effect of his decision will relate back to the date of inception of the transaction. If he decides to adopt the transaction, it becomes valid from the incep-

tion; otherwise it will be treated as void and of no effect from the very commencement. Some Hanafi jurists are inclined to classify such transactions under the head of Sa'ibs or legally correct transactions on the ground that the subject-matter dealt with being fit for the purpose and the parties to the transaction being majors, the contract is validly constituted and that is all that is required to make a transaction Sa'ib or legally correct, though it will not be operative until the minor on whose behalf the transaction was entered into notifies his assent on attaining majority. But the question as to the exact nomenclature applied to such a transaction in Mahomedan jurisprudence is of no substantial importance. All that we are concerned with is its legal effect: (see Baharurraiq, Vol. 6, p. 78). The law, as regards the effect of dealings with a minor's property by a de facto guardian otherwise than in a case of absolute necessity or clear advantage to the minor, is but a corollary of the general rule to sales by a person professing to deal with another's property, but without having legal authority to do so, i. e., by a ferooli as he is technically called; such sales generally are treated as malikuf or dependent. The subject is discussed in Hedaya, Vol. 6, Ch. 10, section of feroolea bea, or the sale of the property of another without his consent: Grady's Edition of Hamilton, p. 296, Baillie on the Muhammodan Law of Sale, pp. 218, 220, 221 and 241 Kazi Khan, Vol. 2, p. 172 (original) Talimulhaqu, Vol. 4, p. 44 (original), Radd-ul-muhtar original, Vol. 6, p. 110; Bahrurraiq (original) Vol. 5, pp. 75 and 76; Almajallah (original), p. 53; Fatwai Alamgiri original 2, Calcutta Edition, p. 235.

The result of the above discussion is, that according to Mahomedan jurists, in case of urgent and imperative necessity, such as those mentioned, the de facto guardian can alienate the property of the minor, no distinction being made between moveable and immoveable property. Also such a person can do acts on behalf of the minor which from their nature must necessarily be beneficial to the minor. In either class of cases, there seems to be no substantial difference between the power of such a person who has assumed

the duties of a guardian without lawful authority and of a legal guardian. But there are other powers which a lawful guardian can exercise which are not within the competence of other persons. It may be observed here that an act by which the wants of the minor are met, must, to that extent, be also advantageous to the minor, and that is apparently why some of the text-writers regard acts done of necessity in the same light, as acts which are purely for the benefit of the minor: (see Fathul Mubeen, Vol. 3, Chapter on Abomination, Section Sale, p. 410).

It should be pointed out that, in Macnaghten's Precedents of Muhammadan Law, it is stated in case 6, at p. 171, that a mother, who assumed the guardianship of her minor son, cannot exercise any right over the property of the minor. This, as a statement of the general rule, is undoubtedly correct, but leading authorities, as we have shown, recognize certain exceptions to this rule. The case cited by Macnaghten in which a mother sells a small portion of her minor son's property for resuming the estate and recovers judgment in a suit would seem to be a case of absolute necessity and pure advantage to the minor. Such a sale is, however, stated to be totally illegal and inadmissible. This would seem to be in conflict with the case in Ch. 7, p. 305, where it is laid down that, where the uncle of a minor jointly interested in the property sells both his own share and the share of the minor, such a sale may be valid under certain circumstances, such as when the minor's share is sold for double its value, or when there is no means of supporting him without recourse to sale of his property, or where the land is in danger of being lost, or with a view to save the minor's property from usurpation or where some similar emergency has arisen. At all events, according to the authoritative Hanafi jurists, there can be little doubt that the law is as we have stated it and the general trend of decisions of the Courts seems to be substantially to the same effect.

In the present case, the sales were clearly not of the character which would be upheld on the ground either of their being made of necessity or being by their nature necessarily beneficial to the minor. The sale, which is in question

in S. A. No. 1416, was really made to find money for the expenses of the minor's sister's marriage and neither this nor the grounds on which the sale, which is in dispute in S. A. No. 1639, was made, are justified, nor the discharge of family debts and other family purposes can be said to be justifying causes according to the rule of Mahomedan law.

In Appeal No. 1416 an objection was taken to the decree which directs the division of the shop into as many as 51 shares on the ground that it does not make any provision for the sale of the shop in case such a division cannot be conveniently effected. But the objection was not taken in the lower Court and we are not prepared to hold that such an order, if found to be necessary, cannot subsequently be made by the Court which passed the decree: see *Bai Hirakori v. Trikamdas* (18). In Appeal No. 1639 it was argued by the pleader for the applicant that the suit was barred on two grounds: firstly, even if the findings of the Court be accepted that Jamil Mohamad Rular, defendant 10, attained majority in January 1906, the suit which was instituted on 3rd January 1909 was time barred. We find that the verification of the plaint is dated 23rd December 1908, but the plaintiff did not apparently file the plaint until 4th January 1909.

If the Court re-opened after the Christmas vacation on 4th January 1909, the suit would be within time and if the objection now taken had been taken in the lower Courts, this apparently would have been the answer. The question not having been raised before the lower Courts, and being one involving an investigation of facts, cannot be entertained for the first time in second appeal. The second ground on which it is contended that the suit is barred is that, although defendant 10 could avail himself of three years' time after attainment of majority, the plaintiff, as his assignee, cannot be allowed such extension of time. This question again was not raised in the lower Courts and, in the circumstances which are stated in paras. 15 and 16 of the judgment of the District Munsif in Suit No. 248, we do not think we should allow the objection to be raised for the

first time here. The result is both the appeals are dismissed with costs.

Ayling, J.—I agree.

S.N./R.K.

Appeals dismissed.

A. I. R. 1914 Madras 501

SUNDARA AIYAR AND SADASIVA
AIYAR, JJ.

Bonda Chinnaya and another —Appellants.

v.

Pothala Achamma—Respondent.

Second Appeal No. 810 of 1911, Decided on 12th August 1912, from decree of Tempy. Sub-Judge, Vizagapatam, in Appeal Suit No. 534 of 1909.

Provincial Small Cause Courts Act (9 of 1887), Sch. 2, Art. 28—Art. 28 applies to claims by heirs—Suit for ornaments given to daughter and her husband, on their death, is one on termination of gift and hence cognizable.

Article 28 applies only to claims preferred on the ground of inheritance as heirs to the property of another.

A made certain presents to his daughter and his son-in-law on the occasion of their marriage.

After the death of the daughter and the son-in-law, A sued for the recovery of the presents on the ground that he was entitled to the presents made by him, when his daughter and son-in-law died.

Held: (1) that the claim was not on the basis of inheritance but on the ground that the right derived under the gift made on the occasion of the marriage determined on the death of the bridegroom and the bride.

(2) that the suit was a small cause suit and no second appeal would lie when the value was less than Rs. 500. [P 502 C 1]

P. Narayanamurthy — for Appellant.

V. Ramesam — for Respondent.

Judgment.—A preliminary objection is taken in this case that no second appeal lies against the decision of the Subordinate Judge as the suit is of a small cause nature and as the amount sought to be recovered by the plaintiff is less than Rs. 500. The learned vakil for the appellants contends that the cognizance of this suit by the Small Cause Court is barred by Art. 28, Sch. 2, Provincial Small Cause Courts Act. The question is whether this is a suit for the whole or for a share of the property of an intestate. If the plaintiff seeks to claim the property as heir of any person then apparently Art. 28, would apply. The maintainability of the second appeal therefore depends on the construction to be placed on the plaint. As we read the the plaint the suit is clearly not based on the plaintiff's right to inherit

but on her rights to the return of jewels presented by her. The claim is rather a curious one. The plaintiff alleges that the plaintiff made certain presents to her son-in-law on the occasion of the marriage of her daughter and the son-in-law. Both the son-in-law and the daughter died subsequently. The daughter died after her husband. Now the allegation in the plaint is that the plaintiff is entitled after the death of the pair according to the custom of the caste, to those (i. e., presents) presented by the plaintiff's family, and defendants are entitled to those presented by the defendants' family." What was sought to be proved was that after the death of the bride and bridegroom, the plaintiff was entitled to the return of the presents made to the bridegroom. It is not stated in the plaint that the plaintiff was the heir either of the bridegroom or the bride with respect to the property inherited by the latter from her husband. In the case of heirship, the property in question is taken from the person whose heir the plaintiff claims to be as his or her property. The claim is as we understand it not to inherit as the property of the bridegroom or of the bride, but to a return of what was presented, the basis of the action being that the right derived under the gift made on the occasion of the marriage determined on the death of the bridegroom and the bride, and the property returned to where it was before or rather to the parents of the bride. It is a case of the determination of the right granted and the revival of the original right of ownership, and not a case of inheritance from the person to whom the presents were given. Art. 28 is therefore not applicable and as no other article bars the cognizance of the suit by the Small Cause Court, it must be held to be of a small cause nature and the second appeal must be held to be incompetent. On this ground we dismiss the second appeal with costs.

S.N./R.K.

*Appeal dismissed.***A. I. R. 1914 Madras 502**SUNDARA AIYAR AND SADASIYA
AIYAR, JJ.*Secretary of State—Appellant.*

v.

Kalekhan and another—Respondents.

Second Appeal No. 2158 of 1910, Decided on 18th July 1912, from decree of Sub-Judge, Bellary, in Appeal Suit No. 164 of 1907.

Civil P. C. (5 of 1908), S. 80 — Notice is necessary even in suits for injunctions—Object is to give time to reflect—Where rule is general, Court cannot make exception—Civil P. C. (14 of 1882), S. 424.

Notice under S. 424, Civil P. C., 1882, is not confined only to suits for damages but also applies to suits for injunctions against the Secretary of State: 25 Cal. 239; 25 All. 187; 10 I. C. 639 and 15 I. C. 539, *Foll.* [P 504 C 1]

The words "in respect of any act purporting to be done by him" in S. 424, apply only to public officers and not to the Secretary of State for India in Council. [P 503 C 2]

The object of S. 424 was to give the Government time for reflection whenever a suit is threatened against it and this would apply whatever be the nature of the suit. Notice is therefore necessary in all suits of whatever description against the Secretary of State for India in Council. [P 504 C 1]

It would not be within the province of a Court of Justice to introduce an exception where the rule enacted by the legislature is universal in its terms. *Obiter dicta* in 10 I. C. 539 and 15 I. C. 539, *Diss. from.* [P 504 C 1]

Per *Sundara Aiyar, J. (Quaere)*—Whether punctuation can be taken note in construing a statute. [P 503 C 2]

"Secretary of State for India in Council" is merely a name under which the Government is to be sued and does not demonstrate an individual or a corporation. [P 503 C 2]

Per *Sadasiva Aiyar, J. (Quaere)*—Whether a suit against the public officer alone for an injunction can be brought without a notice.

The pronoun "him" in S. 424 relates only to "public officer" and does not extend to the Secretary of State in Council. [P 504 C 2]

Most of the suits against the Secretary of State for India in Council involve reliefs in the nature of an injunction and the legislature might have well put in an exception under the section itself, if it had intended to exclude from its operation cases of injunction or cases where irreparable injury would be caused if an injunction is not at once granted. [P 505 C 1]

It is not legitimate for the Courts to themselves graft on such exceptions to the section: *Flower v. The Low Leyton Local Board*, (1877) 5 Ch. D. 347, *Diss. from.* [P 505 C 1]

Such a course would be a fraud on the part of the judiciary against the powers of the legislature, which powers are practically omnipotent. [P 505 C 1]

Sundara Aiyar, J.—This second appeal must be disposed of on the objection taken by the defendant, the Secretary of State for India in Council, that the suit is not maintainable as no notice

of it was given as required by S. 424 of the old Code, corresponding to S. 80, Act 5 of 1908. The plaint states that the Board of Revenue passed an illegal order, that a certain sum of money, not due by the plaintiff to Government, should be collected from him and that "on account of the said order, the plaintiffs have lost peace of mind and are much troubled." The plaintiffs ask for a decree granting an injunction restraining defendant 1, that is, the Secretary of State for India in Council, from collecting the amount or any amount from the plaintiff.

The Subordinate Judge held that no notice was required under S. 424, Civil P. C., in such a case. The view he took was that the section applied only to suits for damages. This position is, in our opinion, entirely untenable. S. 424 enacted: "No suit shall be instituted against the Secretary of State for India in Council, or against a public officer in respect of an act purporting to be done by him in his official capacity, until the expiration of two months next after notice in writing has been, in the case of the Secretary of State for India in Council, delivered to, or left at the office of, the Secretary to the Local Government or the Collector of the District." The contention before us is that the section applies only when the suit is in respect of an "act purporting to be done" and thus, it is said, does not include a suit for an injunction but only one for damages arising from the act done. The case for the respondent has been argued with great fullness and ability by the learned vakil who has appeared for him, but he has been unable to persuade us that the view adopted in the decided cases, which is against him, is wrong. Two arguments have been urged on the meaning of the language of the section. It is contended that the words "in respect of any act purporting to be done by him" qualify both "the Secretary of State for India in Council" and "public officer." In the Government edition of the statute, there is a comma after the word "Council." The object of the comma evidently was to show that the phrase "purporting to be done" did not apply to "Secretary of State for India in Council." It is argued that punctuation cannot be taken note of in considering a statute. There is no doubt, authority in English

cases for this position but no Indian cases had been cited to us, and it may be permissible to express a doubt whether the considerations which induced Judges in England to lay down such a rule would be equally applicable in the construction of statutes in this country. The question however does not depend on the punctuation alone. Now the expression "Secretary of State for India in Council" is as urged by Mr. Krishna-samy Iyer himself for his own purpose, merely a name under which the Government is to be sued and does not denote either an individual or a Corporation: see *Kinloch v. Secretary of State for India in Council* (1). If that be so, to speak of an act being done by the Secretary of State for India in Council understood in that sense, seems to involve some straining of language although it is pointed out that in *Secretary of State for India in Council v. Rajlucki Debi* (2), Maclean, C. J., was of opinion that an act done by a public officer, who is subject to the authority of the Secretary of State for India in Council, could be imputed to the latter. We may also note that the Secretary of State for India in Council has no other than any official capacity, assuming that he has any capacity at all, and that the expression is not a mere name. This makes it unlikely that any distinction was intended to be made between the acts of Secretary of State for India in Council in his official capacity and other acts of his. On all these grounds, we entertain no doubt that the phrase "purporting to be done" was intended to apply to only public officers.

Another argument of the respondent is that the section applies only to suits arising out of acts done by public officers, whether they be against the Secretary of State for India in Council or against a public officer; in other words he contends that the section should be read thus: "No suit shall be instituted in respect of an act purporting to be done by a public officer in his official capacity either against the Secretary of State for India in Council or against the public officer." But if this were the meaning, we think more appropriate language would be used to indicate it. The res-

(1) [1880] 15 Ch. D. 1=49 L. J. Ch. 571 = 42 L. T. 667=28 W. R. 219.

(2) [1898] 25 Cal. 239.

pendent's construction requires in effect the omission of the comma after the word "Council" and the insertion of one after the word "officer." Besides, there is reason to believe that the object of the statute was to give the Government time for reflection whenever a suit is threatened against it and this would apply whatever be the nature of the suit. No authority has been cited in support of this contention. *Secretary of State v. Rajlucki Debi* (2), *Bachchu Singh v. Secretary of State* (3), *Secretary of State v. Gajanan Krishna Mavlankar* (4) and *Sakharam Bhagwan Patil v. Secretary of State* (5) are all in favour of the construction contended for by the appellant that notice is necessary in all suits of whatever description against the Secretary of State for India in Council, and we agree with the opinion expressed in those judgments.

It is then contended that the section should not be applicable to suits for injunction restraining the Secretary of State for India from doing a certain act. If the construction we have adopted of the language be correct, then there is no room for excepting any class of suits from the operation of the section and we doubt whether it would be within the province of a Court of justice to introduce an exception where the rule enacted by the legislature is universal in its terms. The observations of Chandavarkar, J., in *Secretary of State v. Gajanan Krishna Mavlankar* (4) and *Sakharam Bhagwan Patil v. Secretary of State* (5) are no doubt calculated to show that the learned Judge was of opinion that where, in consequence of an immediate injury threatened by the Secretary of State for India in Council, it would not be humanly possible for the plaintiff to give the prescribed two months' notice of action, the section should not be held to apply. It is not necessary to say whether even this narrow exception can be made in accordance with the language of the section. In the present case, it is not alleged that any very immediate injury of a serious character was threatened. Revenue officers of Government would, no doubt, have power to arrest the plaintiff for the debt alleged to be due to the Government,

but it is not stated that any immediate arrest was threatened. On the other hand, the suit itself was not instituted until after the expiration of more than two months from the date on which the cause of action is alleged to have arisen. There is therefore no room for any contention that it was not possible to give two months' notice before the suit was launched.

The result is that the suit must be held to be not maintainable on the ground that no notice was given of it as required by S. 424, Civil P. C. The decree of the lower appellate Court must be set aside and that of the District Munsif restored with costs here and in the lower appellate Court.

Sadasiva Aiyar, J.—I do not think I could usefully add any observation of my own as regards the construction of S. 424 of the old Civil P. C., and I agree with what my learned brother has just now said and also with what Chandavarkar, J., has said in the case in *Secretary of State v. Gajanan Krishna Mavlankar* (4) and *Sakharam Bhagwan Patil v. Secretary of State* (5) on this point. So far as the word "him" in the old S. 424, is concerned, the matter has been made very clear by the amended Act, in which S. 80 has substituted the word "such public officer" for the word "him." I do not think the legislature intended to make any alteration in the law but, only to approve those cases decided under the old Code which confine the grammatical relation of the pronoun "him" to "public officer" and do not extend it to "the Secretary of State in Council."

Then, as regards the question of hardship, if a suit against the public officer alone for an injunction could be brought without notice—a position on which I reserve my opinion—the fact that the plaintiff is prohibited from bringing a suit against the Secretary of State for India in Council without due notice cannot cause irreparable injury to plaintiff, for he could sue the public officer alone for his threatened act and obtain a temporary injunction and this will effectually prevent the threatened injury.

As regards suits against the Secretary of State for India in Council, large classes of such suits involve questions as to the legality of the acts done by Sub-

(3) [1903] 25 All. 187=(1903) A. W. N. 13.

(4) [1911] 10 I. C. 639=35 Bom. 362.

(5) [1912] 15 I. C. 539.

ordinate public officers in respect of acquisitions of land under the Land Acquisition Act, recovery of arrears of all kinds of revenue, of prevention and removal of encroachments and of the performance of similar public duties and most of them do involve reliefs in the nature of an injunction. The legislature must be deemed to have been aware of the patent consideration and if they had intended to exclude suits against the Secretary of State for India claiming the relief of injunction from the necessity of notice, they would have put in an exception under the section itself stating that in cases of injunction or in cases where irreparable injury is likely to be caused if an injunction is not at once granted, the notice required by the first part of the section was unnecessary. I do not think that it is legitimate for the Courts to themselves graft on such exceptions to the section.

As regards the English case in *Flower v. The Low Leyton Local Board* (6), in which it was held that in a suit for an injunction against a threatened injury, no notice need be given under the Public Health Act of 1875 before the suit is brought against the local authority, I respectfully dissent from the case and also from the obiter dicta of Chandavarkar, J., in the two cases in *Secretary of State v. Gajanan Krishna Marlinkar* (4) and *Sikharam Bhagwan Patil v. Secretary of State* (5), that a similar though more restricted exception could be grafted on to S. 424 by the decisions of Courts. If I do not put it too strongly, I would say that such a course would be a fraud on the part of the judiciary against the powers of the legislature, which powers, as my learned brother remarked in the course of the arguments in the case, are practically omnipotent. It will also lead to this anomaly that where a plaintiff pays up a demand due to Government loyally and out of respect to revenue authorities (but under protest) and then sues to recover the money so paid by him, he ought to give two months' notice, but if he rushes to Court for an injunction against the Secretary of State acting through the revenue officer, who is given statutory powers to recover the money, he need not give such notice at

all. I do not think that that could have been the intention of the legislature. I might also add that if we give room for even a single exception of that kind, the ingenuity of litigants and of their legal advisers will be found to be quite equal to convert almost all suits against the Secretary of State into suits involving the relief for an injunction.

I, therefore, agree that the lower Court's decree should be reversed and that the suit ought to be dismissed with costs.

S.N./R.K.

Decree reversed.

A. I. R. 1914 Madras 505

SUNDARA AIYAR AND SADASIWA
AIYAR, JJ.

Band Veeramma—Plaintiff — Appellant.

v.

Gangala Chinna Reddi and others—
Defendants—Respondents.

Second Appeal No. 32 of 1911, Decided on 30th July 1912, against decree of Dist. Judge, Cuddapah, in Appeal Suit No. 127 of 1909.

(a) Evidence Act (1 of 1872), Ss. 107 and 108 lay down procedure of proof—No presumption raised as to how long man lived and when died.

Sections 107 and 108, Evidence Act both deal with the procedure to be followed when a question is raised before a Court as to whether a person is alive or dead. These sections do not lay down any presumption as to how long a man was alive or at what time he died: 5 I. C. 709 and 11 I. C. 474, *Foll.* [P 506 C 1]

(b) Adverse Possession—Tacking of—Trespasser cannot tack on possession of another if no heir of that another.

In order to succeed on the basis of a prescriptive title, the claimant, who is found to have no title, cannot rely on the possession of another if he did not enter on possession as his heir. [P 506 C 2]

P. R. Ganapathy Aiyar—for Appellant.

S. Gopalswami Aiyangar—for Respondents.

Judgment.—This is a suit for possession of a house site. The plaintiff stated in her plaint that the house was purchased by her elders, that her husband left the place and went away to foreign places, that she and her father-in-law lived in it subsequently for five or six years, that the father-in-law then died, that she then continued to live in the house for some time till it fell down, that she then went to live with her brother in another village and that when

(6) [1877] 5 Ch. D 347=46 L. J. C. H. 621=36 L. T. 760=95 W. R. 545.

she returned to the village in 1908, she found that the defendants had trespassed on it.

The defendants put the plaintiff to the proof of her title and possession. The case that the plaintiff attempted to make out at the hearing was that she succeeded to the house as the heir of her husband. No positive evidence was adduced to show that her husband survived her father-in-law. She could not succeed unless the Court found that she did so. It is argued by the learned vakil for the appellant that the appellate Court was bound to presume that her husband lived for a period of seven years after he left the village and that, as the father-in-law died before the expiration of the seven years, the husband must be taken to have survived him. Reliance is placed on the combined effect of Ss. 107 and 108, Evidence Act. The former section states that, if a person is proved to have lived within a period of 30 years and the question is whether he is alive or dead, the onus is on the party who asserts that he is dead. This is qualified by S. 108, which lays down that when it is proved that a person has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is on the person who affirms it. It is argued that, inasmuch as under S. 107, it is enough to prove that a man was alive within 30 years to throw the onus of proving his death on the party who asserts it, there is a presumption that he lived during the 30 years, and that S. 108 modified it only where it is proved that the person was not heard of for seven years. We are unable to agree with the appellant's vakil as to the meaning to be put on S. 107. Both S. 107 and S. 108 deal with the procedure to be followed when a question is raised before a Court as to whether a person is alive or dead. Neither of these sections, in our opinion, lays down any presumption as to how long a man was alive or at what time he died. The contention for the appellant is not supported by any Indian authority cited before us. On the other hand, the view we take is supported by the pronouncement of the Calcutta High Court in *Mt. Narki v. Mt. Phekia* (1) and of the Allahabad High Court in a recent Full Bench decision in *Mohamed Sharif*

(1) [1910] 5 I. C. 709=37 Cal. 103.

v. Bande Ali (2). A passage from Lawson on Presumptive Evidence has been read to us, which goes to show that in America there is a presumption that a man was alive until the expiration of the period of seven years from the time that he was last heard of. That, in our opinion, is not the Indian law.

Then it is argued that there is at least a presumption of fact that the husband was alive for seven years after he was heard of. Assuming that a Court may make presumption that a man was alive during some period after he was heard of, it would depend entirely on the circumstances whether the Court would make such presumption or not. We are unable to say that, on the facts placed before us, the Court should have inferred as a presumption of fact that plaintiff's husband was alive when his father died, even if we would be justified in interfering in second appeal on the ground that a presumption of fact has not been made. We are therefore unable to interfere with the finding on the question of title.

Then it is contended that the finding on the question of plaintiff's possession cannot legally be upheld. The finding, perhaps is not quite satisfactory. But the plaintiff's own case was that, though she lived in the house for some time after her father-in-law died, she left it as the house fell down 20 years before suit. It is not shown how her possession could be taken to continue during the period of her absence. Nor is it shown that she had acquired a title by prescription before she left the place. We cannot agree that the plaintiff would be entitled to tack her own possession on to that of her father-in-law. A person who has been found to have no title cannot rely on the possession of another, if he did not enter on possession as his heir. Here the plaintiff's case was that she entered on possession as heir of her husband, not of her father-in-law. On the whole, we do not think that we would be justified in interfering in this case in second appeal. We therefore dismiss it with costs.

S.N./R.K.

Appeal dismissed.

(2) [1911] 11 I. C. 474=34 All. 36.

A. I. R. 1914 Madras 507SUNDARA AIYAR AND SADASIVA
AIYAR, JJ.*Villuri Adinarayana* — Plaintiff—Appellant.

v.

Polimera Ramudu and others—Defendants—Respondents.

Second Appeal No. 931 of 1911, Decided on 19th November 1912, from decree of Dist. Judge, Vizagapatam, in Appeal Suit No. 20 of 1910.

Easements Act (5 of 1882), S. 7—Channel water though passing over whole area of defendant's field and gathering into another channel is not surface water and cannot be obstructed—Well-defined existence arising from ascertained course is test of channel water—Whether it is surface water is question of fact.

Where water flowed through a definite channel across the lands of A up to B's lands and then spread itself all along the field of B and overflowed its bunds and joined another channel which irrigated C's land.

Held: that the water as it flowed from B's land could not be regarded as surface water and C was entitled to the customary flow of the channel water along B's lands and A and B had no right to obstruct the same. [P 511 C 1, 2]

Although no claim can be made either as a natural right or as an easement by prescription except to water flowing in a definite course and no claim can be maintained with regard to surface water or surface drainage, yet it does not follow that the right to the water of a stream ceases when it ceases to flow in a confined water-course. [P 508 C 1, 2]

Water flowing into a field from a known channel and passing along the field onwards into another field, though not over a confined tract in the former field but along its whole area, is not surface water. [P 511 C 2]

In each case the question whether or not particular water is surface water is one of fact to be determined by the circumstances attending its origin and its continued existence. If the water is spread out and flows sluggishly over the surface, losing itself by percolation and evaporation, it is surface water although it has its source in springs. [P 511 C 1]

But the mere fact that the water spreads out at some places and flows sluggishly without sufficient force to form a channel for itself, does not make it surface water if the flow has sufficient force to maintain itself and it is subsequently gathered together into a channel so as to form a water-course. The chief characteristic of surface water is its inability to maintain its identity and existence as a water body. [P 511 C 1]

Well-defined existence arising from an ascertained course appears to be the real test in coming to a conclusion against any body of water being regarded as merely surface water. [P 511 C 1]

B. Narasimhaswara Sarma—for Appellant.*K.V.L. Narasimham* and *V. Ramesam*—for Respondents.**Judgment.**—In this case, the plaintiff asked for a declaration of his right to take water through a channel for the cultivation of certain land belonging to him and for an injunction restraining the defendants from obstructing the course of the channel. The lands both of the plaintiff, and defendants are situated in a proprietary estate. According to the plaintiff a river channel supplied the means of irrigation for the lands of the parties and other ryots, who had lands alongside the stream. A branch leading from the main channel passed through the lands of defendants 1, 2 and 3 and then defendant 4's land and, according to the plaintiff, afterwards reached his own land. Defendants 1, 2 and 3 are alleged to have blocked up the channel at a point higher than defendant 4's land. They contended that the channel never irrigated the lands either of defendant 4 or of the plaintiff, and that it stopped somewhere near their own lands. Defendant 4 did not contest the suit.

The facts found by the lower appellate Court, as we understand the judgment of the District Judge, are: that the channel in question continued, as a definite water-course, up to defendant 4's lands, and that the water of the channel flowed over the bunds of defendant 4's fields and joined another channel which irrigated the plaintiff's lands.

The District Munsif held that the plaintiff was entitled to the flow of the channel water along defendant 4's lands to the channel which was the direct source of irrigation for his land, and that the contesting defendants were not entitled to interfere with the flow. On appeal, the District Judge held that, as the water of the stream did not flow direct to the plaintiff's land in any defined course, it must be taken that it was not intended to supply water to the plaintiff's land. He regarded the water as it flowed from defendant 4's land over his bunds as mere surface drainage and was of opinion that the plaintiff could not claim any legal right to it. He, consequently, dismissed the plaintiff's suit.

The question argued in second appeal is, whether the plaintiff is not entitled to the customary flow of the water of the stream A-I along defendant 4's field until it joined the channel which supplied water to his own field. There was, according to the finding of the appellate

Court, no definite water-course across defendant 4's field, the water-course ceasing to have any definite bed and banks after it reached defendant 4's field. We must also take it, on the findings, that the water in the stream was not always sufficient to irrigate the lands of defendant 4 or to supply a flow to the plaintiff's channel. But this we regard as immaterial; such is the case with many streams and channels in this country. It is also immaterial that the water of the stream flowing through defendant 4's land did not reach the plaintiff's land direct but joined another channel out of which the plaintiff got his water. If the water of the stream supplied a means of irrigation to the plaintiff, it is immaterial whether it did so by directly reaching the plaintiff's land or indirectly by flowing into another channel.

The substantial question for decision is whether the fact that there was no defined channel across defendant 4's field but that the stream spread itself all along the field and overflowed the bunds to reach the plaintiff's channel, puts the plaintiff out of Court. The question is one of considerable importance in this country. It was stated by the learned vakil for the appellant, and we believe with good reason, that irrigation channels do not always go direct to every field irrigated by them and that the water often flows from one field to another, either through cuts made in the bund of the field or by overflowing the bund. And he submitted that it would be disastrous if it should be held that the owners of fields on the further side of channels could not support their right to the waters of the channels in the absence of a confined passage along each field irrigated by them.

The respondent's pleader contended, on the other hand, that no claim can be made by anyone to a flow of water except to water flowing in a definite channel, and that all water, which disperses itself over a field without a definite water-course, must be regarded as drainage and surface water, which the owner of the field over which it passes is entitled to appropriate or divert as he pleases.

After full consideration, we are of opinion that the respondent's contention should not be sustained. It is, no doubt, true that no claim can be made, either as

a natural right or as an easement by prescription, except to water flowing in a definite course and that no such claim could be maintained with regard to what should be regarded as surface water or surface drainage in the proper acceptance of those expressions. But if this principle be understood correctly, it cannot, in our opinion, be held that the right to the water of a stream ceases when it ceases to flow in a confined water-course. If the stream has exhausted itself as a stream and merely soaks into a field, then, no doubt, no right to the water so soaking can be sustained in the same manner, as no right can be recognized to water falling on a field from the sky overhead or oozing from the soil underneath. Water of any of these descriptions cannot be the subject of any right until it again begins to flow in a definite course. The reason why no right to such water can be recognized is explained in various decided cases. In *Acton v. Blundell* (1), the question arose with regard to water flowing in a subterraneous course and supplying a valley, which was drained away by a landowner, who carried on mining operations in his own land in the usual manner. Tindall, C.J., explaining the ground and origin of the law which is held to govern running streams, observed as follows:

"The ground and origin of the law which governs streams running in their natural course would seem to be this, that the right enjoyed by the several proprietors of the lands over which they flow is, and always has been, public and notorious; that the enjoyment has been long continued—in ordinary cases, indeed, time out of mind—and uninterrupted; each man knowing what he receives and what has always been received from the higher lands, and what he transmits and what has always been transmitted to the lower." The right to use such water the learned Judge regards, as stated by Story, J., in *Tyler v. Wilkinson* (2), to be 'an incident to the land.' He continues: "But in the case of a well sunk by a proprietor in his own land, the water which feeds it from a neighbouring soil does not flow openly in the sight of the neighbouring proprietor, but through the hidden veins of the earth beneath its

(1) [1884] 12 M. & W. 324=13 L. J. Ex. 289=67 R. R. 361.

(2) 4 Mason's (American) Reports 401.

surface : no man can tell what changes these underground sources have undergone in the progress of time : it may well be, that it is only yesterday's date, that they first took the course and direction which enable them to supply the well : again, no proprietor knows what portion of water is taken from beneath his own soil ; how much he gives originally, or how much he transmits only, or how much he receives : on the contrary, until the well is sunk, and the water collected by draining into it, there cannot properly be said, with reference to the well, to be any flow of water at all." In addition to the uncertainty and changes in the supply, his Lordship refers to two other reasons why no right to any such water should be recognized, namely, that every man, by virtue of his ownership, is entitled to abstract everything he can from his own land, and secondly, he is entitled to make the best use of his land for his own benefit. He observes : "In the case of the running stream, the owner of the soil merely transmits the water over its surface : he receives as much from his higher neighbour as he sends down to his neighbour below : he is, neither better nor worse; the level of the water remains the same. But if the man who sinks the well in his own land, can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbour from making any use of the spring in his own soil which shall interfere with the enjoyment of the well. He has the power, still further, of debarring the owner of the land in which the spring is first found, or through which it is transmitted, from draining his land for the proper cultivation of the soil ; and thus, by an act which is voluntary on his part, and which may be entirely unsuspected by his neighbour, he may impose on such neighbour the necessity of bearing a heavy expense, if the latter has erected machinery for the purposes of mining, and discovers, when too late, that the appropriation of the water has already been made."

In *Rawstron v. Taylor* (3), the reasons why no right could be obtained over surface water were pointed out. The judgments of the Court throw light also on what should really be regarded as surface

water. Parke, B., said : "This is the case of common surface water rising out of springy or boggy ground, and flowing in no definite channel, although contributing to the supply of the plaintiff's mill. This water, having no defined course and its supply being merely casual, the defendant is entitled to get rid of it in any way he pleases." Martin, B., emphasized the right of every landowner to enjoy his land as he chooses. He said : "The proprietor of the soil has *prima facie* the right to drain his land. He is at liberty to get rid of the surface water in any manner that may appear most convenient to him ; and I think no one has a right to interfere with him, and that the object he may have in so doing is quite immaterial." Pratt, B., observed : "The plaintiff could not insist upon the defendant maintaining his fields as a mere water-table." In *Broadbent v. Ramsbotham* (4), which also related to surface water, the grounds of decision were the same. The plaintiff claimed four sources of water which he said supplied the Longwood Brook on which his mill was situated. One of the sources was a swamp of 16 perches. Alderson, B., observed that it was merely like a sponge fixed (so to speak) on the side of the hill and full of water. "If this overflows, it creates a sort of marshy margin adjoining; and there is apparently no course of water, either into or out of it, on the surface of the land. As to the subterranean courses communicating with this swamp, which must, no doubt, exist, it is sufficient to say that they are not traceable, so as to show that the water passing along them ever reaches Longwood Brook." It will be observed that the learned Judge considered it material that there was no course of water into the swamp.

The judgment of Lord Hatherley, L. C., in *Grand Junction Canal Co. v. Shugar* (5), is also important as throwing light on the nature of surface water. He observed referring to *Chasemore v. Richards* (6): "Wightman, J., there laid down the law very plainly in giving the opinion

(4) [1856] 11 Ex. 602=25 L. J. Ex. 115=4 W. R. 290=26 L. T. (o.s.) 244=105 R. R. 673.

(5) [1871] 6 Ch. Ap. 483=24 L. T. 402=19 W. R. 569.

(6) [1859] 7 H. L. C. 349=29 L. J. Ex. 81=5 Jur. (n. s.) 573=7 W. R. 685=115 R. R. 187.

(3) [1856] 11 Exch. 369=25 L. J. Ex. 33=105 R. R. 567.

of the Judges upon the subject, and the distinction was there drawn - and, I should have thought, firmly established—between water which comes no one knows exactly whence, and flows no one knows exactly how, either underground or on the surface, unconfined in any channel, either as rainfall or from springs of the earth, which may vary from day to day, or spring up from beneath the surface in a direction which no one knows—between that species of water and water once confined in a regular channel.” His Lordship’s description is quite inapplicable to water flowing into a field from a known channel and passing along the field onwards into another field, though not over a confined tract in the former field but along its whole area.

We may refer also to the observations of Lord Watson in *McNab v. Robertson* (7). “Water, whether falling from the sky or escaping from a spring, which does not flow onward with any continuity of parts, but becomes dissipated in the earth’s strata, and simply percolates through or along those strata, until it issues from them at a lower level, through dislocation of the strata or otherwise, cannot with any propriety be described as a stream.” It is impossible to apply this description to the water of a stream flowing into it and afterwards passing out of it after irrigating it, though without making a cutting for itself, over any particular portion of the field. The true test of the existence of a common right is explained in Angell on Water-courses, S. 108 (o), p. 137. The learned author says: “It is to be observed that it is only when the flow of water on one person’s land is identified with that on his neighbour’s by being traceable to it along a distinct and defined course, that the two proprietors can have natural relations with each other in respect of it, considered as the subject of separate existence. If the waters on the two lands do not possess this unity of character, they are in the same category as fish and birds, etc., and are only incident to, and form part of, the produce of their respective soils, while actually resting upon them; no proprietor can make claim to water in such condition before it arrives within his own borders. Nor can any proprietor

claim that another shall receive it within his borders or that he shall not take appropriate measures upon his own land and in the reasonable use thereof to prevent its collecting upon his soil.”

The next section illustrates the real character of surface water. “Thus water rising naturally, making land spongy and wet, and squandering itself over the surface, has no public character whatever, although it ultimately finds its way to and feeds a stream; and therefore before it arrives at any defined natural channel, it belongs solely to the owner of the land which it covers, and he may deal with it exactly as he thinks fit, while he is making a reasonable use of his own land. Such, also, is the case with water which percolates through the porous basin of a pond or overflows the edge of a well, or which passes or runs off the surface of the soil, before, in either instance, it makes itself some natural channel. And clearly, water severed from all other water, as in a pond or tank, and resting solely on the proprietor’s own ground must be in a similar plight.” When the flow of water on one person’s land can be identified with that on another, there is no reason why a right to such flow should not exist although the water may flow along an intervening piece of land. “A mere right of drainage over the general surface of land is very different from the right to the flow of a stream or brook across the premises of another.” Farnham in his “Law of Waters and Water-courses” Vol. III, p. 2556, observes: “When water appears upon the surface in a diffused state, with no permanent source of supply or regular course, and then disappears by percolation or evaporation, its flow is valuable to no one, and it must be regarded as surface water, and dealt with as such. In *Crawford v. Rambo* (8), it is said that surface water is that which is diffused over the surface of the ground, derived from falling rains and melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to, and does, flow with other waters, whether derived from the surface or springs; and then it becomes the running water of a stream, and ceases to be surface water.

(7) [1897] A. C. 129=66 L. J. (P. C.) 27=57 L. T. 666=61 J. P. 468.

(8) 44 Ohio St. 287=7 N. E. 429.

"In each case, the question whether or not particular water is surface water is one of fact to be determined by the circumstances attending its origin and continued existence. If the water is spread out and flows sluggishly over the surface, losing itself by percolation and evaporation, it is surface water, although it has its source in springs. But the mere fact that the water spreads out at some places, and flows sluggishly without sufficient force to form a channel for itself, does not make it surface water if the flow has sufficient force to maintain itself, and it is subsequently gathered together into a channel so as to form a water-course.

"The chief characteristic of surface water is its inability to maintain its identity and existence as a water body. . . . But marsh lands through which overflow water from a lake reaches a natural stream are not governed by the rules applicable to mere surface water." Well-defined existence arising from an ascertained course appears to be the real test in coming to a conclusion against any body of water being regarded as merely surface water: see Farnham, p. 2556. Angell refers to a case which throws light on what is really necessary to make a water-course. For 7 rods the stream descended rapidly in a well-defined course to a piece of marshy ground where it spread, so that its flow was slight and not sufficient to break the turf, but was generally sufficient to form a continuous sluggish current along the surface in a natural depression to a watering place within the plaintiff's land. This was adjudged to be a water-course within the meaning attached in law to that term. Domat states the rule of civil law as follows: "If waters have their course regulated from one ground to another, whether it be by the nature of the place, or by some regulation, or by a title, or by an ancient possession, the proprietors of the said grounds cannot innovate anything as to the ancient course of the water. Thus, he who has the upper grounds cannot change the course of the waters, either by turning it some other way, or rendering it more rapid, or making any other change in it to the prejudice of the owner of the lower grounds."

It is quite clear that the water of the channel in dispute between the parties

in the present case, when it entered defendant 4's land, could not be regarded as surface water. It came from the channel in dispute. Its origin is not on defendant 4's land nor did it come upon the surface of his land through the pores of the earth. The channel did not, according to the findings, "lose itself," and get mixed up with the earth of defendant 4's land but continued its course along his field. The identity of the stream was preserved when it passed out of the field. It may be that defendant 4 could, if he chose, restrict the passage of the stream along his land by confining it to a channel, occupying only a small portion of his field. It was not however defendant 4 that obstructed the course of the stream, but defendants 1, 2 and 3 and the obstruction was made at a place before the stream reached defendant 4's land. They had no right to do so. In *Dudden v. Guardians of Clutton Union* (9), "the water from a spring flowed in a gully or natural channel to a stream on which was a mill. The spring having been cut off at its source and the water received into a tank as it rose from the earth, by the license of the owner of the soil on which the spring rose," it was held that an action would lie against the obstructor by the owner of a mill who used to receive a supply of water for his mill. The obstruction in this case according to the finding, was at a place where the channel, undoubtedly, existed as a regular water-course. In our opinion, it did not cease to be such before it reached the channel which directly irrigated the plaintiff's land. It did not become surface water on reaching defendant 4's land. We reverse the District Judge's decision and restore the decree of the District Munsif with costs both here and in the lower appellate Court.

The plaintiff will also have the further relief of an injunction against defendants 1 to 3 from interfering with the plaintiff's rights declared and granted by the District Munsif who refused that relief of injunction on insufficient grounds and against which refusal, the plaintiff filed a memo of objections in the District Court and has also complained in the second appeal memo. before us.

S.N./R.K.

Order accordingly.

****A. I. R. 1914 Madras 512**
Full Bench

BENSON, OFFG. C. J., SANKARAN NAIR
 AND SUNDARA AIYAR, JJ.

Muni Reddi and another—Petitioners.
 v.

K. Venkata Rao—Counter-Petitioner.

Civil References Nos. 9 and 10 of 1912 and Civil Revn. Petn. No. 485 of 1911, Decided on 2nd October 1912, made by Dist. Judge, Bellary, in O. P. Nos. 102 and 313 of 1911.

**** (a) Legal Practitioner—Pleader not appearing after receiving fees is amenable to disciplinary jurisdiction—Negligence in performance of duty must be gross—Non-payment of part of fee is no defence unless contract to contrary.**

A pleader is amenable to the disciplinary jurisdiction of the High Court for failure to appear for his client at the trial of the cause after receiving the fees thereof or, in the event of unavoidable circumstances precluding his appearance for failure to make the necessary arrangement for his client.

Per *Sundara Aiyar, J.*—Mere negligence, as the omission by a pleader to do his duty, may not amount to misconduct. But where the negligence is gross or where the pleader falsely repudiates an agreement that he had entered into with his client, he is amenable to the disciplinary jurisdiction of the High Court.

[P 516 C 1]

Per *Sankaran Nair, J.*—A vakil is bound to appear in Court and conduct his client's case even if the fee or any portion thereof remains unpaid, in the absence of any agreement to the contrary, or at least notice to that effect to the client in sufficient time to enable him to make other arrangements.

[P 522 C 1]

**** (b) Evidence Act, S. 11—Judgment in suit between pleader and client if relating to subject-matter under enquiry under Legal Practitioners Act is admissible—Legal practitioners Act (18 of 1879)—S. 13.**

The judgment in a civil suit between the pleader and his client, relating to the subject-matter of the enquiry against the pleader under the Legal Practitioners Act, is admissible in the latter inquiry to establish at least a prima facie case against the pleader.

The judgment will not be admissible where the conduct of the pleader was not the direct issue in the Court which found him guilty of misconduct, but only arose incidentally in a litigation between other parties. 22 *All. 49 Ref.* and 33 *Cal. 151 (P. C.) Dist.*

[P 514 C 1]

**** (c) Legal Practitioners Act (18 of 1879), S. 13—Purchase of actionable claim is professional misconduct.**

The purchase of an actionable claim by a pleader amounts to professional misconduct, the more so when the claim has been put in Court and is ripe for judgment.

[P 519 C 2]

**** (d) Legal Practitioners Act (18 of 1879); S. 13—Trading without sanction contravenes**

R. 27 of High Court Rules—Pleader belonging to trading family must report that fact.—High Court Rules (Madras) R. 27.

Failure to obtain the sanction of High Court before a pleader engages in trade, is in contravention of R. 27 of the rules under the Act.

The High Court has not declared under S. 13, Legal Practitioners Act that it is unprofessional for a pleader to follow any trade or business especially where pleaders belong to a joint family which is carrying on a family trade, but the omission to report this circumstance under R. 27, of the High Court rules brings the defaulting pleader under Cl. (b) or (f), S. 13, and renders him liable to punishment.

[P 523 C 2; P 524 C 2]

**** (e) Legal Practitioners Act (18 of 1879), S. 13—Trading family—Pleader member is not necessarily trading unless there is partnership.**

A pleader, who belongs to a trading family, should not be regarded as trading simply because other members carry on the trade, the benefit of which would go to all the members of the family, including the pleader. But if all the members enter into a partnership then all of them must be regarded as carrying on the trade.

[P 520 C 1, 2]

J. L. Rozario—for the Crown.

K. Srinivasa Aiyangar—for Vakils Association.

T. Richmond and *M. Govindarajulu Naidu*—for Petitioner.

T. Rangachariar—for Counter-Petitioner.

Sundara Aiyar, J.—This is a case of misconduct against a first grade pleader practising in Bellary. One Muni Reddi lodged a complaint against the pleader charging him with the misconduct for which he has been tried by the District Judge of Bellary. He subsequently withdrew his complaint, but as the District Judge had, before the withdrawal, already framed a charge against the pleader, he proceeded with the inquiry, found him guilty of the misconduct charged, and made a report to this Court under S. 14, Legal Practitioners Act.

The facts that led up to the charge are briefly as follows: An inquiry into a charge of dacoity was going on about June 1908 in the Sub-Magistrate's Court of Tadpatri against Muni Reddi. The pleader was engaged, according to Muni Reddi's case, to defend him both in the Magistrate's Court and in the Sessions Court of Bellary in the event of the case being committed to the Sessions Court for trial, and a fee of Rs. 350 was settled and paid for the pleader's services in both Courts. The pleader appeared in the Magistrate's Court, but did not

defend Muni Reddi in the Sessions Court. He left the district for Rangoon* without making any arrangement for Muni Reddi's defence at the Sessions trial. Another pleader had to be engaged for the defence. Muni Reddi was acquitted at the trial. He subsequently instituted a suit for the recovery of the fees paid by him with interest. It was transferred to the Subordinate Judge's Court of Bellary for trial. The pleader defended the suit contending that his engagement with Muni Reddi was only to defend him in the Magistrate's Court and to put in a petition for bail in the Sessions Court, and did not include Muni Reddi's defence at the Sessions trial; that only Rs. 268 and not the whole of the Rs. 350 stipulated for was paid to him by Muni Reddi; that although Muni Reddi afterwards asserted that he had undertaken the defence in the Sessions Court also, he repudiated any such agreement and that he had not failed to fulfil the engagement actually entered into by him. The Subordinate Judge dismissed the suit upholding the pleader's defence. On appeal, the District Judge, Mr. Phillips, reversed the judgment of the Subordinate Judge and found the defendant's contentions to be untrue. He passed an order, under S. 476, Criminal P. C., directing the prosecution of the pleader for making a false statement on a comparatively unimportant point. The order was set aside by this Court in revision and it is unnecessary to refer to it further. Muni Reddi afterwards put in a petition against the pleader under the Legal Practitioners Act, requesting that an inquiry should be made into the pleader's conduct, but, as already stated, he subsequently withdrew the petition. The charge framed against the pleader was that having agreed to appear for Muni Reddi in the Sessions Court and received the fee for such appearance, he failed to appear, and when asked to return the fee, he failed to do so, and that in defending the suit filed by Muni Reddi, he denied receipt of part of the fees, and also denied that he was engaged to work in the Sessions Court; and that therefore he was guilty of fraudulent and improper conduct in the discharge of his professional duty, an offence under S. 13 (b), Legal Practitioners Act.

No fresh evidence was recorded in support of the charge and indeed there was

no one to let in evidence as Muni Reddi had withdrawn his complaint. The pleader evidently relied on the evidence he had already adduced in the civil suit, but he also adduced some fresh evidence. He examined two witnesses and gave evidence again himself. He also put in his account books and diary which he had not filed in the civil suit. The District Judge, after considering the fresh evidence, adhered to the conclusions he had arrived at in his judgment in the appeal from the Subordinate Judge's decision in the civil suit.

Mr. Rangachariar, who has appeared for the pleader at the hearing of the charge against the pleader in this Court, has raised an objection which, if well founded, would go to the root of the whole proceedings before the District Judge and vitiate his report. That objection is that the Judge was wrong in considering the judgment or the evidence in the civil suit, that the proceedings in the suit were not admissible in evidence at all in the inquiry under the Legal Practitioners Act, which he contended, was in the nature of a criminal trial and that the charges should have been established by evidence adduced at the inquiry. He argues that a judgment is not admissible in evidence in any judicial proceeding except in the cases covered by Ss. 40, 41 and 42, Evidence Act, and that none of these sections is applicable to the present case. This contention I am entirely unable to accept. In *the matter of Rajendra Nath Mukerji* (1), a pleader, who had been convicted of fraudulently using as genuine a document which he knew to be forged, was proceeded against for conduct under para. 8 of the Letters Patent of the Allahabad High Court. That Court not only regarded the judgment convicting the pleader as good evidence of his misconduct but refused to allow the propriety of the conviction to be questioned at the inquiry, and removed his name from the rolls of the Court. The Judicial Committee of the Privy Council upheld its procedure. Counsel who appeared for the pleader before the Privy Council, did not indeed question the admissibility of the criminal judgment in evidence but merely contended that the Court would not in consequence necessarily disbar him and that the learned

(1) [1900] 22 All. 49=26 I. A. 242 (P. C.).

Judges of the High Court went too far in not allowing the propriety of the conviction to be questioned which counsel maintained was not justified either in law or in fact. The Privy Council dealing with this argument observed: "It is plain that the object of the present appeal is to have the judgments of the Sessions Judge and of the High Court on appeal reviewed and reversed in substance if not in form. This ought not to be allowed. In effect, the appellant would indirectly have an appeal against the conviction when, if he had petitioned for leave to appeal against it, the leave would certainly have been refused." These observations show that their Lordships treated the conviction as conclusive evidence of the offence of which the pleader had been convicted. Their Lordships refer to the judgment of Lord Mansfield in *In re Brounsall* (2), where that learned Judge observed with reference to proceedings taken against a solicitor who had been convicted of stealing a guinea. "This application is not in the nature of a second trial or new punishment, but the question is whether after that conduct of this man (that is in stealing the guinea, it does not say when, where or how) it is proper that he should continue a member of the profession which should stand free from all suspicion. . . . and it is on this principle that he is an unfit person to practise as an attorney." Lord Mansfield evidently appears to have regarded the conviction as evidence of the man having committed the offence of theft. Mr. Rangnchariar contends that the case before the Allahabad High Court and the cases referred to in the Privy Council judgement therein are distinguishable from the present case, for in those cases the practitioner had been convicted of a serious criminal offence and that such a conviction apart from the question of his being really guilty of the offence or not, would be a sufficient ground for his being regarded as unfit to be a practitioner in a Court. It is no doubt true that a conviction for felony or other serious offence has been regarded as a sufficient ground for punishing a solicitor or an advocate for misconduct, and S. 12, Legal Practitioners Act, recognizes and gives effect to this view. But what is the principle underlying it. The conviction itself is certainly not mis-

conduct on the part of the pleader convicted. Can it be said that whether the pleader be guilty or not he having been subjected to the infamy of a conviction he must be further punished by the Court in its disciplinary jurisdiction over its practitioners? I do not think that this is the reason for punishing a pleader. The Court is not bound to, nor does it always altogether remove a pleader from the exercise of his profession on the ground of his conviction of a criminal offence. It may inflict a lighter punishment by suspending him for a period. If the infamy due to conviction be the ground of punishment, one would suppose that if it makes him unfit to practise he must be regarded as unfit to do so for ever and not for a period only. But as already observed, the Court having regard to the gravity of the offence, the extenuating circumstances, if any and taking all the facts of the case into consideration, has the power, in the interests of the public and of the profession, to award such punishment to the pleader or no punishment at all.

I am of opinion that the reason for punishing a person who has been convicted is that the conviction is good evidence of the commission by the pleader of the offence in question. But assuming that the conviction itself is regarded as good cause for punishing the pleader, would not a similar principle apply where a civil Court has found the pleader guilty of grave misconduct which requires that he should be dealt with by the Court under its disciplinary jurisdiction? I see no reason why it should not. The principle would of course not apply where the conduct of the pleader was not the direct issue in the Court which found him guilty of misconduct, but only arose incidentally in a litigation between other parties. Such was the case in *In re Lubcek* (3). In this case the suit related to the very misconduct charged against the pleader in the present proceedings and I see no reason for holding that the judgment and the proceedings in the civil suit are not admissible in evidence. With respect to the contention that the judgment would not be relevant on the question of the pleader's guilt under any of the sections of the Evidence Act, I do not think it presents any serious difficulty. It appears to me on the other

(2) [1773] Cowper's Rep. 829.

(3) [1906] 33 Cal. 151=32 I. A. 217(P.C.).

hand, to be a rather bold argument to urge that the finding in proceedings against the pleader in which the question was exactly the same as at the present inquiry should be regarded as irrelevant. There is no reason why it should not come within the provisions S. 11, Evidence Act, which lays down that "facts not otherwise relevant are relevant if by themselves or in connexion with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable."

I have more doubt whether the finding of the civil Court can be regarded as conclusive. In a criminal trial the guilt of the accused has to be proved by the prosecution beyond all reasonable doubt and a Court convicting a pleader of a criminal offence must be taken to have found the offence proved conclusively against him. But in a civil suit, the finding on the issue does not proceed on the conclusiveness of the evidence adduced on either side but on the balance of the evidence adduced on both sides. It might for instance, be said that in this case the District Judge could not be held to have decided in the civil suit that the plaintiff had proved by his evidence beyond all reasonable doubt that the pleader had agreed to defend the plaintiff in the Sessions Court and that he had been paid his fee for doing so. It is unnecessary to decide this precise point in this case, for the District Judge did not treat his own previous judgment in the civil suit as conclusive against the pleader but allowed him to adduce any evidence he might choose. No complaint has been made before us that the pleader was not allowed to let in any specific evidence or that he was prevented from further cross-examining any particular witness examined in the civil suit on any specific matter. I must therefore disallow this objection of Mr. Rangachariar.

The learned vakil reviewed the evidence adduced in the civil suit and the fresh evidence adduced at this inquiry at considerable length and attempted to show that the findings of the Judge cannot be sustained. I have given to both the evidence and to Mr. Rangachariar's arguments the anxious consideration which any case against a professional gentleman deserves, but I am unable to differ from the conclusions of the Judge. I do not consider it necessary to repeat

the reasons given by the Judge in his careful and elaborate judgment and shall only deal with the principal points urged by Mr. Rangachariar. The first question for decision is whether the pleader undertook to defend Muni Reddi at the Sessions trial also, or whether he merely agreed to put in a bail petition so far as the Sessions Court was concerned. The learned Judge then considered the evidence on the point and held that he had no hesitation in coming to the conclusion that the pleader agreed to defend Muni Reddi in the Sessions Court also.

Mr. Rangachariar's next contention is that, assuming that the engagement included Muni Reddi's defence in the Sessions Court, as the whole of the pleader's fee was not paid but only Rs. 268 out of Rs. 350, the pleader was absolved from the duty to appear in the Sessions Court. Here again the pleader starts with the initial difficulty that Ex. B.2 furnishes evidence against him in his own handwriting. * * * * *

I must hold on the evidence available to the Court that the sum of Rs. 95 was paid to the pleader. Having regard to this finding, it is unnecessary to deal with the further question whether the non-payment of a portion of the fee would absolve the pleader from his duty to appear for the client. In the absence of an agreement that the fee promised should be previously paid, it is, to say the least, very doubtful whether a plea of non-payment of part of the fee would be of any avail. * * * * *

A client is not generally in much haste to take proceedings against a pleader of standing. It may be that Muni was prompted by others to make his complaint but in the circumstances I do not think that any inference adverse to the truth of Muni's case can be drawn from his delay. I therefore hold it to be satisfactorily proved that the pleader, after undertaking the defence of Muni at the Sessions trial and receiving payment for it, deliberately failed to make any arrangement for the defence on a false plea that he had not agreed to conduct the defence at the Sessions trial.

Mr. Rangachariar argued that if it should be found that the pleader did undertake to appear for Muni in the Sessions Court, his default must have been due to forgetfulness on his part as he had arranged for his other

cases during his absence. The District Judge was inclined to take this view in his judgment in the civil suit but this view is absolutely inconsistent not only with the pleader's own contention both in the civil suit and at this inquiry but also with the evidence of his brother that he told Muni Reddi on 14th October 1908 that the pleader had not agreed to defend him at all in the Sessions Court. It is very difficult to believe that a Sessions case of so grave a nature in which the pleader had appeared in the Magistrate's Court would have been forgotten. In Civil Revision petition No. 321 of 1911 preferred by the pleader against the judgment of the Judge in civil case, his counsel stated that the pleader might have forgotten the engagement. As this was inconsistent with the case that his engagement did not include the Sessions trial, Mr. Rangachariar was asked to explain the inconsistency and the Court was told that the statement in the memorandum of civil revision petition was made by counsel without instructions. In the circumstances, I am unable to accept the suggestion made as a last resort that forgetfulness might have been the reason for the pleader not arranging for the defence.

It is argued for the pleader that even if all the facts are found against him, they amount only to negligence and that the pleader cannot be punished for mere negligence not amounting to fraud. I am of opinion that what is proved amounts to something worse than negligence; nor am I prepared to accept the contention that a pleader who is wilfully and grossly negligent in the discharge of his duties cannot be punished for his misconduct in the exercise of our disciplinary powers. The pleader was not guilty of a mere omission to do his duty in this case. He repudiated the agreement into which he had entered with his client and he did so deliberately and without justification. I cannot say that this amounts to anything less than fraudulent conduct on his part.

A passage in Cordery on Solicitors, p. 180, was referred to on behalf of the pleader. I do not think that that passage lays down anything more than that it is not all negligence which would furnish a cause of action to a client that would be punished by the Court. Certainly that is so. For instance, a pleader may not have acted with sufficient diligence in the

discharge of his duties. He may not have instructed himself in the facts or the law of a case as he should. He may have acted contrary to the client's instructions in some particular matters, or he may have acted without instructions. In such cases, the Court would generally be content with leaving the client to his remedy in an action for damages. But negligence may also be so gross and amount to such a violation of the duties of a pleader as an officer of the Court and to the litigant and as a member of a responsible and honourable profession as to require that the Court should punish him in the exercise of its powers over its officers.

The rule to be followed has been very recently laid down by the Judicial Committee of the Privy Council in its judgment in a case in which a vakil of this Court was concerned: see the judgment dated 20th June 1912, *In the matter of G. Krishnaswami Aiyar* (4). In that case, the pleader was acquitted of all direct and personal fraud, but he was found guilty of not exercising any control over his clerks who omitted to discharge their duties and wrote false letters to the client and misled him, and of a grave omission in not informing the Court and the client of the true state of things after he had discovered the improper conduct of his clerks. Lord Shaw in delivering the judgment of the Privy Council observes: "Their Lordships, while not interfering, as stated, with his acquittance of direct and personal fraud, do not see their way to acquit him of conduct in the management of the appeal and of his client's affairs which caused the procedure of the Court to be the very opposite of what all such procedure should be, namely, first, responsible, secondly, orderly, and thirdly, pure. In all these respects, there has been a violation of the proprieties which attach to legal procedure." And their Lordships expressed the hope that the vakil "in the management by those under him of affairs committed to his charge, would, in future, see to it, that such improprieties as those referred to do not recur." These statements clearly show that their Lordships were of opinion that gross negligence, which interfered with the responsible, orderly and pure conduct of

(4) [1912] 16 I. C. 328=35 Mad. 543=39 I. A. 191 (P.C.).

proceedings in Court, would be punishable. The same rule has been laid down in America. "Professional misconduct or neglect of duty as an attorney is a good ground for suspension or disbarment." Cyclopaedia of Law and Procedure, Vol. 4, p. 911. The jurisdiction of the Courts in punishing improper conduct on the part of pleaders is expressed in very wide terms in the Legal Practitioners Act. S. 13, Cl. (f), provides that a pleader may be punished for any other reasonable cause. It is not in the interest of clients whose interests pleaders are bound to protect, or of the profession to which they belong, or of the pure administration of justice, to attempt to define exhaustively the different kinds of misconduct which are punishable. Any conduct, which contravenes the orderly and pure administration of justice would be within the disciplinary jurisdiction of the Courts. The pleader in this case is a person of long experience, and his defence to the charges against him has only aggravated his misconduct. It is not necessary to deal separately with the charge that he made a false defence in the civil suit. I wish to say nothing which would deprive pleaders of the privileges in the conduct of their own suits which other litigants possess. But it is impossible not to regard the pleader's defence as a serious aggravation of his prior misconduct.

I agree with the learned Chief Justice as to the punishment that should be imposed on the pleader.

Referred Case No. 10 of 1912

Sundara Aiyar, J.—In this case, two charges were preferred against the 1st grade pleader: first that he trafficked jointly with one Marwadi Vannajee in an actionable claim put into Court obtained by Yadalla Pichayya and Papayya against the minor heirs of one Virabhadra in a suit in which he was plaintiff's *vakil*; secondly, that he had been and was engaged in trade under the name of K. V. S. Ramchanler and Co. The District Judge, Mr. B. C. Smith, in his report to this Court has found both the charges proved. After full consideration of the evidence on record, I concur in the findings arrived at by the District Judge. It is not necessary to do more than to refer very briefly to the evidence in support of the charges.

First charge.—On 7th September 1909,

an agreement was entered into between Pichayya and Papayya, the plaintiffs in Original Suit No. 3 of 1910, on the file of the Subordinate Judge's Court of Bellary, on the one hand and Vannajee on the other hand for the transfer of the claim of the former in Original Suit No. 3 of 1910, which was then pending for a sum of Rs. 4,750. The amount claimed was about Rs. 1,000. The evidence in the suit had been recorded but judgment had not been delivered. The transferee Vannajee was to take all risk of loss in case the suit was dismissed. The 1st grade pleader represented the plaintiffs in the suit. According to the evidence of Papayya, one of the transferors, his fee for the suit had been paid prior to the transfer. The case of the petitioner, who made the complaint against the 1st grade pleader, is that the transfer was wholly or partially for the benefit of the pleader himself. The most important fact proved against the pleader is that half of the profit which Vannajee made out of the bargain was paid to him. Vannajee sold his claim to one Veerabhadra, the second witness for the petitioner, for Rs. 6,392-8-0. The profit made by Vannajee, according to himself, was Rs. 1,571-4-0 and of this amount, exactly one half, i.e. Rs. 785-10-0 was received by the pleader. A sum of Rs. 70-12-0 was deducted out of the total amount of Rs. 6,392-8-0 as the interest on the loan contracted by Vannajee at 6 per cent. per annum for the consideration paid by him for the transfer. The amount was borrowed from the firm of a banker S. Donga Chand. It is not denied that the pleader became responsible to the banker for the payment of the amount.

The pleader's case is that he merely became surety to the banker for the loan which Vannajee took from him. Vannajee was the *gumastah* of one Kannajee. The pleader gave a letter or *chit* to Vannajee addressed to the banker. This letter was dated 9th September 1909. It is stated on behalf of the pleader that the money had been paid by the banker to Vannajee on the 7th before he gave the letter. First witness for the petitioner, Sivaraj, a partner of the banker, states the banker's account contains an entry, dated 7th September 1909, debiting Kannajee through Vannajee with Rs. 4,000. On 9th September, the debt was transferred to the pleader,

Kannajee being credited with the amount on the date. This might go to show that the pleader's connexion with the loan commenced only after it was actually advanced by the banker, but the inference does not necessarily follow. The reason for the alteration of the entry was that Vannajee objected to the entry in the name of Kannajee as he claimed the benefit of the transfer of the claim himself. It is quite clear that on the 9th, it was agreed that the pleader should be regarded as the person mainly responsible to the banker for the payment of the loan. Now, why did the pleader agree to make himself responsible for the amount? The answer suggested by the payment of half the profits to him undoubtedly is that it was understood that he and Vannajee should be sharers in the bargain.

The pleader in his written statement does not give any explanation of his receipt of Rs. 785-10-0. He merely denies the allegation that he was interested in the purchase of the claim and states that there was nothing against law or rules of public policy even if he was interested in it. After the witnesses in the present proceedings were examined, the pleader made another short statement (not on oath) and offered himself for cross-examination. He gave no explanation of the receipt of Rupees 785-10-0 in this statement either. In cross-examination, he admitted his receipt of the amount (the payment being made directly to his father-in-law). He also stated: "This Rs 785-10-0 might have been partly remuneration for spending my time in negotiating the transaction and preparing the necessary documents. I have no account to show the sum due for each piece of work done." This affords no satisfactory explanation. He does not say that the whole amount was paid for his services in bringing about the transfer. He admits that the amount was not entered in his accounts as fees and gives an extraordinary explanation that only remuneration for work done in Court is entered as fees in his accounts. He entered the amount under family earnings. Papayya, the transferor of the claim, says that he had paid to the pleader the fee due to him for the conduct of the suit.

This is likely as the case was almost ripe for judgment when the transfer

was made. If the amount was not paid as fees due for professional work, then the payment must have been on account of a half-share possessed by the pleader in the claim by virtue of the transfer. Vannajee, who tries to support the pleader as much as he can, is equally unable to show how the amount of Rs. 785-10-0 was made up. He tries to make out that he promised to pay the pleader his fee and a present, but he could not give any explanation as to how the fee would amount to Rs. 785-10-0. He admits that that amount was paid to the pleader. He says that the interest payable on the loan was 7-1/2 annas and not 6 per cent. so as to throw doubt on the amount available for division between him and the pleader. But he admits that the profit made out of the transaction was Rs. 1,571-4-0. and he also admits that he charged the pleader 8 annas per Rs. 100 interest on his whole account including the sum of Rs. 4,000. There is absolutely nothing to support his statement that 7-1/2 annas and not 6 per cent was the interest payable on the loan. In the absence of any explanation forthcoming from the pleader, I have no doubt that the Judge was justified in coming to the conclusion that it was agreed between him and Vannajee that he should receive half the profits arising from the transfer of the claim. It is immaterial to consider whether he became interested in the transfer on 7th September, or only on 9th. The Judge's conclusion is strongly supported by the evidence of the petitioner's second witness who purchased the claim from Vannajee. He states that he negotiated the purchase with the pleader without any reference to Vannajee and that the payment of the consideration was made to the latter at the instance of the former. Papayya, who does not admit that the pleader had a share in the claim, admits that the negotiations for the transfer to Vannajee took place at the pleader's house.

The next question is whether the pleader's act in purchasing the claim amounts to grossly unprofessional misconduct within the meaning of S. 13, Legal Practitioners Act. The claim was then the subject-matter of a suit in which the pleader appeared for the plaintiff. The defendants in the suit pos-

sessed large properties, but were in involved circumstances. Papayya says that it was broadly rumoured that his suit would fail, and the pleader admits that his client told him that the defendants were giving out that the suit would be dismissed. There can be no doubt that the plaintiffs were apprehensive of failure. The pleader, on the other hand, was in a far better position than his client to judge of the chances of success. There can be no doubt that the transfer was a highly speculative one. There is no force whatever in the contention that the claim ceased to be actionable because a suit had been instituted for its enforcement. That fact is absolutely immaterial according to the definition of "actionable claim" in S. 3, T. P. Act. The old definition contained in S. 130, Act 4 of 1882 and Cl. (d) S. 135, as it originally stood, put this beyond a doubt. Mr. Rangachariar, on behalf of the pleader, contends that a purchase of an actionable claim is not necessarily unprofessional conduct. Mr. K. Srinivasa Aiyangar, who appears on behalf of the Vakils' Association, supports this argument. I am quite unable to accept this contention. S 136 enacts as follows: "No Judge, legal practitioner or officer connected with any Court of justice shall buy or traffic in or stipulate for, or agree to receive, any share of, or interest in, any actionable claim, and no Court of justice shall enforce at his instance or at the instance of any person claiming by or through him any actionable claim, so dealt with by him as aforesaid."

It does not merely make purchases of actionable claims by the classes of persons named in it unenforceable in law. It expressly prohibits them from being interested in any transfer of an actionable claim. The prohibition is based on the ground of the offices held by them. I cannot doubt that the doing of an act, which a legal practitioner is forbidden to do on the ground that he is a legal practitioner, is a violation of the conduct that he should pursue as a practitioner, and therefore unprofessional conduct. It is urged that the legislature could not have intended to make the purchase of an actionable claim by a pleader under all circumstances unprofessional conduct, that in other countries there is no such absolute

prohibition, that the New York Civil Procedure Code forbids purchase of actionable claims and negotiable instruments only where it is made, "with the intention and for the purposes of bringing a suit thereon;" and that in the French Civil Code the prohibition is confined to claims falling within the jurisdiction of the Court where the pleader is practising. The language of S. 136, Act 4 of 1882, is in my opinion absolutely clear. It is quite immaterial that the Indian Legislature considered it expedient to enact the rule in wider terms than the legislatures of some other countries have done. It being clear that the pleader's act amounted to professional misconduct, was it grossly unprofessional? I have no doubt that it was. I have already referred to the circumstances under which the transfer was made. The Court of first instance, as a matter of fact, passed a decree for about Rs. 11,000 though the amount was reduced to Rs. 6,000 odd in appeal. The purchase amounted in this case to trafficking in litigation. It is unnecessary to decide the question whether the purchase of an actionable claim, though unprofessional, must amount to grossly unprofessional misconduct in every case. Undoubtedly, the onus would be on the pleader who purchases an actionable claim to show that in the circumstances of any particular case it does not amount to gross misconduct. I think that it would not be improper to hold that pleaders should not be permitted to do acts that are liable to subject them to severe temptation. I am of opinion that this charge has been proved against the pleader. I agree with the learned Chief Justice as to the punishment that should be imposed.

Charge 2.—The facts relating to this charge are practically undisputed. The pleader belongs to a wealthy family, possessed of various kinds of properties including landed estates, houses, directorships in companies. Secretaryship in one company, an agency under the Oriental Life Insurance Co, some other trade agencies, shares in Joint Stock Companies and a mill at Bellary known by the name of Medum Seshanna Cotton Manufactory. The evidence of Srinivasa Row, the pleader's brother, and, himself a pleader, shows that in 1894

the members of the family entered into a partnership. A fresh partnership deed (Ex. G) was executed in 1900. According to this deed, each member of the firm is authorized to sign the name of the firm, and the partners of the firm are responsible jointly and severally for the acts of the firm as well as for the acts of each partner and for moneys reaching the hands of any one of them. The pleader states in his written statement: "The members of the firm supervise the work of the managers and agents whenever they have leisure and during holidays." He denies that he has engaged himself in trade. In the face of the admitted facts, I am of opinion that the denial is absolutely untenable. It is contended that the actual work of the trade is done by clerks and agents and that therefore the pleader cannot be said to be personally carrying on trade. I am quite unable to agree that the mere appointment of servants or agents is sufficient to show that the trade is not carried on personally by the pleader. In that case, any trader, who is able to engage clerks and to dispense with attending to customers himself, may say that he is not personally engaged in his trade. It is not denied that the agents and managers could be dismissed at pleasure by the pleader and his partners.

The admission that the members of the firm supervised their work puts an end to all doubt on the matter. It is contended by Mr. Rangachariar that a pleader who belongs to a trading family should not be regarded as trading, simply because other members carry on trade the benefit of which would go to all the members of the family including the pleader. I agree with him so far. It is quite true that every member of an undivided Hindu family cannot be said to be carrying on a trade the benefit of which would go to the family. One member of it alone may be carrying on the trade, but he may do so with family funds. Although as between the members of the family, the profit or the loss must be shared by all of them, it would not follow that every one of them is conducting the trade. Again two or more members may alone carry on a trade as partners and the outside public may be dealing with them alone, though, as amongst the members of the family inter

se, all might be responsible for the result of the trade. But if all the members enter into a partnership and carry on a family trade as partners, then all of them must be regarded as carrying on the trade. This is a distinction well understood in law. In the present case, the pleader, who is the senior member of his family, has entered into a partnership with the other members.

He, as much as any other member of the family, is trading with the outside public whatever may be the actual amount of work done by him in connection with the management of the trade. I hold therefore that the pleader must be held to be personally engaged both in trade and in the other business referred to in the deed of partnership. It is then argued that carrying on a trade is not professional misconduct within the meaning of S. 13, Legal Practitioners Act, and that there is no rule framed by this Court under that Act which has declared it to be misconduct. Cl. 27 of the rules framed under the Act is in these terms: "If any person, having been admitted as pleader, accepts any appointment under Government, becomes a student of any school or college for purpose of pursuing his studies or enters into any trade or other business, or accepts employment as a law agent other than a pleader, mukhtar or agent certified under Act 18 of 1879 and these rules, he shall give immediate notice thereof to the High Court, who may thereupon suspend such pleader from practice or pass such orders as the said Court may think fit." It is true that engaging in trade or other business is not definitely pronounced to be misconduct by this rule. According to it the High Court may give permission to any pleader, if it thinks fit to do so, to engage himself in any particular trade or business. A similar rule has been framed under the Letters Patent of the High Court with respect to High Court vakils, although, curiously enough, no such rule has been framed applicable to advocates and attorneys. The pleader was undoubtedly guilty of misconduct in not obtaining the permission of the High Court for carrying on trade or other business. He has been engaged in trading business of an important character and it was undoubtedly his duty to apply for and obtain the High Court's permission. No charge however has been

framed against him of violating the provisions of Cl. 27 which require him to apply for permission to the High Court and I do not think we should find him guilty of misconduct in violating the provisions of this clause without his having an opportunity to explain his conduct. But it does not follow from this that he is not guilty of misconduct by being engaged in trade or other business without the permission of the Court, if his doing so is inconsistent with the profession of a pleader. The rule enables pleaders to avoid all risk of being pronounced guilty of misconduct by obtaining the opinion of the High Court with respect to any business they may propose to undertake, but the failure to take advantage of the provisions of the rule cannot absolve them from liability to be convicted of misconduct if they act in a manner inconsistent with their profession. It seems to me that there are two reasons why carrying on trade may be inconsistent with the profession of a pleader. One reason is that it might prevent him from devoting that attention to his work as a pleader which his duty to the public and to the Court require that he should. But another and certainly not less important reason is that a pleader should not be permitted to engage himself in any pursuit which is inconsistent with his status as a member of a learned and honourable profession. In England every person who wishes to be called to the Bar has to state that he is not and has never since his admission as a student "been engaged in trade and that he is not an undischarged bankrupt."

I am not aware that according to the rules of the Bar in England, a barrister can be punished for being engaged in any trade or business inconsistent with his being actively engaged in the practice of his profession, though there are various offices the holding of which is deemed to be inconsistent with practice as a barrister : see p. 384 of Halsbury's Laws of England, Vol. 2. But I strongly believe that carrying on a trade would be deemed to be generally inconsistent with the active practice of the profession of either a barrister or an attorney. To do so may not be in some cases inconsistent with the status itself of a legal practitioner. He would probably not be punished for having been engaged in trade or other business if he was not

practising his profession at the same time although it is probable, I think, that there are some trades and businesses, which may be regarded as altogether inconsistent with the status of an advocate. However as the rules stand, it would be open to this Court to permit any particular trade or business being undertaken by a pleader.

There might certainly be some kinds of business which would in no way be inconsistent with either the status or the active practice of a pleader's profession. There have been instances where engagement even in a trade has also been permitted by this Court, although I take it that this would not ordinarily be allowed. It may be that there are enterprises which, having regard to the circumstances of this country, the Court would sanction a pleader actively promoting and devoting a portion of his time to. Whether sanction should be given in any case would, no doubt, largely depend on the character of the trade or business and the extent to which it is likely to occupy the time and attention of the pleader. But no pleader can be permitted to derive any advantage by taking the responsibility on himself and engaging in a trade or business without the sanction of the Court. If he does so, he takes the risk of its being subsequently held that his conduct amounts to professional misconduct. If permission would not have been given if he had asked for it, he must be held guilty of misconduct in having done that which the Court would not have sanctioned. This is the rule followed where a trustee acts without the sanction of the Court in a matter for which he could have obtained its permission. I do not consider it possible that the Court would have given permission to the pleader in this case to be engaged as a partner of a large cotton mill and in the various other businesses which the pleader admits to be included in the concerns of the partnership. It is however possible that he thought, as he says he did, that inasmuch as he would not have to devote much of his time personally to his work as a partner, he was not acting in violation of his duty as a pleader. I am willing to believe that he acted bona fide and without any intention to act contrary to his duty as a professional man. I am therefore of opinion that it is sufficient to point out that

he acted wrongly and that it is unnecessary to impose any punishment on him for his conduct in this matter.

Referred Case No. 9 of 1912.

Sankaran Nair, J.—I think that Mr. Rangachariar is right in his contention that any charge against the pleader must be proved by evidence taken at this inquiry. But I do not accept the further contention that the judgment in the civil suit is inadmissible in evidence. The pleader was the defendant in that suit. It was decided therein that the plaintiff had paid him his fee to appear for him at the Sessions; that he failed to appear without making any arrangement for the conduct of the case: a decree was passed against him on these findings. The facts found against him must be taken, *prima facie* to be proved. At the same time, I think it is open to him to show that the judgment is wrong and should not be accepted as final for the purpose of this inquiry. Any evidence which should have been, but was not, produced in the suit will, of course, be viewed with grave suspicion. Nor is it clear to me why it is not open to us, at this inquiry, to consider whether the judgment is right on the materials on which it was based. There is no law preventing us from doing so, and I see no injustice in it.

I think therefore the Judge is right in allowing the pleader to give further evidence. On the evidence Ex.-A, the receipt given by the pleader to Muni Reddi, makes it clear that he was bound to defend him at the Sessions. I doubt whether it is open to him to say in this inquiry, after giving that receipt, unless he proves mistake or some other invalidating circumstance, anything against that receipt. Because as a pleader it was his duty to grant a proper receipt and not one which is misleading. He has, however, failed to prove that he did not agree to appear at the Sessions. I do not attach any weight to the other contention that the *vakil* was not bound to appear as his client owed him a portion of his fee. He has failed to prove that any balance is due.

I am also of opinion that a *vakil* is bound to appear and conduct his case even if the fee, or any portion thereof, remains unpaid, in the absence of any agreement to the contrary or at least notice to the effect to the client in suffi-

cient time to enable him to make other arrangements.

Mr. Rangachariar argues that a pleader like Mr. Venkata Rao would not have failed to make some arrangement about his case before going to Rangoon. There is great force in this argument. Mr. Venkata Rao appears to have made arrangements about all other cases. The only explanation that suggests itself to me is that he may have really thought that he was not bound to appear for Muni Reddi at the Sessions. This is supported by the facts that the counterfoil of the receipt kept by him showed that he was to appear only before the Magistrate and this Srinivas Row told Subba Row that Mr. Venkata Row was not engaged to defend Muni Reddi. What took place at the meeting in September between Muni Reddi and the *vakil* also supports this view. I think that Venkata Row believed that he was not engaged to defend Muni Reddi at the Sessions. If he had pleaded in this inquiry, after the disposal of the appeal, that he acted in this erroneous but honest belief and tendered a proper apology, speaking for myself, the result might have been different. But he has persisted in this inquiry in trying to prove a defence already found false in a civil suit. I agree accordingly to the order which will be pronounced by the Chief Justice.

Referred Case No. 10 of 1912.

The charge against the pleader, Mr. Venkata Rao, is that he purchased the claim of the plaintiff in Original Suit 8 of 1909 on the file of the Subordinate Judge's Court of Bellary. That was a suit brought by Pichayya and Papayya against certain minors for the recovery of a sum of more than Rs. 1,0000. After evidence had been heard, but before judgment was pronounced, one Vannaji agreed to purchase the claim of the plaintiffs therein for Rs. 4,750 on 7th September 1909. Now, it appears from the evidence of the vendor, who is P.W. 4 in the case, that, so far as he is concerned, he had nothing to do with Mr. Venkata Rao, and that, though the negotiations for the sale took place in Venkata Rao's house, the claim was agreed to be sold to Vannaji who was his client without any consultation with Venkata Rao. Vannaji borrowed Rs. 4,000 of this amount from the firm of

Satraji Dongerchund. Anadaji, who was examined as a witness for Venkata Rao, was a partner in that firm. It appears from his evidence, which there is no reason to disbelieve that when the firm lent Rs. 4,000 to Vannaji, the amount was debited against one Bhataji Khemaji, who was the principal of Vannaji two days later Vannaji told this witness that it should have been debited against him and not against his principal; he refused to do so; then Vannaji, got a letter from Mr. Venkata Rao asking him to debit that amount against Venkata Rao's account and that was accordingly done. Mr. Venkata Rao admits having written a letter to the firm asking them to do so. The entry was made by P. W. 1 and he also gives evidence to the same effect.

On 7th December Vannaji sold the decree to one Veerabhadrapa. Veerabhadrapa was a relative of the defendants in that suit and was naturally interested in them. He says that he heard a rumour that Mr. Venkata Rao had purchased the decree and that he spoke to him and arranged to purchase the decree from him; he paid Rs. 6,392-8 0 to Venkata Rao and got an assignment of the decree from the original decreeholder, Pappayya, who had agreed to sell it to Vannaji. The money was actually paid to Vannaji as Venkata Rao directed him to do so. According to this witness, he never saw Vannaji at all while the negotiations were going on. If the matter had stopped here, the case would have been one of suspicion only.

But there is the following additional circumstance to be taken into consideration. The entire amount borrowed by Vannaji was Rs. 4,750. Now this, with interest at 6 per cent. per annum for three months, that is, the period between 7th September, the date of agreement of sale to Vannaji and 7th December the sale of the decree to Veerabhadrapa, would come to Rs. 4,821-4-0. The difference between the two amounts Rs. 6,392-8 0 and Rs. 4,821-4-0, i. e., Rs. 1,571-4-0, is the profit, and half of this is Rs. 785-10 0.

Now, it appears from the evidence and it is admitted that this amount, i. e., Rs. 785-10-0, was paid on Venkata Rao's account to his father-in-law. It is not explained how this particular sum of exactly half of the profits was due to

Venkata Rao. He gives no explanation; he produces no account to show that this was due to him for any fee. There is evidence that the interest payable on the sum of Rs. 4,000 was at 6 per cent. The evidence as to the rate of interest payable on the remaining Rs. 750 is discrepant, and it is not clear what the real interest was; but there is nothing improbable in their setting apart interest at 6 per cent. for three months for the purpose of calculating profits on the transaction. In the absence of any explanation on the part of Venkata Rao, the only conclusion that we are justified in drawing is that he received it as his share of the profits of the transaction; and taken with the other circumstances of the case, his advancing the money to Vannaji and the facts disclosed by P. W. 2 whose evidence is strongly corroborated by these two facts, I come to the conclusion that from 9th September 1909 Venkata Rao must be treated as a partner with Vannaji and equally interested with him in the decree.

The question then remains for consideration whether this is grossly improper conduct in the discharge of professional duties.

An actionable claim should not be purchased by a pleader and, in my opinion, the purchase of a claim after suit offends against public policy more than the purchase of such a claim before suit. It is trafficking in litigation and when the vendor is the client of the purchaser, the transaction, in the majority of cases, is likely to be oppressive to the client. In the case before us, however not only no undue advantage has been taken but Venkata Rao seems to have acted fairly. Papayya offered to accept Rs. 4,000 from Verabhadrapa in full satisfaction of his claim and he got from Vannaji and Venkata Rao Rs. 4,750. Further, Venkata Rao did not deal with the client and was not in fact the original purchaser on the 7th. It is also proved that a portion of the interest due to the minor was remitted. As this is the first case of the kind that has come before this Court, a lenient view might have been taken of the case, if he had pleaded good faith and placed before the Court all the facts. He has not chosen the course. I agree to the order which will be pronounced by his Lordship the Chief Justice.

The next charge against Mr. Venkata Rao is that he has been trading in cotton and yarn with the other undivided members of his family as partners. That he is a partner with them is proved beyond doubt by Ex. G. The company has also bought a spinning mill in Bellary, borrowed money to pay for it; and to cover working expenses, it was buying cotton and selling yarn. There are, no doubt, managers and gumastas appointed; but Venkata Rao and his brother do not cease to be persons carrying on trade any the less on that account. Holding then that Venkata Rao and his brothers are traders, the question remains whether he is guilty of any grossly unprofessional conduct. R. 27 of the rules framed by the High Court under the Legal Practitioners Act 18 of 1879, runs thus:

"If any person, having been admitted as pleader, accepts any appointment under Government, becomes a student of any school or college for purposes of pursuing his studies or enters into any trade or other business, or accepts employment as a law agent other than a pleader, mukhtar, or agent certified under Act 18 of 1879 and these rules, he shall give immediate notice thereof to the High Court, who may thereupon suspend such pleader from practise or pass such orders as the said Court may think fit.

"Provided that when a pleader is appointed by or under the authority of the High Court to the office of District Munsif, whether temporarily or permanently, it shall not be necessary to give the notice prescribed in the first part of this rule: but no pleader, while employed as District Munsif, shall be permitted to practice or do any business as a pleader before any Court."

Now it will be noticed that the High Court can take action under this rule only if the pleader who enters into any trade or business gives notice to the High Court. Under the rule, he is bound to give such notice. Then S. 13 of the Act itself empowers the High Court to punish the pleader in certain circumstances. The words of the section run thus: "The High Court may also, after such inquiry as it thinks fit, suspend or dismiss any pleader or mukhtar holding a certificate as aforesaid: (b) who is guilty of fraudulent or grossly improper conduct in the discharge of his professional duty, or, (f) for any other reasonable cause,"

The omission to comply with R. 27 by a pleader would probably come under Cl. (b). It would certainly come under Cl. (f). If therefore a first grade pleader omits to make the application which he is bound to submit to the High Court under R. 27, then he may be suspended under S. 13 for breach of that rule until he makes the application under that section or any further time the High Court thinks fit. If he makes the application under R. 27 then he can be dealt with under that rule. Apparently therefore the rule and the section provide adequate remedy for all cases. Whether the pleader should be suspended or should be allowed to carry on a trade under R. 27 depends upon the particular circumstances of each case, the character of the person making the application, the nature of the trade or business, the time that the pleader would have to devote to it. There may also arise other considerations. The trade or business may be one which it may be in public interests to foster in that locality and men other than pleaders may not be available perhaps to carry on the trade or business satisfactorily. Under this rule applications are being made to the High Court for sanction and they have been granted or rejected according to the particular circumstances of the case. If we lay down a definite rule under S. 13 of the Act it would be depriving the High Court of the discretion vested in it by R. 27, for it is obvious that once a pleader is declared to be disqualified from engaging in any trade or in any particular kind of trade, it would not be right for the High Court to give any sanction under R. 27 to any other pleader applying for it. I am not therefore able to say that under S. 12 the High Court should declare that it is unprofessional for a pleader to follow any trade or business. It is not required by the conditions of the legal profession or the circumstances of the country.

It may be a question whether any rule even is necessary, because the evil to be guarded against cannot be serious as the sanads of the first grade pleaders have to be renewed every year and the High Court may refuse a renewal. But in any event I do not think it necessary that we should take any action under S. 13 as against any pleaders to whom R. 27 is applicable. I am also of opinion that it

is difficult now to say generally that a pleader should not engage in any trade or business. Confining myself now only to vakils they exercise the profession both of the advocate and the solicitor, and they should not be debarred from performing those functions which a solicitor is and a barrister may not be entitled to discharge. Many, if not the majority, of the pleaders are members of joint families who are engaged in trades or businesses. It would be an unnecessary interference with them now to declare that such trades or businesses are unprofessional. The notion that no trade, however honestly carried on, is worthy of a vakil is a relic of the times that have passed away, and I should regret its introduction into India.

On the facts before us, there is no doubt Mt. Venkata Rao has been guilty of a violation of R. 27 in not having reported to the High Court his connexion with the firm or with the mill. But he has not been charged with having violated that rule and we cannot take any notice of it as he has had no opportunity of making any answer to that charge. So far therefore as the second charge is concerned, I am not prepared to inflict any punishment on him.

Referred Cases Nos. 9 and 10 of 1912.

Benson, Offg. C. J.—I concur with the conclusions arrived at by my learned brothers in the judgments which have just been read and which I have had the advantage of perusing.

With regard to the charge in connexion with the criminal case against Muni Reddi, I am unable to accede to Mr. Rangachariar's contention that the judgment and evidence in the civil suit against the pleader, Mr. Venkata Rao, is not admissible as evidence against him in the present proceedings. The question in that suit was the very question which we now have to decide, viz., whether he engaged to defend Muni Reddi in the Sessions case and failed to do so without any valid excuse. Mr. Venkata Rao was the defendant in the case and the decision was against him.

I do not think that the decision is conclusive proof against him in the present proceedings, but it has not been treated as conclusive. He has been allowed in the present proceedings to produce further evidence in support of his defence and he has produced it, and it has been

duly considered by the District Judge and by us. There is no suggestion that any evidence which the pleader wished to adduce in the present proceedings has been shut out. We have not been referred to any authority for holding that the judgment is inadmissible in the present proceedings as establishing a prima facie case of unprofessional conduct against the pleader, or for holding that we are precluded from considering whether the judgment is right on the evidence on which it was based, nor do I see any ground in reason why we should treat them as inadmissible.

On the merits the evidence and probabilities in all these cases have been so fully considered in the judgments of the two District Judges and of my learned brothers that I do not think anything would be gained by my reviewing them afresh. I entirely agree with the conclusions at which my learned brothers have arrived.

I do not understand how it can be seriously argued that what the pleader is said to have purchased from the plaintiffs in Original Suit No. 3 of 1909 was not "an actionable claim," and that there was nothing contrary to law or public policy in his purchasing it, if he did do so, and therefore his doing so was no professional misconduct. The plaintiff's claim had, no doubt, been put in action, but that did not render it the less an "actionable claim" as defined in S. 3, T. P. Act. The claim was still sub judice. Though the case was ripe for judgment, it had not been given. The claim had not become merged in a decree. S. 136, T.P. Act, in the most stringent terms declares that no Judge, legal practitioner or officer connected with any Court of justice shall buy or traffic in or stipulate for, or agree to receive, any share of or interest in any actionable claim." A pleader holds a privileged position in connexion with the administration of justice, and the law imposes on him certain restrictions and disabilities by reason of the position or office which he holds, and in order to safeguard the interests of litigants and the pure administration of justice.

It is, I think, futile to contend that it is not professional misconduct for a man to do that which the law expressly forbids him to do by reason of the profession which he exercises. The degree

of misconduct will, no doubt, vary with the circumstances of each case, but I cannot doubt that a transaction such as that with which we are now concerned amounts to gross misconduct. The pleader who is conducting a case is in a better position than his client to judge of the probability of his success or failure, and the nearer the case is to judgment, the greater will be his opportunity for correctly anticipating the event. It may be that when a case is ripe for judgment, there is no longer any temptation to the pleader to conduct the case improperly, but to allow him at that stage to purchase his client's claim would expose him to a strong temptation to misrepresent to his client his prospects of success and the value of his claim. In the present case, the transaction was a highly speculative one. The evidence shows that the plaintiffs feared their suit would be dismissed and were willing at one time, to sell their claim for Rs. 4,000. They, in fact, got a decree for Rs. 11,000 in the original Court, though this was reduced on appeal to Rs. 6,000. It is true there is no suggestion that the pleader made any misrepresentation to his clients in this case, and the plaintiffs were satisfied with the price (Rs. 4,750) paid to them, but this does not prevent the pleader's purchase of the claim, in defiance of the express provisions of law, from being professional misconduct of a very grave character.

It only remains for me to state the decision at which we have arrived as to the penalty we should impose under S. 13, Legal Practitioners Act, on Mr. Venkata Rao in respect of the charges which have been established against him. He cannot plead youth or inexperience in extenuation of his misconduct. Its gravity has certainly not been lessened by the false defences which he has put forward and maintained throughout in regard to the charges relating to his conduct in connexion with the criminal case against Muni Reddi, and in purchasing his own client's claim in Original Suit No. 3 of 1909 in the Subordinate Judge's Court. We do not think that a mere warning or censure would suffice to mark our sense of the gravity of his misconduct in either of these cases. We think that we are required to impose a penalty of a substantial period of suspension in each case. We accordingly direct that Mr. K. Ven-

kata Rao be suspended from the exercise of his profession as a pleader for six months and three months on account of his misconduct in regard to these two cases respectively, the two periods to run consecutively.

We do not think it necessary to impose any penalty in connexion with the charge against him for 'engaging in trade. We think it sufficient to say that he was wrong in carrying on trade without reporting the fact to the High Court under R. 27 of the rules, made by the High Court under the Legal Practitioners Act 18 of 1879. The pleader will have to pay the costs of the petitioner in Referred Case No. 10 of 1912.

The Civil Revision Petition No 485 of 1911 is dismissed.

S.N./R.K. *Order accordingly.*

A. I. R. 1914 Madras 526

BENSON AND SUNDARA AIYAR, JJ.
(*Rebala*) *Ramana Reddi* — Plaintiff—Appellant.

v.

(*Rebala*) *Babu Reddi* and others—Defendants—Respondents.

Civil Misc. Appeal No. 268 of 1911, Decided on 26th November 1912, from order of Dist. Judge, Nellore, D/- 15th September 1911, in E. P. No. 173 of 1910.

(a) Limitation Act (9 of 1908), S. 6, and Art. 182 — Exemption of cases coming under S. 48, Civil P. C., from Art. 182 — S. 6 does not apply to S. 48, Civil P. C.—There are no exemptions from limitation unless provided by law—Civil P. C. (1908), S. 48.

Article 182, Lim. Act, which lays down the general rule of limitation applicable to execution of decrees, exempts from its operation cases coming within the purview of S. 48, Civil P. C. [P 527 C 1]

Section 6, Lim. Act, is expressly limited to cases where limitation is provided for in the Limitation Act itself. [P 527 C 2]

The period of limitation prescribed by S. 48, Civil P. C., is not subject to the rule of exemption during the period of minority.

Apart from the provisions of the Limitation Act, minority is not the ground of exemption under general law: 16 Bom. 536, *Disappr.*; 128 P. R. 1894, *Appr.*

Limitation being the result of statute law, no exemption from it can be recognized except what the statute itself provides. Limitation is not based solely or even mainly on the ground of laches. [P 528 C 2]

(b) Civil P. C. (5 of 1908), O. 20, R. 12 — Application under O. 20, R. 12, is one for execution.

An application for ascertainment of mesne profits, for which a decree was passed under

the old Code of Civil Procedure, is one relating to the execution of the decree within the meaning of S. 244 (c) of the old Code. [P 531 C 2]

According to S. 48 of the new Code, all decrees, except a decree granting injunction, will be barred after the expiration of 12 years.

Quære.—Whether an application for ascertainment of mesne profits under O. 20, R. 12, would not be one for execution of the decree and whether Art. 181, Lim. Act, would not apply to such an application. [P 532 C 1]

The effect to be given to a document and to the proceedings of a Court must be decided by the law in force when the document was executed or the proceedings were passed.

[P 532 C 1]

T. V. Muthukrishna Aiyar—for Appellant.

S. Subramania Aiyar — for Respondents.

Judgment.—This appeal is against an order of the District Court of Nellore, dismissing an application for execution of the decree of the Subordinate Judge's Court of Nellore in Original Suit No. 15 of 1892. The decree is one for partition and was passed on 3rd August 1897. There were several intermediate applications for execution presented on the plaintiff's behalf during his minority by his next friend. One of them was compromised on 31st October 1910. The plaintiff's present application ignores the compromise, his case being that it was illegal and not binding on him. The application has been dismissed by the lower Court on the ground that it is barred by limitation under S. 48, Civil P. C., it having been presented more than 12 years after the date of the decree, although within three years after the attainment of majority by the plaintiff. The first question for consideration is whether the plaintiff is entitled to the benefit of S. 7, Lim. Act, and to reckon the period of limitation for execution of the decree from the date of attainment of majority; and whether apart from that section, there is any general principle of law entitling him to the same benefit on account of his disability arising from minority. Art. 182, Lim. Act, which lays down the general rule of limitation applicable to execution of decrees, exempts, from its operation, cases coming within the purview of S. 48, Civil P. C.

Section 6 of the Act, enacts that "where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from

which the period of limitation is to be reckoned, a minor. . . . he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in Col. 3, Sch. 1;" and as Art. 182 of the schedule is inapplicable to the case, S. 6, enacting the rule of exemption during the period of minority, must also be held to be inapplicable. The District Judge, Mr. Wallace, has dealt with the question in a remarkably able and lucid judgment; but the question really does not admit of any serious doubt on the language of the section.

It is unnecessary to consider whether the other general provisions of the Limitation Act contained in Ss. 4 to 25 would be applicable or not, where the period of limitation is prescribed by some special Act and not by the general Code of Limitation. S. 6 is expressly limited to cases where the limitation is provided for in the Limitation Act itself. We therefore agree with the Judge in holding that the plaintiff cannot claim the benefit of S. 6, Lim. Act. It is strenuously contended by Mr. Muthukrishna Aiyar, the learned vakil for the appellant, that apart from that section, minority is a well-recognized ground of exemption in law from the operation of the law of limitation. He relies in support of this contention mainly on *Moro Sadashiv v. Visaji Raghunath* (1) and a passage in Bacon's Abridgment. The Bombay case, it cannot be denied, supports his contention. The question there was the same as in this case. Sargent, C. J., observed:

"The question referred to us must be decided by the general principle of law as to the disability of minors to which the provisions of the Civil Procedure Code must, in the absence of anything to the contrary, be deemed to be subject. The general principle is that time does not run against a minor, and the circumstance that he has been represented by a guardian does not affect the question." No authority has been cited in support of the enunciation of the rule that there is a general principle of law that time does not run against a minor. The passage cited from Bacon's Abridgment is in the following terms: "The rights of infants are much favoured in law; and regularly their laches shall not be pre-

(1) [1892] 16 Bom. 536.

judicial to them, upon a presumption that they understand not their rights and that they are not capable of taking notice of the rules of law so as to be able to apply them to their advantage; hence by the common law infants were not bound for want of claim and entry within a year and a day; nor are they bound by a fine and five years' non-claim, nor by the statutes of limitation, provided they prosecute their rights within the time allowed by the statute after the impediment was removed." *King v. Dilliston* (2), is cited as authority for this proposition.

After full consideration we have come to the conclusion that the authority relied on in the passage cited does not show that according to the English law, infancy is an answer to a plea of limitation. The question in *King v. Dilliston* (2) was whether a certain custom was applicable to minors, namely, a custom that the person to whose use a copyhold estate is surrendered shall come in and be admitted after three proclamations or otherwise his land shall be forfeited. It was held that it was not and that therefore if a surrender be made in fee and the surrenderee die before the next Court, the estate is not forfeited by the infant heir and the surrenderee not coming in after three proclamations. Eyre, J., observed: "That a feoffment of an infant was no forfeiture at the common law, and that as a particular custom may bind an infant for a time, so it may bar him for ever," and that the question was whether the custom in question as it was found in general words should bind an infant after three proclamations; "all customs," he said, "are to be taken strictly when they go to the destruction of an estate." Strictly, infants were not prevented by the letter of the custom, they were not bound by other customs like this, there was no necessity to construe them to be within the custom. He, no doubt, observed that, "the right of infants is much favoured in law, and their laches should not be prejudicial to them as to entry or claim upon a presumption that they understand not their right" but he did not say that they were not bound by statutes of limitation. On the other hand, he observed: "It is admitted that if an infant do not present to a church within six

months or do not appear within a year, that his right is barred; but this is because the law is more tender of the church and the life of a man than of the privileges of infancy. So if an office of parkship be given or descends to an infant, if the condition annexed in law to such an office (which is skill) be not observed, the office is forfeited. But that a proclamation in a base Court should bind an infant, when he is not within the reason of the custom, is not agreeable either to law or reason." Nor did either of the other concurring Judges, Gregory, J., and Dolbin, J., make any pronouncement in favour of the exemption of minors from rules of limitation proper. It may be that laches may not be attributable to an infant and that a penalty inflicted for laches may not be enforced on an infant. But laches should not be regarded as the sole or perhaps even the main ground on which rules of limitation are based. Lord St. Leonards observed:

"All statutes of limitation have for their object the prevention of the rearing up of claims at great distances of time when evidences are lost; and in all well regulated countries, the quieting of possession is held an important point of policy." In *Trustees of Dundee Harbour v. Dougall* (3), Lord Kenyon described the statutes of limitation as statutes of repose: see also the observations of Lord Redesdale in *Cholmondely v. Clinton* (4). Lord Coke says that the limitation of actions was by force of diverse Acts of Parliament, although at a very remote time in England there was undoubtedly a stated time for the heir of the tenants to claim after the death of his ancestor and in case of non-claim before the expiration of the time (a year and a day), the claimant was without remedy. Banning in his work on Limitations, p. 1, observes: "The limitation of the times for bringing actions is at the present day entirely dependent on statute." He states that under the common law, the presumption arose after a long time in respect to a legal claim that it had been satisfied: see 4 Brown's Chancery Cases 115. Eminent Judges have repudiated the notion that limitation is based solely on the ground of laches. In

(3) 1 Macq. H. L. 317 at p. 321.

(4) 4 Bligh. 106.

(2) 3 Modern Reports 223.

Dalton v. Angus & Co. (5), Lord Blackburn, observed:

"This ground of acquiescence or laches is often spoken of as if it were the only ground on which prescription was or could be founded. But I think the weight of authority, both in this country and in other systems of jurisprudence, shows that the principle on which prescription is founded is more extensive. Prescription is not one of those laws which are derived from natural justice. Lord Stair, in his *Institutes*, treating of the law of Scotland, in the old customs of which country, he tells us, prescription had no place (Book 2, Tit. 12, S. 9), says, I think truly, prescription, although it be by positive law, founded upon utility more than upon equity, the introduction whereof the Romans ascribed to themselves, yet hath it been since received by most nations, but not so as to be counted amongst the laws of nations, because it is not the same, but different in diverse nations as to the matter, manner, and the time of it. . . . It is both fair and expedient that there should be provisions to enlarge the time when the true owners are under disabilities or for any other reason are not to be considered guilty of laches in not using their right within the specified period, and such provisions there were in the Roman law, and commonly are in modern statutes of limitation, but I take it that these are positive laws, founded on expedience, and varying in different countries and at different times." Angell in his work on *Limitation* observes:

"Although, says Domat, there was no other reason to justify the introduction and use of prescription than that of public policy, it would be just to prevent the property of things from being constantly in a state of uncertainty. Laches like limitation, no doubt, deprives the plaintiff of his remedy, but it depends upon general principles while limitation depends on express law. Laches may be adapted to the facts of each particular case, but limitation is a matter of inflexible law. A positive rule of limitation must not depend on whether there be laches or not. Courts of Equity in England apart from any rules of limitation refused relief to parties resorting to them for remedies not open to the Courts of

Common Law, if they were guilty of laches; but they also followed the Statutes of Limitation by analogy in granting equitable reliefs, although no Statute of Limitations before 3 and 4, Will. IV, C. 27 provided in terms for equitable rights or expressly bound the Courts of Equity:" see Darby and Bosanquet on *Limitation*, p. 234.

Limitation then being the result of statute law, it has been held in England that no exemption from it can be recognized except what the statute itself provides. In *Beckford v. Wade* (6), the Judicial Committee of the Privy Council held that the fact that the defendants in an action who were absent from the realm could not postpone the running of limitation. The Master of the Rolls observed:—"The proposition, that this construction, under the doctrine of inherent equity, is put upon our English Statutes of Limitation, is, as I apprehend, altogether unfounded. General words in a statute must receive a general construction, unless you can find in the statute itself some ground for limiting and restraining their meaning by reasonable construction, and not by arbitrary addition or retrenchment." He goes on to say: "The true rule on this subject is laid down by Sir Eardly Wilmot in his opinion in the House of Lords on the case of *Lord Buckinghamshire v. Drury* (7). He says:—"Many cases have been put, where the law implies an exception; and takes infants out of general words by what is called a virtual exception. I have looked through all the cases; and the only rule to be drawn from them is, that, where the words of a law in their common and ordinary signification are sufficient to include infants, the virtual exception must be drawn from the intention of the Legislature, manifested by other parts of the law, from the general purpose and design of the law, and from the subject-matter of it." And he mentions the statutes of limitations, as an instance of a case, in which infants would be barred, if it were not for the introduction of the saving clause. Accordingly, we find that in the great case of *Stowel v. Lord Zouche* (8), upon the Statute of Fines of Henry the Seventh where the question was, whether, when

(5) [1882] 6 A. C. 740=50 L. J. Q. B. 689=44 L. T. 844=30 W. R. 191=46 J. P. 131.

(6) 11 R. R. 20=17 Ves. 87.

(7) Wilm. 177.

(8) Plowd. 353 at p. 363.

the bar by five years' non-claim had begun to run in the time of the ancestor of full age, it should continue to run against his infant heir, although there was a great difference of opinion among the Judges upon that question, the whole argument turns upon the true construction of the statute itself, with reference to all the parts of it, and to the object it had in view, and not upon any supposed inherent equity, by which infants were to be excepted out of the operation of the Statutes of Limitation. On the contrary it is laid down in that case, and laid down without any contradiction for as much as they intended, that is, the Legislature intended, "to avoid universal trouble (as the preamble speaks) and to make peace, which is to be preferred before all other things, and for as much as they have made the provision general, viz. that the fine shall be final, and shall conclude as well privies as strangers if the Act had stopped there, it would have bound as well infants, females covert and the others named in the exception, as people of full age, and who were void of such defects." His Lordship went on to observe referring to the case before him that the absence of the defendants from the realm or even the fact of the Courts of Justice being shut up in times of war, were no grounds for excluding the Statutes of Limitation. See also Angell on Limitation, p. 498, where the opinions of Chancellor Kent and Marshall, C. J., in America to the same effect are referred to. It is perfectly clear from *Beckford v. Wade* (6) that minority, unless expressly provided for in the statute, would be no ground of privilege: see *Mahomed Bahadur Khan v. The Collector of Bareilly* (9). We have no hesitation in saying that the same view must be held in this country also.

The earliest Statutes of Limitation in India therefore made express provisions in favour of minors: see Madras Reg. 2 of 1802, S. 18, Cls. 1, 2 and 3. In Act 14 of 1859, S. 11 provided a general exemption in favour of minors but only in the case of suits. In Act 9 of 1871, also the exemption was confined to suits, but a further restriction was introduced by it by limiting the privilege to cases where limitation was provided for in the schedule to the Act. There can be no

doubt that the restriction was deliberately made. In S. 7 of Act 15 of 1877, the privilege was extended to applications; but the restriction to cases for which the limitation was provided for in the Act was continued. The provision in the present Act is in the same terms. We cannot therefore uphold the argument that there is any fundamental rule of law or justice entitling the appellant to claim that the limitation should run only from the date of his attaining majority. The decision of the Punjab Chief Court in *Jhandu v. Mohan Lal* (10) is in accordance with the view we have taken on the question.

It is next contended for the appellant that the application is not barred in so far as the claim for mesne profits is concerned, even if S. 48, Civil P. C., would be a bar so far as partition is concerned. The argument is that with regard to mesne profits, the decree cannot be regarded as complete until they are ascertained; and that the present application may be regarded as one for the ascertainment of the mesne profits, and as such should be regarded as one not for execution of the decree, but as one in the suit itself to finish the inquiry and make the decree for mesne profits final. And reliance is placed in support of the argument on *Puran Chand v. Roy Radha Kishen* (11), *Harmanje Narain Singh v. Ram Prasad Narain Singh* (12), *Midnapore Zamindari Co. Ltd., v. Kumar Naresh Narain Roy* (13), *Muhammad Umarjan Khan v. Zinat Begam* (14) and *Waliya Bibi v. Nazar Hasan* (15). The decree here was passed when the repealed Civil Procedure Code was in force. It provided that "the defendants do pay to the plaintiff his one-third share of the mesne profits (to be ascertained in execution) from the date of suit, 11th August 1892, until delivery of the lands or until three years from this date whichever event first occurs." The direction for the ascertainment of the mesne profits in execution was apparently made under S. 211 of the Code. S. 212 enacted that with regard to mesne profits prior to the institution of the suit "the Court may

(10) [1894] 123 P. R. 1894.

(11) [1892] 19 Cal. 132.

(12) [1907] 6 C.L.J. 462.

(13) [1911] 11 I.C. 939=39 Cal. 229.

(14) [1903] 25 All. 335=(1903) A.W.N. 80.

(15) [1904] 26 All. 623=(1904) A. W. N. 145=1 A.L.J. 344.

(9) [1873-74] 1 I. A. 167=13 B. L. R. 202=21 W.R. 318.

determine the amount either by the decree itself, or may pass a decree for the property and direct an inquiry into the amount of mesne profits, and dispose of the same on further orders." Where the decree provided for the mesne profits up to the date of delivery of the property the inquiry had necessarily to be postponed. S. 244 laid down that "questions regarding the amount of any mesne profits or interest which the decree has made payable in respect of the subject-matter of a suit, between the date of its institution and the execution of decree or the expiration of three years from the date of the decree" should be decided by the Court executing the decree. It is argued the expression "the Court executing the decree" merely designates the Court which is to hold the inquiry into mesne profits and that the provision in S. 244 does not make the inquiry a matter relating to the execution of the decree. It is not easy to see why an inquiry for mesne profits accruing subsequent to the date of judgment given by the Court should be regarded as necessary to make the decree itself complete. Where the mesne profits relate to the period before the decree, it may be said that the decree should, strictly speaking, determine all the rights of the plaintiff including the claim to mesne profits up to the date of the decree; but it is doubtful whether this argument can apply to mesne profits subsequent to decree. Whatever the strictly logical view of the matter may be, it appears to us that the object of the provisions of the Code was to enable the Court to separate the question of mesne profits from the claim to the land to relegate the former to proceedings in execution.

It was certainly within the competence of the Legislature to do so; and it was regarded as promoting the convenience of litigants and the Court. According to S. 244 the inquiry need not be held by the Court which tried the suit. If the execution of the decree is transferred to another Court, it might be held by such Court. The inquiry may not logically be one relating to the execution of the decrees; but, in our opinion it was the intention of the legislature to make it a part of the execution proceedings. This explains the reason for its inclusion in S. 244. The language of Cl. (c) of that section "any other question relating to

the execution" shows that the inquiry into the amount of mesne profits was also to be regarded as a question relating to execution. An application for the ascertainment of mesne profits must therefore according to the Code, be regarded as an application for execution though it may be that the decree, in so far as mesne profits are concerned, would be incomplete until they have been ascertained. It may be right to hold that within the meaning of S. 230 of the repealed Code, the 12 years prescribed therein for the execution of a decree for money would run only from the date when the mesne profits are ascertained; for it may be said that until that is done, it cannot be said that there is a decree for money. In this view, the actual decision in *Harmanoje Narain Singh v. Ram Prasad Narain Singh* (12) may not be open to exception and the observation in *Puran Chand v. Roy Radha Kishen* (11), that the decree is not complete with regard to mesne profits for the purpose of execution until they have been ascertained, may also be unexceptionable; but this does not show that an application for the ascertainment of mesne profits would not be an application for execution as held by the Calcutta and Allahabad High Courts. The Code expressly made it such. *Ram Kishore Ghose v. Gopi Kant Shaha* (16) is in accordance with this view. *Midnapore Zemindari Co. Ltd. v. Kumara Naresh Narain Roy* (13), no doubt, contains an observation that the whole decree including the decree for possession must be regarded as incomplete until mesne profits are ascertained; but with all deference we are for the reasons already stated unable to agree in this view. It is not supported by the earlier decisions of the Calcutta High Court. It is based partly upon a judgment of the Privy Council in *Radha Prasad Singh v. Lal Sahab Rai* (17). But that case does not support the proposition.

There although there was a declaration that the original defendants were liable for mesne profits, the decree did not determine the important question whether the defendants were liable jointly or severally in respect of wrongful occupation. There was no adjudication upon any of these matters until a long time after the original decree and

(16) [1901] 28 Cal. 242.

(17) [1891] 13 All. 53=17 I. A. 150.

until after the death of the defendants whose representatives were sought to be made liable. The decision of their Lordships was that the representatives not having been made parties to the investigation about mesne profits, they were not liable for the amount adjudged against them. Their Lordships did not decide any question of limitation. The appellant relies also on the decision of the Court in *Vydanatha Aiyar v. Subramanian Pattar* (18). There the decree directed that the costs of one of the parties should be paid by the other when ascertained. The ascertainment was not directed to be made in execution proceedings. The Court had no power to give such direction. The question was when limitation began to run for the execution of the decree. It was held that the decree was complete only when the costs were ascertained. We do not think that the case affords any support to appellant's contention here. According to S. 48 of the present Code, the execution of all decrees except a decree granting an injunction will be barred after the expiration of 12 years. An application for the ascertainment of mesne profits being in our view an application for execution, we must hold that it is barred by the provisions of the section.

But it is contended that this case must be decided according to the provisions of the present Procedure Code which, by O. 20, R. 12, directs that in a suit for the recovery of immovable property and mesne profits, the Court may direct an inquiry as to the mesne profits and should pass a final decree in accordance with the result of the inquiry. The effect of the provision is to make the decree, so far as mesne profits are concerned, complete only when the amount has been ascertained while not making the rest of the decree complete till then. In this view, an application for the ascertainment of mesne profits would not be one for execution of the decree, though the question might then arise whether Art. 181 would not apply to such an application. We are however of opinion that the question whether the application is one for execution or not should be decided in accordance with the provisions of the repealed Code. The effect to be given to a document and to the proceedings of a Court must be decided by the law in force

(18) [1911] 10 I. C. 552.

when the document was executed or the proceedings were passed. The decree for mesne profits in this case cannot be regarded as incomplete and incapable of execution on the ground that according to the present Code it would be so regarded. This view is, in our opinion, in accordance with the decisions discussed at pp. 324 to 333 of Maxwell on the Interpretation of Statutes: see also the judgment of this Court in Second Appeal No. 117 of 1911.

Lastly, it is contended that the application is not barred, at any rate so far as the recovery of outstandings is concerned inasmuch as they had not been collected by the defendant at the time of the decree, according to which the plaintiffs are entitled to recover their share when the outstandings are collected. But the application for execution does not state when they were collected or that they have been collected at all. It does not therefore disclose any right on the part of the plaintiff to recover anything from the defendants. In the result, the appeal is dismissed with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 532

BENSON AND SUNDARA AIYAR, JJ.

Vyapuri Koundan and others—Appellants.

v.

A. C. Chidambara Mudaliar—Respondent.

Misc. Second Appeal No. 70 of 1911, Decided on 22nd November 1912, from the order of Dist. Judge, Trichinopoly, in Original Suit No. 44 of 1911.

Civil P. C. (5 of 1908), S. 47—Prior execution application for less amount—Subsequent one for larger amount—Order to reduce amount not appealed against—Decree-holder held bound by the order.

A decree-holder, when applying again for execution of his decree, made his calculation of the amount due to him in a way different from that adopted in the previous applications, with the result that the amount was shown to be much larger than would be due according to the method of calculation adopted in the previous applications. Without issuing notice to the judgment-debtor, the Court held that the decree-holder was not entitled to the larger amount and returned his application with the direction that he should amend the amount due to him in accordance with the mode of calculation previously adopted by him. The decree-holder failed to appeal against the order.

Held: (1) that the decree holder was bound by the order of the Court and could not thereafter:

claim a larger amount in any subsequent application;

(2) that the order should be regarded as a decision between the parties and was, therefore, appealable;

(3) that the order was similar to the dismissal of a suit as time barred without notice to defendant.

Although an ex parte order cannot bind a party against whom it is passed without his having an opportunity to make the defence, yet the bar of former adjudication cannot be avoided by a party who had such opportunity.

[P 533 C 1, 2]

K. V. Krishnasami Aiyar—for Appellants.

C. V. Anantakrishna Aiyar—for Respondent.

Judgment.—The plaintiff obtained a decree on a mortgage against the defendants. The decree directed a certain amount to be paid with future interest on the principal at 18 per cent. per annum. Various payments were made by the defendants from time to time. There have in all been fourteen applications by the plaintiff for execution. In the first twelve applications, he appropriated the payments in a certain way which it is unnecessary to describe. In the 13th application, that is, the one immediately preceding the present one, he made his calculation of the amount due to him in quite a different way with the result that the amount was shown to be much larger than what would be due according to the method of calculation adopted in the previous applications. The Court held without issuing notice to defendants that the plaintiff was not entitled to the larger amount and returned his application with the direction that he should amend the amount due to him in accordance with the mode of calculation previously adopted by him. He never appealed against this order nor did he obey the direction to amend his petition. It was accordingly rejected. He put in the present application after the period allowed for amendment had elapsed but before the previous application was rejected. He made his claim in the present application on the same basis as in the 13th application. The District Munsif held that he could not do so. On appeal, the District Judge held that the plaintiff was not bound to adopt the mode of calculation previously adopted erroneously in the Judge's opinion. We are of opinion that the order of the Munsif on the 13th applica-

tion, holding that the plaintiff was not entitled to claim a larger amount on a new basis, must be held to bar the contention that he is entitled to do so. The order was a judicial adjudication that the plaintiff was not entitled to calculate the amount due to him on a certain basis. The plaintiff was certainly entitled to appeal against it, if so advised, and he failed to do so. The ground on which the District Judge has held the contrary view is that the order was passed without notice to the defendants and could not, therefore be regarded as a decision between the two parties. In our opinion, this view is wrong. The plaintiff's petition for execution was a proceeding between him and the defendants and the order decided the question of the plaintiff's right as against them. The fact that the defendants were not called upon to appear and answer the plaintiff's claim is immaterial. Suppose a suit is dismissed as barred by limitation without notice to the defendant on the ground that the plaintiff's own allegation shows that the suit is barred. It would be impossible to hold that the plaintiff could sue again on the same cause of action. If any such order is against the defendant and further proceedings in execution are subsequently dropped and afterwards commenced again, the previous order against the defendant would not bar him from setting up any defence that may have been adjudicated on without notice to him.

This is not on the ground that the former order was not one passed between the parties, but because an ex parte order cannot bind a party against whom it is passed without his having an opportunity to make his defence. But the bar of former adjudication cannot be avoided by a party who had such opportunity. The learned vakil for the respondent has relied on three cases in support of his contention that the former order is not conclusive against his client. *Hira Lal Bose v. Dwija Charn Bose* (1), *Bholanath Das v. Profulla Nath Kundu Chowdhry* (2), *Delhi and London Bank, Ltd. v. Orchard* (3); but none of these is in point. In *Bholanath Das v. Profulla Nath Kundu Chowdhry* (2) the

(1) [1906] 3 C. L. J. 240=10 C. W. N. 209.

(2) [1901] 28 Cal. 122=5 C. W. N. 80.

(3) [1877-78] 3 Cal. 47=4 I. A. 127 (P. C.).

judgment-debtor put in a counter-petition stating that the plaintiff's application for execution was barred. Both parties failed to appear on the date fixed for the hearing and the Court dismissed for default both the petition for execution and the counter-petition. When the plaintiff again applied for execution, the defendant again set up the plea of limitation and the Court held that the former order did not bar his plea as the dismissal of the counter-petition was not based on the merits of the plea. In *Hira Lal Bose v. Dwija Charn Bose* (1) also, the previous application for execution was struck off without any judicial determination of the question of limitation which was set up in the subsequent application. In *Delhi and London Bank, Ltd. v. Orchard* (3), the head-note of which in the report is inaccurate, all that their Lordships of the Privy Council held was that an order sending an application for execution to the record room on the ground of the non-receipt of the Commissioner's sanction, which was required under the law, was not a judicial determination of any question between the parties. There was no decision on the question of limitation at all: see the case explained in *Manjunath Bhadrathat v. Venkatesh Govind Shanbhog* (4).

We reverse the order of the lower appellate Court. The plaintiff may amend his petition by substituting the amount due to him in accordance with his former calculation. He must pay the appellant's costs here and in lower appellate Court.

The case is remanded to the District Munsif's Court for fresh disposal according to law.

S.N./R.K.

Case remanded.

(4) [1881-82] 6 Bom. 54.

A. I. R. 1914 Madras 534

MILLER AND SANKARAN NAIR, JJ.

Secy. of State—Appellant.

v.

Kannepalli Jankiramayya and others—Respondents.

Appeal No. 124 of 1906, Decided on 24th January 1913, from decree of Dist. Judge, Ganjam, in Original Suit No. 3 of 1904.

(a) Limitation Act (15 of 1877), Art. 31—Suit for illegally levied water-cess is not

governed by Art. 131 as it is not a periodical-ly recurring right.

A claim to recover a water-cess illegally levied is not a suit to establish a periodically recurring right governed by Art. 131, but the cause of action arises on such occasion when the cess is demanded: 3 I. C. 747 and 12 M. L. J. 126, Ref. [P 535 C 1]

(b) Madras Irrigation Cess Act (7 of 1865), S. 1—Payment under coercion is not voluntary.

A payment for water-cess made under fear of coercive process is not a voluntary payment.

[P 536 C 1]

(c) Madras Irrigation Cess Act (7 of 1865), S. 1—Unlimited water supply goes with grant of land without limitation.

In grants of land it must be assumed that where there is no limitation in the grant itself, the proprietor is entitled to unlimited water supply: (Case law referred). [P 541 C 2]

(d) Madras Irrigation Cess Act (7 of 1865), S. 1—Government's proprietorship in rivers includes streams also.

Under Act 7 of 1865, the proprietorship of Government in rivers is not confined to tidal and navigable rivers, but to natural streams also: (Case law referred). [P 536 C 1, 2]

(e) Madras Regulation (25 of 1802), S. 1—Exemption in S. 1 does not apply to zamindars taking water from their rivers.

The exemption in S. 1 does not apply to those zamindars and proprietors who themselves take and are entitled to take the water for irrigation from rivers and streams on their zamindaris without its being supplied to them by Government. [P 544 C 2]

(f) Madras Irrigation Cess Act (7 of 1865),—Scope—No change in substantive law—Object is to recover water cess and recoup expenditure on irrigation.

Act 7 of 1865 was not intended to effect any change in substantive law. It was only intended to enable Government to recover water-cess for anicut water, to recoup themselves from the expenditure incurred for the construction of irrigation works, or when a ryot used the water in a natural stream owned by Government. [P 549 C 1]

(g) Madras Land Encroachment Act (3 of 1905)—Rivers not Government property—By custom river-water belongs to owners of estates through which it passes—Government has right to regulate water supply in ryotwari villages, but has no right in zamindari.

Madras Act 3 of 1905 cannot be used to interpret Act 7 of 1865; it does not make the river or water therein Government property.

Under the Customary law of the country, river-water belongs to the owner of the estate through which it passes subject to the claims of the proprietors below. [P 548 C 2]

The Government have a right to regulate the distribution of water among ryotwari villages without causing injury to any of them. But they have no such right in zamindaris: 32 Mad. 141, not Appr.; 26 Mad. 66; 3 I. C. 456 and 6 I. C. 199, Dist. [P 549 C 2]

J. L. Rozario—for Appellant.

P. Nagabushanam—for Respondents.

Miller, J.—The learned Advocate-General argued only two questions at the hearing of the appeal:

(1) Whether the suit is barred by limitation; and

(2) whether the water-cess was properly levied by reason that the Vamsadhara River is a river belonging to the Government.

As to the first question, it is not denied that if the suit is a suit to establish a periodically recurring right, a suit, that is, to which Art. 131, Sch. 2, Lim. Act, 1877, is applicable, then it is barred; but it is contended that that article does not apply and that a cause of action arises on each occasion on which the cess is demanded.

This contention is supported by *Sriman Madabushi Achamma v. Gopesetti Narayanasawmy Naidu* (1), and the case therein referred to, *Gopaladasu v. Perraju* (2). In fact, it seems to me that if those cases are rightly decided the respondents' contention must prevail. The Advocate-General did not succeed in satisfying me that the case in *Sriman Madabushi Achamma v. Gopesetti Narayanasawmy Naidu* (1) can be distinguished. Following that case I must hold that the suit is not barred.

On the second point Munro, J., and I in *Kandukuri Mahalakshamma Garu v. Secy. of State* (3) have held as a matter of law, on the facts put before us in that case that the Vamsadhara is a river belonging to the Government. Mr. Nagabhushanam did not on this point lay before us any facts which were not before the Bench in *Kandukuri Mahalakshamma Garu v. Secy. of State* (3), but argued, as a matter of law, that the decision in that case is wrong. It has however been followed by another Bench and has not yet been overruled by a Full Bench or a higher Court; till that is done it is an authority which I ought to follow, and I follow it.

Mr. Nagabhushanam presented for our consideration some evidence as to the repair and control of the Mobagam channel by the Urlam zamindar. That evidence, it seems to me, does not affect the case; it might perhaps be evidence in favour of the zamindari of a contract with the Government, but does not help the plaintiffs, who do not allege any contract with the Government for the supply of water.

I would allow the appeal and dismiss the suit with costs in both Courts.

Sankaran Nair, J.—This is an appeal by the Secretary of State in Council from the judgment and decree of the District Judge of Ganjam, by which it was declared that the Government are not entitled to levy any water-cess from the plaintiffs for having cultivated their lands with the waters of the Vamsadhara River and the Mobagam channel. The plaintiffs are the inamdars of the village of Varahanarasimhapuram paying a quit-rent to the zamindar. Their case is that the lands in their village were irrigated by the Mobagam channel which conveyed water to their lands from the Vamsadhara River. They alleged that they have been cultivating their lands from time immemorial with this water, and that the Government have illegally collected from them since 1894 water-cess under Act 7 of 1865 for the water from this channel used for converting dry lands into wet and for raising second wet crops on lands which were already under wet cultivation. They therefore prayed for a declaration of their title alleged and an injunction to enforce such declaration, and also for the recovery of the amount illegally collected from them. The Government pleaded that the Vamsadhara River is a Government source of irrigation and that the Mobagam channel is the property of Government. They also pleaded that a right to the free use of water supplied from a Government source cannot be acquired by immemorial user, but can be acquired only by virtue of an engagement with Government and that there was no such engagement with the plaintiffs. The defendant also pleaded that the payments made by the plaintiffs were voluntary and not therefore recoverable, and that the suit was barred by limitation. The District Judge held that the payments were not voluntary and there was no limitation bar; on the merits, he held that the plaintiffs have failed to prove that the Mobagam channel was constructed by their ancestors as alleged by them; and that before 1803 it was the property of Government, but that in 1803, when the Urlam estate was granted to the predecessor-in-title of the present zamindar, the Mobagam channel was also granted to him. As to the Vamsadhara River, he found that the Government had

(1) [1909] 8 I. C. 747=93 Mad. 171.

(2) [1902] 12 M. L. J. 126.

(3) [1910] 8 I. C. 67=34 Mad. 295.

failed to prove that it was tidal and navigable, and he was further of opinion that, even if it was a tidal and navigable river, that would make no difference with reference to the claim advanced by the plaintiffs. On the questions of law which were raised he held that the plaintiffs were only entitled to claim any rights relating to the irrigation of the lands which were recognized by the title-deeds and according to them their right to irrigation must be limited to a single wet crop on the wet lands. He also held that, even if the plaintiffs had acquired a prescriptive right to the use of water as against Government, this would only debar the Government from interfering with the supply of water but would not affect the right of Government to charge water-rate for wet crops, as he was of opinion that such right is only limited by any engagement with Government under Act 7 of 1865, and the title deeds showed no such engagement in this case. However, on the finding that neither the Vamsadhara River nor the Mobagam channel was a Government source of supply, he decreed the plaintiff's claim. Against this decree the Secretary of State appeals.

The appeal was first argued before Munro, J., and myself by the then Advocate-General, Mr. Sivaswami Aiyar. The questions of law in this case were argued before me and Abdur Rahim, J., in another second appeal by Advocate-General, Mr. Napier, and finally the appeal was again reheard by Miller, J., and myself when the Advocate-General, Mr. Rozario, argued the case on behalf of the appellant.

As to the voluntary nature of the payment, I cannot help expressing my regret that the Government ever put forward the plea that the plaintiffs are not entitled to recover the amount paid by them and which would have been collected from them by the Revenue Officials by coercive processes if they had not paid, even if they establish their title alleged by them and the illegality of the demand on the ground that it was a voluntary payment. It was given up in this Court as the question had been decided in *Kandukuri Mahalakshamma Garu v. Secy. of State* (3). Following *Sriman Madabushi Achamma v. Gopesetti Narayanasawmy Naidu* (1), I also hold that the suit is not barred by limitation.

I now proceed to consider the main question.

The facts found by the District Judge were scarcely disputed in appeal by the Advocate-General on either occasion, and as to the questions of law reliance was placed upon a decision of this Court reported as *Kandukuri Mahalakshamma Garu v. Secy. of State* (3). The suit out of which that appeal arose was also tried by the same District Judge. It had reference to the claims of certain proprietors to irrigate lands from the same river and channel i. e., the Vamsadhara and the Mobagam, and if the conclusion therein arrived at is right, it is conceded that this judgment under appeal cannot be supported. As no further arguments were adduced on behalf of the Crown in support of those conclusions than those contained in that judgment, I shall state briefly the grounds of decision in that case. The learned Judges therein pointed out that under S. 2, Act 3 of 1905, subject to easement and natural and customary rights of landholders, all standing and flowing waters, which are not the property of any one else are the property of Government. The Vamsadhara river being undoubtedly a natural stream and the waters of that river, in their opinion, not belonging to anyone else, it followed that the body of water forming the river is the property of Government and from that it followed that the river itself belongs to the Government.

They found on the evidence, agreeing with the District Judge on this point, that when the estate was granted to the predecessor-in-title of the present Urlam zamindar, the beds of the channels were not reserved by Government but passed with the lands to the proprietors to the same extent and in the same way as tank beds, village sites and other poramboke lands passed; but the non-reservation of the beds did not show anything more than that Government fixed the revenue with reference to the extent of land then under cultivation and is no evidence of any agreement in any particular case to permit free irrigation from Government source of water supply. They further found that the fact that there was no water-cess charged until the year 1901 is not evidence of a lost grant, as in this case before the settlement in 1803 the Government had the full rights of owner

apart from the rights of ryots, if any, and the sanad itself does not give the inamdars any right to take water free of any cess ; and as they were of opinion that the Government are entitled under Act 7 of 1865 to charge water-cess if water is supplied from a river or channel belonging to Government and there is no engagement between the parties that the irrigation is to be free of a separate charge, they held that the Government were entitled to impose the cess.

It will thus be seen that in appeal the question was decided on grounds very different from those which were urged in the Court below ; and if we are now to reverse the decree of the lower Court in favour of Government and justify their action in imposing the assessment, it will be on grounds very different from those on which such assessment was imposed by the Government on the plaintiffs and by reason of an Act 3 of 1905, which was passed subsequent to the institution of the suit.

If the Acts 3 of 1905 and 7 of 1865 enable the defendant to levy a water-cess when the water of a natural stream is used by a zemindar or other landed proprietor for irrigating his lands, in the absence of any engagement with Government to the contrary, then the facts that the Government had no such rights before, that the proprietor was entitled to use such water for irrigation without the leave of the Government, and that the Government promised not to levy any cess, unless such promise amounted to an engagement, would make no difference.

In order to decide the questions in issue, it appears to me necessary to state the facts in some detail. Vamsadhara river rises in the Jeypore zamindari and after leaving the zamindari it flows through ryotwari lands for a very small portion of its course. It passes then through the Urlam zamindari, and the Mobagam channel takes off from its left bank in the village Mobagam in the Urlam estate. It has a course of about seven miles and passes through eight or nine villages. It irrigates about 11 villages. It has a total ayacut of about 4,000 acres of which about 500 acres are ryotwari lands. Four of the villages belong to the Urlam zamindar, and there are seven inam villages irrigated by this channel. Of these seven villages, Varahanarasimhapuram belonging to the

plaintiffs is one. The plaintiffs' village as well as certain other villages, mainly ryotwari, are irrigated by channels which take off from the Mobagam channel. One of such channels is Merakabatti. It takes off from the Mobagam main channel within the limits of plaintiffs' inam village and, after partially irrigating it, enters the Government village of Madapam. This Merakabatti channel has no head sluice or regulator and its control, as well as the title of the Secretary of State in it, is found by the District Judge to begin only at the point, where it enters ryotwari land, and the Judge finds that the Secretary of State has nothing to do with this channel from where it takes off from the main Mobagam channel to where it enters the ryotwari village of Madapam. This finding has not been attacked before us in appeal. Mobagam channel has a head sluice which was constructed in 1892 by the zamindar of Urlam, and the Judge finds that there is evidence to show that sums have been expended by the Urlam zamindari from time to time on the channel. He also finds that the revenue officials never exercised any control over the distribution of water from the main channel and that no money has been expended towards its upkeep.

There is another channel, Lukulam, which also takes off from the left bank of the Vamsadhara river from what is now a ryotwari village. Its head sluice is under the control of the Government ; the Lukulam channel and the four branches which take off from the Mobagam channel, to which I have already referred, also irrigate some of the same villages in addition to certain others. This is the system of irrigation of the villages. The finding of the District Judge that the Mobagam channel was not constructed by the plaintiffs' ancestors was not disputed in argument before us. We must, therefore take it that the Mobagam channel, when the village was granted to the predecessor-in-title of the Urlam zamindar, belonged to the Government subject only to the claims of the ryots, if any. The lands, through which the Vamsadhara and the channels flowed after leaving the Jeypore zemindari, also belonged to Government subject to the rights of the ryots. In 1803, the villages were constituted into three or four zamindaris. Urlam, which includes, the bed of

the Vamsadhara river and the bank at the place where Mobagam channel has its head, was one of them, and one of the important questions for decision is what were the rights acquired by the zamindar and conferred by the Government.

It must be remembered that in 1802 and in the subsequent years, sanads were granted to three classes of landholders. Some of them were representatives of those who were really Ruling Princes. Within their small kingdoms, they exercised all the powers of a Ruler. They commanded armies, they made wars on their own account and concluded treaties and they had their own coins. As an instance I refer to the Ramnad zamindar : see *Ramnad* case (4). Some of them like the Parlakimidi zamindar in the District of Ganjam were the descendants of the ancient Hindu Sovereigns : as to this class of zamindars in the Circars : see Fifth Report, p. 35. Another class was composed of those who were chieftains under rulers exercising various degrees of authority. Some of them like the Telugu Poligars of the south and the Hindu zamindars of the Telugu District were really Viceroy's who exercised the delegated powers of their Sovereign in every respect. Others were originally only revenue officials or military commanders or police officers who usurped other functions. The history of this class of chieftains is given in the judgment of this High Court in *Lekkamani v. Ranga Kristna Muttu Vira Puchaya Naikar* (5) : see also Privy Council judgment in *Collector of Trichinopoly v. Lekkamani* (6). Besides these two classes of holders, a new class of zamindars was created by the East India Company.

They carved zamindaris out of what were called haveli lands in the Circars which were under their own control subject to the claims, if any, of the ryots. In the north of the Presidency, they were parcelled out and sanads granted to persons who became the proprietors of those estates thenceforward. It is important to remember that, when these new estates were formed out of the haveli lands, the purchasers of those estates, thenceforward the proprietors, were placed on the same footing as the other classes of hol-

ders, viz., the descendants of ancient Chiefs and Rulers who were already in possession of their own lands and to whom sanads were granted, with one exception in the case of rights to water which will be noticed later : see paras. 58 and 60 of the instructions issued to Collectors as to Permanent Settlement of Lands, pp. 330, 331, Vol. 2 of the Fifth Report. They thus acquired by grant all the rights which the other two classes of the ancient Rajas had before they obtained the sanad and the immunity from enhancement of land revenue or rent which they acquired under the sanad. The sanads were in the same terms.

What were those rights? These ancient Rajas exercised all the powers of a Sovereign over their Raj as well as proprietary rights over some of the lands. They levied taxes ; they received a share of the produce from those ryots who were bound to pay melwaram ; they received the full rent of the lands when they were cultivated not by ryots but by tenants who had no ryotwari interests in the land. It was in this state of things that Regn. 25 of 1802, was passed and "sanads-i-milkut istimrar or deeds of permanent property," as they were called, were given to some of them. This regulation has been fully discussed in the judgment of the Judicial Committee reported as *Collector of Trichinopoly v. Lekkamani* (6). In that case the Judicial Committee say: "The only difference between a polliem and a zamindari which is permanently settled and one that is not, is that, in the former the Government is precluded for ever from raising the revenue; and, in the latter, the Government may or may not have the power:" see *Collector of Trichinopoly v. Lekkamani* (6).

The policy of the East India Coy's. Government at that time was to take away from these Chiefs or zamindars the rights which according to the Western ideas should be exercised only by a Ruling Sovereign and to leave to them all such rights as could be exercised by a private proprietor. There were some claims which apparently did not fall clearly within the scope of the one or the other and they were dealt with by name. It was necessary that there should be no doubt on the question and great care was therefore taken to enumerate

(4) [1901] 24 Mad. 613.

(5) [1870-71] 6 M.H.C.R. 203.

(6) [1873-74] 1 I.A. 232=14 B.L.R. 115=21 W.R. 358.

the rights which were till then exercised by the Rajas and which should no longer be exercised by them. For instance, all salt and saltpetre revenue, duties of every description by sea or land, tax on liquor and intoxicating drugs, all taxes personal and professional, all taxes and lands for police establishments were expressly excluded in the sanads: see Cl. 4 of Lord Clive's Permanent Sanads, appendix to the Standing Orders of the Board of Revenue, and Fifth Report, p. 321. Waste lands were specially referred to as having been granted to the zamindars. There were claims which were generally included in the name sayar understood to refer to taxes generally: see Fifth Report, p. 321, paras. 13, 14, 15 and 16.

As already stated, it was not intended to deprive these Rajas of any rights which they were at that time exercising as the proprietors of those lands. And looking to the items which were specially resumed and the purpose of the regulation and the words in the permanent sanad, there is very little doubt that they were confirmed in the exercise of those rights other than those which were enumerated, and in the cases of zamindars of Government creation, those rights, were granted to them unless specially reserved. In my opinion, speaking generally whenever the Government contend that these Rajas are not entitled to exercise any of the rights which are capable of private ownership and that such rights are vested in the Crown, it lies on the Government to prove that these zamindars were deprived of them either expressly or by necessary implication under the sanads granted under that Regulation; the new zemindaris were intended to be placed on the same footing. The sannads to which I refer are those which were granted by Lord Clive, a copy of which will be found in the earlier editions of the Standing Orders of the Board of Revenue.

It now remains to consider how far these views may be acted upon in cases of water supply. In considering what title to waters passed to those to whom sanads were granted, it is desirable to bear in mind all the different forms of water supply for the cultivation of lands. Except on the western coast, throughout the Presidency the rainfall is moderate and insufficient for the satisfactory production of rice, a crop which is most

abundantly cultivated, so that the country depended a good deal upon the supply of water otherwise than by rain. In many districts, there were tanks for the conservation of water which depended for their supply mainly on the rains. They even now exist in vast numbers throughout the Presidency for the irrigation of lands. Most, if not all, of them are of old native construction though some few of them have been kept under repair by the British Government. It can scarcely be suggested that, where these tanks are situated in zamindari lands, it was not the intention of Government entirely to part with their control to the zamindars. There were also groups of rain-fed tanks connected with each other for cultivation by means of channels. There is very little doubt that in their case also wherever this group of tanks was situated in a zamindari, the control completely passed over to the zamindars. Some of these tanks are large reservoirs which contain a good deal of water, and the supply of water therefrom can be safely relied upon after the monsoon had commenced. The water supply however of a great number of these tanks is very precarious, and the cultivation often suffers from water not being sufficiently supplied and does not attain the general standard which is secured from other sources. But for cultivation greater dependence is placed therefore upon tanks supplied by river-water. Many tanks are supplied not only by the rains, but by the high freshes of rivers by means of channels unconnected with any dams. But in the majority of cases, the level of the river is lower than that of the adjoining fields and it is usual to put up an anicut or masonry dam right across the river-bed in order to store water and raise its level.

Generally, except in the cases under Government supervision, the dam consists of a row of granite posts of the necessary height with the interstices being filled with turf earth, often a wall with the same materials being put in front of the posts. This is washed away during the monsoons leaving the posts alone standing. From these dams the water passes into the channels. The beds of these channels are kept high enough for the water to flow by gravitation into the distributing channels, or tanks. From these channels water is taken or distri-

buted for cultivation. It is also stored in reservoirs and rendered available for purposes of irrigation often by channels from those reservoirs. The area of land that can thus be irrigated according to the customary methods is called the *ayacut* of the river, a well-known revenue term which is thus defined in the Standing Orders 1820-65 of the Board of Revenue "*Ayacut*.—The total area of land in a village, when applied to irrigation estimates, it means the land that can be watered by the tank or channel referred to." Garden land is often, if not generally, cultivated with water by cattle-power or manual power. With reference to the channels conveying waters from the river for irrigation and river-fed tanks, it cannot be denied that the ancient Chiefs who afterwards became zamindars under sannads were exercising every form of control subject only to the claims of the ryots, if any.

The central power seldom interfered with such exercise of control. Even when the Mahomedan Rulers considered that such an interference was necessary, it was done by depriving the old Chiefs and mirasidars of those rights and transferring them to their Governors and other officials who took their place and were also constituted zamindars by the East India Co. Agriculture and the wealth of the country depended upon the water supply, and it was scarcely likely that they ever meddled with it. After the grant of permanent sanads, the supply of river-water continued to be as necessary as before for the cultivation of those lands which depended upon river-fed channels and tanks. There is nothing to indicate that the Government ever desired to interfere with what was believed to be the ancient usage. Everything tends to show that the zamindars and the ryots were allowed to exercise rights of ownership and to use the river-water as before. When the sharing system prevailed, it is possible that a melwaramdar or Government did not take the trouble to ensure the necessary supply of water.

But a Permanent Settlement with peshcush or cash payment to the Government pre-supposes the continuance of the usual water supply. If the lands did not receive it, Government could not have expected the zamindar to pay. Cl. 12 of the sanads contemplates engagements by the zamindars with the ryots. Such

engagements for payments of rent show that the zamindari ryots were entitled to get the required supply: see also para. 37 of the Fifth Report, p. 326. The zamindars and the ryots therefore must have continued to receive the supply. It is obvious that in the zamindaris the Government did not undertake to, and did not, supply water. The landholders therefore must have continued to take the water as before for irrigation from the rivers. There is absolutely nothing in the volumes of papers relating to the Revenue Settlements to show that there was any restriction placed upon them in using the waters of the rivers or exercising any right as before, assuming that it was open to the Government to restrict it. The presumption is that they allowed it. The Government contemplated the cultivation of the waste lands: see p. 324, p. 27, of the Fifth Report. That is unlikely unless the right to take waters from the rivers was conceded. Any increase of revenue due to such increased cultivation was certainly not contemplated any more than if such cultivation had been carried on by water from wells or tanks constructed at the expense of the zamindar. If such an increase is claimed on account of the right of Government to take a share, it could be claimed quite as well in the one case as in the other. We see in the ryotwari district the Government actually taking a share of the produce when waste lands are brought under cultivation.

The regulation and the sanads granted thereunder make it quite clear that the object was to give security to property; there is no security if at the pleasure of Government any assessment not regulated by law, not under the control of the Courts, may be imposed for the use of what is a necessity for cultivation. The sanads declare that the assessment on the zamindari lands should "never be liable to change under any circumstances." An unlimited power to tax a commodity indispensable for cultivation is undoubtedly against this solemn assurance.

I now refer to the one difference which was recognized in the case of haveli lands which places this question in my opinion beyond all reasonable doubt. I stated in a previous part of the judgment that besides granting these permanent sanads to the ancient chiefs, the

Government also came to the resolution of transferring the property which was at their disposal like the haveli lands in the north. For that purpose they had to divide the haveli lands into various lots, such division being made with reference to the facilities of water supply. In the case of these lands, unlike the case of ancient zamindaris, the tanks and the water-courses belonged to the Government. It was open to them to transfer them to the new zamindars or to retain the control in their own hands; it was however distinctly stated then that the construction and repair of tanks and water-courses were to be left to the zamindars except in those cases where there may be works of great general importance to the country or too extensive to be entrusted to the charge of individual proprietors or where there may be other reasons to make it advisable for Government to reserve to themselves the right or duty of looking after these water sources: see p. 331, para. 59, of the Fifth Report. It will be noticed that the Government evidently did not consider it necessary to point out that in case of ancient Chiefs, they proposed to transfer such rights or obligations to them or to reserve any control to themselves as obviously such right of control was not with the Government and the zamindars were entitled to it. In the case of these zamindaris formed out of haveli lands therefore there may be cases in which the Government reserved control of the water-courses, but that has to be made out by Government; where the Government do not prove that any such control was reserved there is nothing to distinguish the case of these new zamindaris from that of the old: see para. 60, Fifth Report, p. 361. This appears to me to be decisive of the question in the case of old zamindaris as well as is the case of the zamindaris formed out of these haveli lands. The water-courses are generally of no use without the supply of water from the river.

If we look at the usage and practice that prevailed it also tends to the same conclusion. In no estate from the time the permanent sanad was granted up to 1865 when the Cess Act was passed is it the fact that the Government ever increased the land revenue—there was no law entitling them to claim a charge otherwise—on account of water being

taken from any natural stream or imposed any separate charge from the zamindars for taking water from the rivers themselves.

In the ryotwari districts if a ryot used water from the river for other than the usual cultivation they levied an enhanced revenue. If a second crop was raised with additional water, there was a second crop assessment. If a well was sunk within the ayacut of a river and cultivation carried on with the water of that well it was usual, even for years after the passing of Act 7 of 1865, to impose additional revenue on the ground that he had had the benefit of the river water. In the case of the zamindaris no such demands have ever been made. I am not aware that in cases of ancient zamindaris any head sluice has ever been retained under Government control. Whenever the Government wished to interfere with any such sluice for the benefit of their own lands, it was, as in the Vaigai case *Ponnusami Tevar v. Collector of Madura* (7), with the consent of the proprietor. Most of these zamindaris were at some time or other under the Court of Wards. The Court of Wards, so far as I know, never recognized such a claim on behalf of Government. The decisions till within the last few years assumed and where necessary held, that where there is no limitation in the grant itself the proprietor was entitled to unlimited water supply: *Secy. of State v. Perumal Pillai* (8).

I now come to the change in the law introduced by Act 7 of 1865. In 1802 and for some years afterwards it was not the policy of the British Government to embark upon any irrigation projects. The irrigation works of the Cauveri river and of the Godaveri and the Kistna rivers in the Godaveri and Kistna Districts were completed before 1855, when the general survey and settlement of the Presidency was undertaken. They entailed an enormous expenditure and the Government looked to increased revenue to recoup them. So far as the ryotwari lands were concerned, they could get over the difficulty by increasing the land revenue on those lands which profited by these irrigation works, and it appears that, when lands were permanently irrigated from such sources, a consolidated

(7) [1869-70] 5 M. H. C. R. 6.

(8) [1901] 24 Mad. 279=11 M. L. J. 117.

assessment was imposed leaving it to the ryot to occupy or throw up that land. If only a temporary use of such water was made a water-rate was added to the dry land rate and the aggregate formed the revenue demand.

In the case of zamindaris and inams to which water was supplied, it was open to the Government to impose conditions before supplying them with water. But the Secretary of State suggested for the consideration of the Madras Government, in considering their proposals for a general survey and settlement whether a separate water-rate might not be charged when water from these sources was used or was permanently available so that the profits derived on account of these irrigation works could be ascertained. At that time British Government hoped to attract British capital and enterprise to India in the construction of irrigation works as in railway undertakings. The Madras Irrigation Company started in 1858 was the result of this policy. It was given up only some years after the passing of Act 7 of 1865. If British capital was to be attracted to India it was necessary to recognize the principle of a separate charge to be levied for water that was necessary in order to realize this. If therefore water-cess was to be imposed and levied separately from land revenue, legislation was necessary to recover it in the same way. I have referred in some detail to the proceedings which led to the passing of Act 7 of 1865 in my judgment in second appeal No. 573 of 1911. They show in my opinion beyond all doubt that the object the Government had in view was to obtain a return for the costs incurred by the Government and not to realize increased revenue where none was incurred and where the ryots and the zamindars were only utilizing such facilities of irrigation as existed before. This return was to be obtained out of the increased profits which would naturally be derived by the ryots. They show further that when the Government interfered with any pre-existing source of water supply, they supplied water free of charge from Government sources. See in particular Government Order 101, Revenue, dated 16th January 1864 and Government Order 986, Revenue dated 11th May 1865, which contain "the drafts of a bill and of rules for the levy of a water-cess in

localities where the Government may see fit to adopt that mode of realizing the revenue from works of irrigation in preference to levying a consolidated assessment."

The preamble of Act 7 of 1856 points out "large expenditure out of Government funds has been and is still being incurred in the construction and improvement of irrigation and drainage to the great advantage of the country and of proprietors and tenants of the land," and then states that "it is right and proper that a fit return should be made to the Government on account of the increased profits derivable from the lands irrigated by such works." So far the preamble makes it quite clear that under the Act what was intended was that there must be works of irrigation or drainage constructed or improved by the Government and that there should be increased profits derivable from lands irrigated by such works. There was no idea that where water was taken as before by a zamindar or ryot without having recourse to any such works, any revenue was to be imposed. Then S. (1) empowers the Government to levy a cess in certain cases; under S. 1, Act 7 of 1865, it is a necessary condition that the "water is supplied or used for purposes of irrigation from any river, stream, channel, tank or work belonging to or constructed by Government". The question for decision is whether these words "river stream belonging to Government" apply to natural streams like Vamsadhara while in zamindaris. A "river" is composed of bed, banks and water. Angell, pp. 3 to 5, Farnham, Vol. II, pp. 1462, 1557. The bed of the river is the part between the banks. The banks are the elevations of land which confine the water to a definite course. He is therefore the owner of the river who owns the beds, the banks and the water. It follows therefore that in zamindaris, where the zamindars own the beds and banks of rivers, as in Jeypore and Urlam they cannot be called "rivers belonging to Government." It has been contended that all tidal and navigable rivers, and they only, belong to Government. I do not think so, as such an interpretation will exempt from the operation of the Act many natural streams to which the Act is evidently intended to apply, and also, as the Judge points out, hitherto no

difference has been recognized so far as irrigation rights are concerned between tidal and navigable rivers and others. The English Law, when the Act passed, was laid down in *Embrey v. Owen* (9). "Flowing water is publici juris, not in the sense that it is a bonum vacans to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of possession only. But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it." It is possible that the words "river, stream belonging to Government" were used in the section to indicate only this kind of ownership. I am satisfied it certainly includes that right. The river therefore may be said to belong to Government when they have got the proprietary interest in the bed or adjacent land which gives them access to it and power to exclude others. This reason limits the ownership to the part of the stream adjacent to the land, and excludes therefore rivers and streams in zamindaris and inams or adjacent to them. But I think the section includes other claims as well. The riparian right above referred to depends upon vicinage and consequent right of access. The power does not generally vest in the Government or zamindars. It vests often, perhaps generally, in the ryots. Moreover, this riparian right will not entitle Government or zamindar to use the water for the cultivation of tenements not in the vicinity, while it is undoubted that they have been doing so from time immemorial. The customary law of the country may throw some light.

So far as the old Customary Law in the Madras Presidency is concerned, the question appears to be clear. In the deeds of conveyance before the days of British rule, and in conveyances executed even afterwards, at least in the early years of the century, by mirasidars and landed proprietors like zamindars, inamdars, etc., which have come before the

Courts, it is generally stated that the lands are conveyed with the eight incidents of ownership.

"The eight incidents of ownership in land are stated in the following verse :

- | | |
|--------------------------------------|----------------------|
| (1) <i>Nidhi</i> | (2) <i>Nicshepa</i> |
| (3) <i>Pashanam</i> | (4) <i>Siddha</i> |
| (5) <i>Sadhya</i> | (6) <i>Jalanwita</i> |
| (7) <i>Aeshiny</i> | (8) <i>Agamisam-</i> |
| <i>yuctam ashta-bhoga samanwita.</i> | |

(1). Treasure, trove; (2) property deposited in the land not claimed by another; (3) mountains, rocks and their contents, mines, minerals, etc.; (4) all land, etc., yielding produce; (5) all produce from such land; etc., (6) rivers, tanks, wells and all other waters; (7) all privileges actually enjoyed; (8) all privileges which may be conferred; these are expressed by the general terms *ashta-bhogam*, the eight rights enjoyed by the owner of land: see *mirasi papers*, p. 206. The papers were compiled and the translation made by Mr. Bayley, who was a member of the Board of Revenue, and they were finally corrected by Mr. W. Hudleston, Secretary. It will be noticed that the conveyance carries with it "*jalani*" i. e., "rivers, tanks, wells and all other waters." These rights were possessed by mirasidars and other proprietors of land. The deeds, printed in Mr. Hudleston's *mirasi papers*, were executed by the mirasidars. The various water-sources are therein mentioned, in some deeds separately and also under a general term. Where the landed proprietors known by different names, like mirasidars, and others, in different districts were dispossessed of their ancient rights by Hindu and Mahomedan Chiefs and Governors, such rights were vested in these latter. But when lands were granted to favourites, etc., by rulers, these rights were conferred upon them. In a case reported after this case was heard, a grant in 1768 by the Tanjore Raja, under which the properties were held till recently, was produced containing the same words "total of 60 valleys of land including wet and dry lands, water, trees, stones *nidhi*, *nicshepa* (treasure), *siddha*, *sadhya* (whatever is and may be brought into existence) present and future *patta*, all *banb* and all *kana* with all *samudayams* with waters poured from the hand:" see *Jeyamba Bai v. Secy. of State* (10).

(10) [1912] 15 I. C. 871.

(9) [1851] 6 Ex. Rep. 353=23 L. J. Ex. 212=15 Jur. 639.

The right to water was therefore, treated as a proprietary right and ownership in it was recognized as in land, treasure, trove, etc.

The ownership ceased when the water left the land. There is no reason to think this rule was discarded. The right which the proprietor has to use the water for agriculture is obviously not the right of easement as there is no dominant or servient tenement. Nor is it, as already pointed out, the natural right of a riparian proprietor. Both the Government and the zamindar claim and concede in this case the right of landholders, in no way riparian proprietors, to the use of river water. The right claimed by Government is not to prevent the zamindar from using such water but to impose a water-cess, even if he is entitled to use it for irrigation, and this is the right upheld by the District Judge.

In the ryotwari districts, villages which are not adjacent to the natural stream use river-water for irrigation. The right to prohibit such use has never been recognized.

If I am right in my view of the Customary Law of the country, that the proprietor of the land is the owner of the water thereon, then those rivers or streams of which they own the bed and the banks, on either side, belong to Government. Except on the west coast where the cultivation is dependent upon the rains, not river-water supplied by Government, and in those few and dwindling places in the eastern districts where the mirasi right is recognized, the Government have asserted their claim to all waste and poramboke which include river-bed and the banks; and any channel therefore could be constructed only by Government or with their leave. I have therefore little doubt that the legislature, which only carried out the behests of the Executive Government, intended this section to refer to all rivers and streams in those ryotwari districts where no mirasi or any corresponding right prevailed. For the same reason, it did not apply to rivers running through or by zamindaris.

Further if the words "rivers belonging to Government" apply to zamindaris it will be open to Government to impose water-cess on zamindari lands in the exercise of their natural rights for irrigating their lands with river-water as

before the Permanent Settlement. This is clearly against the Regulation of 1802 and, as the amount of the water-cess is not open to discussion in the civil Courts, practically repeals the Regulation and cancels the sanads in this respect, and involves such gross breach of faith that the Courts should not, if possible, adopt a construction which will have that effect. But to escape from this consequence, reliance is placed on behalf of Government on the exemption clause. It runs thus: "Where a zamindar or inamdar by virtue of engagements with the Government is entitled to irrigation free of separate charge, no cess under this Act shall be imposed for water supplied to the extent of such right and no more." It will be noticed that under S. (1) the water-cess may be imposed when water is supplied or used, but the exemption applies only to cases where water is supplied, of course, by Government. These terms have been explained in *Venkatappayya v. Collector of Kistna* (11), followed in *Krishnayya v. Secretary of State for India* (12), and since the amendment of the Act in 1900 on account of those decisions retained this word as before, the judicial interpretation may be taken to have received legislative sanction. This exemption therefore does not apply to those zamindars and proprietors who themselves take and are entitled to take the water for irrigation from the rivers and streams in their zamindaris without it being "supplied" to them by Government. In their cases you cannot imply a demand.

Moreover, if we are to presume an engagement to "supply" water by reason of the grant of permanent sanad, then the Government are bound to supply the zamindars with water, but such is clearly not the case. I am therefore unable to accept this argument. It is only advanced to meet the untenable position in which the Government find themselves in asserting that a river like Vamsadhara is a Government source of irrigation for zamindaris. That the exemption clause does not apply is conclusive to show that the section itself does not apply to such rivers.

If however the word "supplied" only means "used" and the section with the

(11) [1889] 12 Mad. 407.

(12) [1896] 19 Mad. 24.

exemption clause applies, I am clearly of opinion that the "engagement" to be implied is one to allow the proprietors to irrigate all their lands which could be irrigated, i. e., all those comprised in the ayacut without any fee and without any charge. There is nothing to suggest in any Government papers that the unqualified power which the old zamindars had to cultivate waste lands with river-water was taken away and such right was confined to the cultivation of those lands then under wet cultivation. The usage till 1865 tends to the same conclusion. The object of Act 7 of 1865 was only to collect a cess for water supplied from Government works. Further, to hold that the "engagement" was to allow water for the cultivation of lands then under wet cultivation is to ignore the history of the Permanent Settlement. In some cases, a comparatively small peshcush alone was fixed as a pledge of submission to Government without any reference to assets—Arni, for instance, a jagir of ancient days. It was a complaint of the Famine Commission in 1880 that, receiving substantial benefit from Government works, the proprietor declined to contribute and could not be compelled by law to pay any cess: see Madras section of the Report, p. 164, S. 61. In a few others the peshcush was simply an equivalent for the military services formerly rendered by them without any reference to their assets. The great zamindaris of Venkatagiri, Kalahasti and Karvetnagar are among these. Their peshcush was a proportion of the cost of the zamindar's military establishment inclusive of amarams and kattubadis less the revenue from salt, abkari dues etc. Some were settled without any inquiry into their resources. Sivaganga is one of the most important of them. A few of these estates, when they passed under British rule, had to pay a certain proportion of what they were paying to the old Rulers—Kangundi for instance.

In all these instances, the obvious intention of Government was to leave it to the zamindar to exercise all the proprietary rights as before. The extent of wet cultivation or the assets had nothing to do with the peshcush. The conditions under which the peshcush was imposed rebut any other presumption.

In the District of Ganjam, with which we are now immediately concerned, no

proportion of the jama was adopted, but the peshcush was in each case in point of fact fixed by the Board of Revenue at their discretion on a consideration of all the circumstances and accounts before them.

When the Act was passed, the Government had these facts before them, because about that time another important operation to afford security of title was going on—the enfranchisement of inams. The Inam Commissioner, the Board and Government, had to consider the circumstances under which every estate was held to decide whether they had the right to the reversion and therefore to enfranchise the inams therein. It also appeared at that time that the accounts on which the settlements of some zamindaris like Ramnad may have been based were lost in the Government offices. How is it possible in all these various cases to assume that the word "engagement" in the exemption clause in S. 1, Act 7 of 1865, had reference to the "wet land" at the time of the Permanent Settlement, when it had either nothing to do with assets or it was not possible to find out whether it was so. In some of the important zamindaris like Pita-puram the peshcush was fixed on certain accounts taken by the Circuit Committee between 1776 and 1786. Are we to ignore the very probable increase in cultivation between 1786 and the sanad? It seems to me to raise a strong presumption that the extent of wet cultivation was not the determining factor. In those other cases, where the peshcush was a proportion of the fixed assets, it was the average of certain years before the Permanent Settlement that was adopted. Is it then seriously contended on behalf of the Crown that a zamindari like Urlam was entitled to cultivate wet land to the average extent but must pay cess if he cultivates lands of the larger extent cultivated in the other years? No zamindari was then surveyed. The wet area was never localized. If the zamindar is now made to pay cess for the excess area, he cannot now localize the area, if any, then under cultivation so as to demand their contribution from the tenants of the excess area; and where the wet area, if any, adopted as the basis of the settlement is less than the actual extent of wet cultivation before the settlement, as it well might

happen on account of the average area having been adopted, it would be impossible for the zamindar to localize the wet area. I am therefore unable to accept the view that the zamindar was entitled to cultivate only the mamool wet free.

I am therefore of opinion that under the Act, as it stood unaffected by the subsequent legislation (3 of 1905 to which I shall presently refer), it was not competent to the Government to levy any cess for any water taken from the Vamsadhara River, of course, without the aid of Government works. I make this reservation to exclude Lukulum with reference to which I express no opinion.

We have now to consider the plaintiffs' position as inamdars. The village was granted to their predecessors-in-title in 1764 by the Zamindar of Parlakimidi. When the haveli lands along with this village were granted under a deed of permanent sanad to the predecessors-in-title of Urlam, the quit-rent was included in the assets. The sannad is not before me but if the general practice was adhered to, the reversion was in the Government, and accordingly the Crown enfranchised the inam afterwards. As I have pointed out already, the evidence is not clear as to the circumstances under which the Mobagam channel was constructed; but as it was in the haveli land at the time of the Permanent Settlement, it may be presumed to have belonged to Government. The inamdar was undoubtedly irrigating his lands from the Mobagam channel at that time as it was his source of irrigation. The general policy of the Indian Government was against any restriction on irrigation as they shared in any increase in produce. There is no reason to suppose that this inamdar was entitled to use only a certain quantity of water or to irrigate only a certain extent of land. Innes, J., rightly states the principle applicable to such cases: "Where a channel has been constructed by Government acting as the agent of the community to increase the well-being of the country by extending the benefit of irrigation, and in pursuance of that purpose a flow of water is directed to the villages designed to be benefited, it becomes simply a question upon the circumstances of the case whether there has not been a conveyance to such villages in perpetuity

of a right to the unobstructed flow of water by the channel. Looking at the permanency of such works and to the permanency attaching to the object that there was a transfer in perpetuity would seem an almost necessary conclusion, unless there were other circumstances to lead to one of an opposite character. It might, of course, be capable of being shown that the privilege was granted as a mere license, and that before the water was allowed to flow to the villages, it had been left open to Government by arrangements then made to obstruct the flow at will at any future period:" *Ponnusawmi Taver v. Collector of Madura* (7). Any arrangement between the zamindar and Government at the Permanent Settlement cannot prejudicially affect him. After the enfranchisement, it is said that he is only entitled to irrigate the land then declared "wet." But we cannot imply an engagement between the Government and the inamdar, as the Mobagam channel and the Merakabatti channel, which takes water from it to irrigate the inam, are not under Government control and they cannot control the distribution of water therefrom. The fact that the Government has control over the Merakabatti channel only after it leaves the inam is significant. Moreover, there is nothing in the title-deeds or proceedings to show that the inamdar is only entitled to cultivate with channel water those lands entered as wet free of charge and that even those lands are entitled to exemption only for the first crop.

Neither in the despatch from the Government of Madras to the Secretary of State, Revenue, dated 9th August 1859, with the enclosures thereto, giving full information of the intended proceedings to enfranchise inams, nor in the final report of Mr. Blair on the operations of the commission, dated 30th October 1869, the proceedings of the Madras Government and the despatch of the Secretary of State thereon dated 10th August 1871, nor in the mass of records relating to the enfranchisement of inams, is there any indication that it was the intention of Government to advance any claim on account of any excess cultivation or that the inamdar's rights was confined to the wet area mentioned in the title-deeds. If it was

so the Government could very easily prove it without asking the Courts to upset a practice upon theories. The available records support the contrary conclusions: when water was supplied from Government anicut works no cess was levied on the mamool wet presumed to have been under wet cultivation at the time of the permanent settlement or the enfranchisement of the inams, but cess was levied on water taken for the irrigation of the rest. That the claim was so restricted to water from Government works is not without significance. The copies of the inam title-deeds show that the inam is only "claimed to be of acres of dry land and acres of wet land." All information had to be given in the registers as the assessment was fixed at the discretion of Government; no inference can be drawn therefore that any fact therein mentioned was the basis of any contract. In asking the Government to cancel their order that inams limited to a limited number of lives should not be interfered with, the Inam Commissioner said: "It is superfluous to add that in all such settlements every care is taken that the interests of Government do not suffer. A fair addition is made to the present value of the village on account of the prospective improvement from the cultivation of waste lands."

The Government accordingly cancelled their Order No. 945 Revenue, 3rd June 1864. This seems decisive: see also the Commissioner's order quoted in my judgment in *Secretary of State v. Amalavana Pandara Sannadhi* (13).

Further the inamdar as such is only entitled to Government revenue. The title-deeds have been declared by legislation not to interfere with the mirasidars or ryots. Any engagement would probably have been with them. I am therefore of opinion that in each case it is for the Government to prove that the right of cultivation is limited as alleged by them; otherwise the so-called engagement will be taken to be in accordance with usage or with the conclusion arrived at by Innes, J., already referred to.

After the passing of the Act, the practice continued the same as before, the Government claiming a cess only when water was taken from Government works. The first note of dissatisfaction was that of the Famine Commission in the report (18). [1913] 18 L.O. 294.

presented by them to the Houses of Parliament in July 1880. They pointed out what they deemed to be an abuse, that the zamindari lands, which, on the introduction of canal irrigation were in the enjoyment of any means of irrigation however inferior and precarious, were supplied with canal water without any additional charge, with the consequence that the zamindar gets a continuous and unlimited supply for the whole of the area he had ever brought under cultivation. They thought there is no reason why this benefit should be conferred. The Government supplied this water in consequence of their having interfered with the zamindar's channels. Many of these channels supplied him with river-water. His right to irrigate with such water was thus assumed. From this time began the efforts ever since continuously maintained to carry out the above suggestion. Among the suggestions were that the proprietors should be required to prove with reference to every field that it was being fully irrigated to entitle them to claim Government canal water: that they must prove what extent they were cultivating according to the permanent settlement accounts, which were in Government custody and which they are not bound to produce and which the Government condemned as inaccurate when they were against their contention: see Government Order 844, Revenue, dated 18th September 1902. An irrigation and navigation Bill was introduced in 1884 (No. 1 of 1884), which assumed the law as I have stated it. The local officers continued the old practice.

In 1886, the Collector stated the usage correctly when he directed his Assistant Collector that no cess should be levied for water taken from rivers by lifts or by channels dug and repaired by private proprietors (Ex. 14). In 1889-90, there was an inquiry, and the Revenue Board came to the conclusion that, as nothing was spent on the channel by Government, the Government had nothing to do with the regulation or distribution of water in the Mobagam channel—Board's Proceedings No. 3014, Miscellaneous, 29th July 1890. That this was the opinion entertained till then appears also from the records and the judgment in the Full Bench case decided by the Chief Justice, Munro, J.,

and myself. The question is not whether those orders or opinions are binding on the Government, but whether they do not supply strong evidence of the usage till then prevailing.

I may now refer to the Urlam judgment in *Kandukuri Mahalakshamma Garu v. Secretary of State for India* (3). It holds that, as the Government owned the lands before conversion into zamindaris, the sanads must expressly or by necessary implication convey the irrigation rights claimed; otherwise they must be taken to continue with the Crown. This is perhaps so in the case of ordinary Crown grants. But, as I have pointed out, these are sannads granted under a Regulation with a particular object and it was intended with one possible exception to place the new zamindaris in the same position, in which zamindars had full proprietorship before the grant as the old. No distinction, so far as I know, has ever been recognized between the two classes. It is stated in the judgment that it was "not contended that the water is their property," i. e., of those who own the banks of the river; and "it follows it is the property of the Government;" but "water" is their absolute property for ordinary uses. It is limited property for extraordinary uses. It is further pointed out that as the water is Government property, the stream also is Government property and the explanation to S. 7, Easements Act, and *Ma: Nab v. Robertson* (14) are referred to. The explanation throws no light on the question before us. It is intended to show that permanency or tidality is not an indispensable element. It says however there must be a "known course" which implied definite bed and banks. The case cited illustrates this. There, a lessor let two ponds to a tenant "together with right to the water in the said ponds and in the streams leading thereto," and the question was whether the word "stream" was used in the ordinary sense of a rivulet or course of running water or any water which found its way into the pond even by percolation through marshy ground. The majority of the Lords held in favour of the former view. The decision had nothing to do with the question before us. The word "stream," no

doubt, is also used to indicate water in motion. But this use is exceptional, Lord Halsbury, who took this view, says it ordinarily means definite stream within definite banks. In Act 7 of 1865, it is used after the word "river" to mean a little "river"; if it means anything else, it has no bearing on the case as Vamsadara is a "river" and not a stream. It is assumed in the judgment that the assessment was fixed with reference to the extent of land under irrigation at the time, not with a view to any possible extension of a cultivation. As a general proposition applicable to zamindars and inamdars, this is obviously incorrect as I have already shown. The Permanent Settlement accounts are with the Government. They seek to alter the existing practice. It is for them therefore to prove that the assessment was so fixed. I seriously doubt whether the Government will be able to prove it, as my experience is that where the assessment was based on the assets, it was the average demand and the average collection for a series of years that formed the main element in the consideration of the question. No Court is justified in raising a presumption or proposing a theory to upset a usage that has prevailed for a long time. The proper function of a theory is to explain or to find a legal origin for a long-standing practice; it should not be used to get rid of it and to unsettle the claims which have long been deemed to be well established. This must be done, if at all, by legislation.

The pleader in that case appears to have given up the ground on which the District Judge based his judgment that Mobagam channel was the source of water supply. For these reasons I am unable to follow that decision on these points.

It is contended, and the Urlam judgment decides, that under Act 3 of 1905 all flowing waters which are not the property of anyone else are the property of Government, and therefore the waters in the Vamsadhara River and consequently the river itself belong to Government. I am clearly of opinion that if under Act 7 of 1865, as it stood before this Act 3 of 1905, the Government were not entitled to impose any water-cess, this Act, coupled with the other Act, does not give them the right to do so. Act 3

(14) [1897] A. C. 129=66 L. J. P. C. 27=75 L. T. 666=61 J. P. 468.

of 1905 was passed to prevent encroachments on Government property, and it is not permissible to construe the Water Cess Act in the light of the provisions of this later Act unless there is some special provision to that effect. In *Nairn v. University of St. Andrews* (15) the House of Lords decided that such a construction is not justifiable; under an Act of 1868, the right to vote was given to "persons" which prima facie would include women; but it was held on account of the usage that had prevailed till then that the Act confined the franchise only to men; the argument was that a later Act of 1899, taken with the Act of 1868, had the effect of conferring the franchise upon women too. With reference to this argument, the Lord Chancellor stated: "It proceeds upon the supposition that the word 'person' in the Act of 1868 did include women, though not then giving them the vote, so that at some later date an Act purporting to deal only with education might enable Commissioners to admit them to the degree, and thereby also indirectly confer upon them the franchise."

It would require a convincing demonstration to satisfy me that Parliament intended to effect a constitutional change so momentous and far-reaching by so furtive a process. It is a dangerous assumption to suppose that the legislature foresees every possible result that may ensue from the unguarded use of a single word, or that the language used in statutes is so precisely accurate that you can pick out from various Acts this and that expression and, skilfully piecing them together, lay a safe foundation for some remote inference. Your Lordships are aware that from early times Courts of law have been continuously obliged, in endeavouring loyally to carry out the intentions of Parliament, to observe a series of familiar precautions for interpreting statutes, so imperfect and obscure as they often are." It also appears to me that the words of Act 3 of 1905 do not support the contentions. It only declares that the water is Government property; but the river does not thereby become so. Again, if the water or the river must be considered Government property

always by the provisions of that Act, there is no reason why we should go back only to the Act of 1865 and not to the Regulation of 1802. It appears to be clear that the Government must have conveyed all their rights including the water and the river within the boundaries of the properties in the sannad. Such a construction was not till now adopted as the Government did not own them. Further, the Act preserves natural rights and rights by easement. There is no natural right to appropriate and consume entirely or to some extent another's property. The proper construction therefore to be adopted is that, in so far as the riparian proprietor has any property in water, or any person has any customary right, it is not Government property. Any other construction would enable the Government to levy a cess when a person is exercising his natural rights and should not therefore be adopted. It will be an interference with the Permanent Settlement Regulation and the sannads. Moreover, if I am correct in my view, according to the Customary law, flowing water in a river belongs to the owner of the bed and banks. For these reasons I disallow this contention.

As to the reported cases, the case in *Ponnusawmi Tevar v. Collector of Madura* (7) shows that the zamindar was using the water of the Vaigai for other than riparian villages; that the Government got his consent to erect a sluice in the channel to convey water to ryotwari villages and the Government claim to interfere with the flow of water so far as the zamindar was concerned was not recognized, while it was recognized so far as ryotwari tenants were concerned.

I am unable to agree with some of the dicta in the Peranai dam case which deal with the right of Government to regulate the distribution of water in zamindaris. It is stated therein, see *Robert Fischer v. Secretary of State for India* (16): "We are prepared to hold that the paramount right of Government under the law of this presidency is independent of the ownership of the bed of the stream. We also think that no distinction can be drawn between cases where the interest said to be affected is that of ryotwari tenants and where the interest which is said to be affected is

(15) (1909) A. C. 147=78 L. J. P. C. 54=100 L. T. 96=58 S. J. 161=25 T. L. R. 160.

(16) (1909) 2 I. C. 325=32 Mad. 141.

that of holders of proprietary estates." No authority is cited to me in favour of this novel proposition. It is really unsupported by any authority. The Government have, I believe, a right to regulate the distribution of water among ryotwari villages without causing injury to any of them. But they have clearly no such right in zamindaris. The reason of the thing is against it, because the zamindar is at least under the same obligations to his ryots as the Government are towards their own. To assume such a right is to ignore the history of the Permanent Settlement, the conduct of the persons concerned and their legal consciousness; common law is the offspring of such consciousness and conduct, and in India particularly it is unsafe to rely upon anything else in opposition to it. A Royal prerogative is presumed when it is in the public interests to do so, but not for revenue purposes and any such prerogative is entirely against zamindars' and zamindari ryots' interests, in whose case Government have no power of remission of revenue or rent.

The decision in *Chidambara Rao v. Secretary of State* (17), *Lutchmee Doss v. Secretary of State* (18), referred to sources of irrigation outside the estate. In *Secretary of State v. Swami Nantheswarar* (19), the river and the channel were admitted to be Government property. There are some observations in it however, which may require further consideration.

The decision in *Secretary of State v. Ambalavana Pandara Sannadhi* (20) only follows the Urlam judgment. The latest decision, *Secretary of State v. Kannapalli Venkataratnamal* (21), (Benson and Sundara Aiyar, JJ.), is, it appears to me, in direct conflict with the Urlam judgment. It holds that a natural stream, of which the beds and banks belong to the inamdar, was not a stream belonging to Government.

My conclusions are: the Rajas and Chieftains who afterwards were granted permanent sannads were using the waters of natural streams for the cultivation of all lands that lay within the ayacut of the streams subject to the claims of the ryots.

While the sannads deprived them in express terms of some of the powers they were exercising, there was no interference with their claim to use the waters of natural streams.

There is no evidence whatever to support the suggestion that the zamindars were entitled only to cultivate lands then under wet cultivation free, or that the Government reserved any right to themselves to increase the revenue if waste land was brought under cultivation or additional or different crops were raised on the land. This suggestion that part of a zamindari alone was to be under Permanent Settlement is inconsistent with probabilities and against the policy of the Permanent Settlement.

Usage disproves the suggestion. The Government imposed revenue when waste lands in ryotwari estates were brought under cultivation, but never claimed any revenue from zamindars for cultivating waste lands. Similarly they claimed enhanced revenue when river-water or water from wells sunk at ryot's expense within the ayacut of a river was used by ryots, but not from zamindars when they used such water.

The ground on which the contention for the Government is based, that the pesheush was generally fixed on the basis of a certain area under cultivation, has no foundation in fact. It is disproved in a great number of instances.

River-water is indispensable for the cultivation of the lands that lay within its ayacut and any prohibition of its use, either directly or indirectly by the imposition of a cess or increase of land revenue, is improbable.

The Government were precluded from recovering any charge for water as land revenue by the terms of the permanent sannad, and there was no law entitling them to recover it otherwise: any restriction placed upon the use of water, either by prohibition or imposition of any assessment, at the pleasure of Government, is a breach of faith destructive of the security of property which it was the object of the Permanent Settlement to create.

The new zamindaris created by the East India Company were placed on the same footing as the old.

Act 7 of 1865 was not intended to effect any change in substantive law. It

(17) (1909) 26 Mad. 63.

(18) (1909) 3 I. C. 456=32 Mad. 456.

(19) (1910) 6 I. C. 199=34 Mad. 21.

(20) (1910) 8 I. C. 357=34 Mad. 366.

(21) (1912) 15 I. C. 594.

was only intended to enable Government to recover water-cess for anicut water, to recoup themselves for the expenditure incurred for the construction of irrigation works, or when a ryot used the water in a natural stream owned by Government.

Act 3 of 1905 cannot be used to interpret Act 7 of 1865; it does not make the river or water therein Government property.

Under the Customary law of the country river-water belongs to the owner of the estate through which it passes subject to the claims of the proprietors below.

I would therefore confirm the decree and dismiss the appeal with costs.

Under S. 98, Civil P. C., the appeal is dismissed with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 551

WHITE, C. J., AND SANKARAN NAIR, J.

Devarayan Chetty — Plaintiff—Appellant.

v.

V. K. M. Muthuraman Chetty and others — Defendants—Respondents.

Civil Appeal No. 199 of 1908, Decided on 13th December 1912, from decrees of Sub-Judge, Madura East, in Original Suit No. 143 of 1907.

Contract Act (9 of 1872), S. 23—Marriage contract — Stipulation to pay damages for breach is unenforceable.

A contract between two persons, whereby one of them stipulates to give his daughter in marriage to the son of the other party and the latter agrees to receive the girl in marriage after a certain time, and it is stipulated that the party guilty of breach is to pay a certain sum as damages, is a contract which gives the parties a pecuniary interest in the marriage taking place and is hence unenforceable: 21 *Bon.* 28 and 5 *I. C.* 475, *Dist. (Case law referred).*

[P 552 C 1]

Sreenivasiengar—for Appellant.

Rangachariar—for Respondents.

White, C. J.—The agreement, which is sued on in this case, was entered into between the plaintiff and two of the relatives of one Vellayappa Chetty. Its effect is clearly stated in para. 5 of the judgment of the Subordinate Judge: "The agreement was that the plaintiff's daughter should be married to Vellayappa's son on 18th January 1903 and should be given the usual jewels and stridhanam etc. in the usual manner, and that, in exchange Vellayappa Chetty's daughter, ap-

parently then too young to be married, should be given in marriage in three years from the date of the plaintiff's daughter's marriage, i. e., on or before January 1906, and that on default of either, the plaintiff to accept that girl or of Vellayappa's relation and the defendants to give her in marriage, the defaulter, i. e. the plaintiff or the defendants as the case may be, should pay the other Rs. 5,000, in case of the plaintiff's default with interest from January 1906 and in case of default of the defendants and Vellayappa Chetty's party with interest from the date of the plaintiff's daughter's marriage, i. e., 18th January 1903." The plaintiff's daughter was married to Vellayappa's son, but died soon afterwards. The plaintiffs thereupon, took back the marriage presents. After the expiration of three years the plaintiff made a formal demand on the defendants that Vellayappa's daughter should be given in marriage to his son. This was not done. Hence the suit. The Judge held that in law, the agreement was not against public policy and could be enforced, but he held on the facts that the carrying out of the contract had been abandoned by agreement between the parties.

As regards the question of abandonment, I am unable to agree with the learned Judge. The defendants' evidence that the plaintiff had stated that he did not desire that the agreement should be carried out is not supported by the witness whom he called. The Judge appears to have relied, to some extent, on a suggested practice or usage that the return of the presents indicated that the parties did not intend that the agreement should be carried out. This practice or usage was not pleaded and was not proved. On the evidence, I do not think it can be held that the agreement was abandoned. There remains the question: Was the contract enforceable? It was argued that this was a family agreement, lawful in itself and this being so, an agreement that the party who declined to fulfil his share of the bargain should compensate the other party was not contrary to public policy. The conclusion at which I have arrived is that the contract is not enforceable. It is true, as the Judge puts it, that no money is payable as "bride price" to anybody. But it is a case in which third parties have a pecuniary in-

terest in a marriage being brought about. If an agreement between A and B that B's daughter shall marry A's son on payment of a sum of money by A to B is contrary to public policy, it seems difficult on principle to say that an agreement between A and B that B's daughter shall marry A's son and that, if she fails to do so, B shall pay a sum of money to A is not equally contrary to public policy. In each case B has a pecuniary interest in bringing about the marriage. In one case, if the event takes place, he receives money; in the other case, if the event does not take place, he has to pay money. A contract to marry between parties who are each sui juris, of course, stands upon a different footing, but here the contract is between third parties. The effect of the contract, as I have said is to give the parties a pecuniary interest in the marriage taking place. The contract as my learned brother put it in the course of the argument is a trafficking in marriages.

There appears to be no case, English or Indian, where a contract like this has been held to be void, but as it seems to me to fall within the mischief of the rule, I am prepared to hold that the contract is not enforceable, and I think the rule applies nonetheless in a state of society where the marriage of children is a contract made by their parents and the children themselves have no volition in the matter. The decision of the Court of appeal in *Hermann v. Charlesworth* (1) shows that in England the Courts are prepared to extend rather than to restrict the class of cases to which the rule is applicable. It is now well established, at any rate in this Presidency, that a contract to make a payment to a father in consideration of his giving his daughter in marriage is opposed to public policy within the meaning of S. 23, Contract Act: *Kalavagunta Venkata Kristnayya v. Kalavagunta Lakshmi Narayan* (2). In *Purshotamdas Tribhovandas v. Purshotamdas Mangaldas* (3) it was not suggested that the contract was against public policy; but there the plaintiff was himself a party to the contract of marriage. The case of

Miss Irene Fanny Colquhoun v. Mrs. Fanny Smither (4) has very little bearing on the question before us. There it was held that the principle of *Quinne v. Leathem* (5) was applicable in the case of a contract to marry and that an action was maintainable against a person for inducing a party to a contract of marriage to break that contract.

On the ground that the contract is not enforceable, I think this appeal should be dismissed with costs.

Sankaran Nair, J.—I agree.

S.N./R.K.

Appeal dismissed.

(4) 33 Mad. 417=7 M. L. T. 394=5 I C. 475=20 M. L. J. 734.

(5) [1901] A. C. 495=70 L. J. P. C. 76=65 J. P. 703=50 W. R. 139=85 L. T. 289=17 T. L. R. 749.

A. I. R. 1914 Madras 552

SANKARAN NAIR AND ABDUR RAHIM, JJ.

The Secretary of State—Appellant.

v.

Ambalavan Pandara Sannadhi Avergal and others—Respondents.

Second Appeal Nos. 1831 and 1834 of 1908, Decided on 11th October 1912, from decree of Sub-Judge, Tinnevely, in Appeal Suit No. 333 of 1906.

(a) **Riparian Rights**—Inam land includes river-beds without grant of waters—Grant—Inam.

Where land is granted in inam by Government it is not necessary that there should be an express grant of water in a stream passing through the land to convey the river-bed also to the grantee. It is a question of inference from the terms of the grant and the surrounding circumstances whether the river bed is conveyed also: 14 I. C. 261, Dist. [P 554 C 2]

(b) **Riparian Rights**—Owner's natural right to use water without injury to others—The manner of irrigation and amount of water vary—Erecting dam is common method.

A riparian proprietor has a natural right to use the water of the stream for irrigating his lands provided he does not thereby cause material injury to the other riparian proprietors. What quantity of water he is entitled to and how he is to take it for irrigating the lands, must depend on the circumstances of each case. [P 555 C 1]

Erecting a dam or bund across the bed of the river when it is low to raise the water to a sufficient height to divert it into an artificial channel is one of the common methods of using the water of a stream by a riparian proprietor: *Miner v. Gilmour*, (1859) 12 M. P. C. 131 and 24 Cal. 865 (P. C.), Ref. [P 555 C 1]

(c) **Madras Irrigation Cess Act (7 of 1865), S. 1**—Inamdar's right to raise wet crops by irrigation—No penal assessment—Inamdar not to take more water.

An inamdar is entitled to use the water of a stream flowing through his village to raise wet crops on lands on which it was only customary

(1) [1905] 2 K. B. 123=74 L. J. K. B. 620=54 W. R. 22=93 L. T. 234=21 T. L. R. 368.

(2) 32 Mad. 185=18 M. L. J. 403=4 M. L. T. 1=3 I. C. 554 (F. B.).

(3) 21 Bom. 22

to raise crops, and the Government cannot, on that account impose penal assessment on him; the only restriction on the landowner's right is that he should not take more water than he was taking before. [P 556 C 1]

C. F. Napier—for Appellant.

T. V. Seshagiri Iyer—for Respondents.

Judgment.—The plaintiff is the inamdar of Adangarkulam village in Nanguneri taluq. He states that a natural stream, Hanumanadhi, takes its rise in the Western Ghats and flows through his village, that he has been taking the water of that river to his tanks, six in number, at certain seasons of the year when it was required for the irrigation of his lands, that in order to divert the water into his channels, he had to put up a dam across the river-bed as the river-bed is on a level lower than that of the channels and water could not flow into them when it was knee deep or less than that; and that he has been doing so, according to him, from time immemorial. The dam consisted of a masonry anicut with interstices between the vertical stones which he filled up, when necessary, with mud or palmyra leaves. The plaint states that the masonry anicut in some places was damaged, and he had, therefore, to put up a temporary mud dam in front of it for diverting the water into his channels. Defendant 1, the Government, recently levied an assessment from him for taking the water into his tanks. The other defendants are the ryots of some of the neighbouring villages who also deny plaintiff's right to take water as claimed by him. He therefore seeks a declaration of his right to take the water of the stream to his tanks by diverting it into the channels, and for that purpose, to put up a dam across the river-bed, and also a declaration that the Government has no right whatever to levy any tax on him for taking such water. Defendant 1 who is the Secretary of State for India in Council, denies that the river, where it passes through his village, belongs to the plaintiff.

It is asserted that the river belongs to Government and that the plaintiff, at the time of the inam grant did not acquire any rights claimed in the plaint to the use of the water. It is also denied that the anicut belongs to the plaintiff or that he is entitled to put up any dam across the river or to take water, as he alleges, through the channel for purposes

of irrigation. The Government also allege that the plaintiff can only take water to irrigate the lands which were under wet cultivation at the time of the inam grant; and that the assessment is imposed because he utilized the water of the stream for the purpose of raising nanjah crop on lands on which it was not usual to raise such crop before. The other defendants also deny the plaintiff's right. They allege that, if the plaintiff is allowed to take water as claimed by him, irretrievable loss and injury would be caused to the defendants who hold lands below. The right of the Government to the river-bed however is not accepted by them in their written statement.

The facts which are admitted or proved beyond doubt are: The Hanumanadhi river takes its rise in the Western Ghats, and after running through various ryotwari villages, in the midst of which the plaintiff's village is situated, flows into the sea. Three of the hamlets belonging to this village lie on the western side of the river and the fourth or the last one Uramoli hamlet lies on the eastern side of it. For the irrigation of the lands belonging to these three hamlets lying to the west of the river, there are five tanks and there is one tank for the Uramoli hamlet on the east side of the river. The masonry anicut which is referred to in the plaint is built across the river-bed to raise the level of the water to divert it into the channel which takes water from the stream to the five tanks of the three hamlets. That masonry anicut, being now in disrepair, the plaintiff has put up a mud dam in front of it to divert the water. At some distance below that anicut the river bifurcates, and at that or near the point of bifurcation, the plaintiff has put up a mud dam to prevent the flow of water along one of the branches and to make it flow into the other, that is, the eastern branch, that he might take it into his Uramoli tank.

The plaintiff's case is that this system of taking water into his tanks has been in existence from time immemorial.

The Subordinate Judge has found that the anicut across the bed of the river was built by the plaintiff's predecessors within the limits of the Adangarkulam village, that the river Hanumanadhi ran through the village, both the banks of

the river belonging to the plaintiff. He also found that he was a riparian owner of the inam village. The question whether he was a riparian owner was raised apparently with reference to the plaintiff's claim as an inamdar. On the question whether the plaintiff was entitled to take the water, he found that the plaintiff, as a riparian proprietor, was entitled to take the water for irrigation of his own lands, without causing any material injury to the other riparian proprietors and that the method he had adopted of constructing anicuts for the purpose of damming the river was, in the circumstances of the case, the only reasonable method of enjoying his right. He also found that no material injury was thereby caused to the other riparian proprietors. He also came to the conclusion that the plaintiff's predecessors-in-title had been putting up the dams in question and thereby diverting the water of the stream into his channels for a very long time, probably from the year 1803 and certainly for more than 30 years. He was, therefore, of opinion that even if the plaintiff's natural right to take the water as a riparian proprietor has not been proved, he has proved a right to take the water by prescription and he was also of opinion that, in the circumstances of the case, there is a presumption of a grant by the Government in favour of the plaintiff. He further held that defendant 1 was not justified in imposing penal assessment on the ground that the plaintiff had put up a dam and that the plaintiff, as a riparian owner, was entitled to the use of his stream to irrigate his inam village to any extent, provided he did not thereby interfere with the rights of the other riparian owners either above or below him. It was also held that it was only when the plaintiff used Government water for the irrigation of any lands in excess of the original area that the Government had a right to raise any revenue on that account and that this was not Government water in that sense. The other questions which were argued before him and decided are not material for the purposes of this second appeal.

He, accordingly, passed a decree in favour of the plaintiff declaring his rights to put up dams in the river. In appeal, it is first contended before us that the finding of the Judge that the

dam erected at (A) in the plan across the bed of the river to take water to the five tanks is within the plaintiff's village of Adangarkulam is wrong. The survey plan of the inam village of Adangarkulam on the west of the river and of Thanangulam on the east of it, shows that the bed of the stream is included within the limits of Adangarkulam river in the pymash accounts and is described as the boundary of another village, Kalyankulam, also on the eastern side (K). The Government revenue accounts of 1803 treat the bed of the stream adjoining it as part of the Adangarkulam village (Exs. R, R-1 and R-2). These are the reasons given by the learned Subordinate Judge for his finding. The Advocate-General however states that though the village is recognized as belonging to the plaintiff and the descriptions of the boundaries and the revenue accounts of the village may show that the river-bed is included within its limits, yet unless it is expressly stated that the river-bed is conveyed, it will not pass, and he relies upon the decision in *Papala Narayanaswami Naidu v. Pensalani Kaniappa Naidu* (1). That was a case of a grant on shrotriem tenure and it is stated in the judgment that the object of the grant was to make a provision for an official whose office was no longer necessary and "what was regarded was the land as producing an income." In the case before us, there is no grant produced. There is, therefore, nothing to rebut the inference drawn by the Subordinate Judge from the facts above set forth. It also appears that the plaintiff and his predecessors have been exercising acts of ownership in the bed of the stream by putting up stone pillars. Moreover, when the plaintiff applied to the Inam Department of the Revenue Board Office that the poramboke in the village may be ordered to be expressly included in the inam patta, he received this reply:

"It is not the practice to enter the extent of poramboke lands too in the pattas issued on the settlement of the whole village. The term "entire village" includes the poramboke and all other lands which are within the four boundaries and comprised in inam patta huk. The inamdar, therefore, may enjoy in any way he pleases all the lands within

(1) [1912] 14 I. C. 261.

the boundaries of each village. There is no necessity to pay separate tax to Government for it": Ex. S. We uphold the finding of the Subordinate Judge on this question. It is next urged by the learned Advocate-General that the plaintiff's claim to erect a bund or dam up a river is unreasonable. The plaintiff is a riparian proprietor; he has a natural right to use the water of the stream for irrigating the lands of his Adangarkulam village, provided he does not thereby cause any material injury to the other riparian proprietors. What quantity of water he is entitled to take and how he is to take it for irrigating the lands must depend upon the circumstances of each case. Erecting a dam or bund across the bed of the river when it is low to raise the water to a sufficient height to divert it into an artificial channel for irrigation is one of the common methods in this Presidency of using the water of a stream by a riparian proprietor. That a dam may be erected when it is reasonably required for the use of stream water is recognized by the Judicial Committee: see *Miner v. Gilmour* (2) and *Debi Parshad Singh v. Joynath Singh* (3).

The Subordinate Judge, in a careful judgment, finds that, when the water in the stream is only knee deep or below that level, the erection of bunds to raise the level to divert the water into the channels is necessary for purposes of irrigation. He finds that the holders of land above and below have been similarly erecting bunds to take water to their lands. Six permanent anicuts above and two below were erected by the Government to divert the stream water into irrigation channels. In 1873, 1874, 1882 and in 1889, the existence of the dam and its prejudicial effects on the cultivation of Government ryotwari lands was brought to the notice of the Government and they recognized the plaintiff's right to take water by the erection of dams (Ex. O). It is difficult to believe that, if this had been unusual, it would have received any recognition. There is, therefore, strong evidence to support the conclusion of the Subordinate Judge that the erection of bunds at certain seasons when the water was

only knee-deep is reasonable, and in second appeal, we cannot interfere with that finding. The Subordinate Judge also finds that no material injury has been caused to the defendants by the erection complained of. We, therefore, uphold the decision of the Subordinate Judge that the plaintiff has the right to erect dams which he has erected to enjoy his natural right. No objection has been taken to the dimensions of the dam or to the time of its erection.

The Subordinate Judge goes further and finds that, even if material injury was caused to the other riparian proprietors, they are not entitled to complain as the plaintiff has acquired a right to take water to his tanks by prescription. He finds that even if the masonry anicut was put up for the first time only in 1872 or 1873, the plaintiff has been damming up the stream to take water through his channels to his tanks for irrigation by putting up mud or sand dams across the bed of the river long before that time. He finds, from the documentary and oral evidence adduced in the case, that these channels have been in existence as supply channels for his tanks from before the year 1803. He discredits the defendant's evidence that they were only marukalls or drainage channels. This finding is supported by evidence and we see no reason to interfere with it; and, on this finding also, the plaintiff is entitled to the declaration that he has obtained. It is contended, on behalf of the Government, that the plaintiff was not entitled to take water to raise wet crops on lands on which hitherto it was only customary to raise dry crops, on the ground that it must be taken that the plaintiff was only entitled to receive so much of the water, of the stream as was conceded to him by the Government when the village was granted to him in inam and if he takes any more water he is liable to pay any assessment that may be imposed under the Madras Act 7 of 1865. The Subordinate Judge disallowed this claim on the ground that the river did not belong to the Government under S. 1 of that Act, as he had found that it ran through the plaintiff's village, the banks on either side belonging to him and also on the ground that he is a riparian proprietor. It however is urged by the learned Advocate-General that,

(2) [1859] 12 M. P. C. 131=7 W. R. 328=3 L. T. 98.

(3) [1897] 24 Cal. 365=24 I. A. 60 (P.C.).

under Act 3 of 1905, whatever might have been the law before it must now be taken that the water of the stream belongs to the Government.

The provisions of this Act were not considered by the Subordinate Judge as the suit was instituted in 1904, before the Act was passed. In reply to this, it is urged before us by the respondent's pleader that first of all the Act did not interfere with the rights which existed before the riparian rights of the plaintiff are preserved and secondly, that neither the water nor the stream belonged to the Government. It was also urged that on the facts found in this case, there was an engagement between the plaintiff and the Government by which the former was entitled to irrigation free of charge.

It is contended that the plaintiff has taken more water than he has been taking before. It appears that he has taken water from the river only to fill the tanks as he has been doing hitherto. The carrying capacity of the channels is not said to be greater now than before nor is it said that the tanks have been widened or deepened in order to take in more water than hitherto. The plaintiff is clearly entitled to irrigate such land as it is in his power to do so with the water which according to the findings, he is entitled to take from the stream. The right that is proved is the right to take the water until the tanks are filled. It is not shown that he has taken more water than that. We must therefore disallow the contention on this ground. Under S. 82, Civil P. C., we allow a period of three months for payment of costs. The second appeals are dismissed with costs.

S.N./R.K.

Appeal dismissed.

* A. I. R. 1914 Madras 556

SANKARAN NAIR AND NAPIER, JJ.

Ramanathan Chettyar and another—Appellants.

v.

Kalimuthu Pillay and another—Respondents.

Civil Appeal No. 198 of 1908, Decided on 28th August 1912, from decree of Addl. Sub-Judge, Madura, in Original Suit No. 6 of 1908.

* Civil P. C. (5 of 1908), S. 13—Defendants' residence, selection, submission by appearance and contract to submit to foreign Court make them liable on foreign judgment—Judgment against firm is not per-

sonal decree against members—Service on agent gives no jurisdiction against non-resident partners—Submission to forum by non-resident partners through agent makes them personally liable on foreign judgment.

The circumstances that give a Court jurisdiction to entertain a suit on a foreign judgment and to render the defendants liable thereon are, alternatively: (1) where the defendant is a subject of a foreign country in which a judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant, in the character of plaintiff, selected the forum in which he is afterwards sued; (4) where he has voluntarily appeared and (5) where he has contracted to submit himself to the forum in which the judgment was obtained. Selection of forum, submission by appearance and contract to submit found the jurisdiction of the Court. [P 558 C 1]

Judgment against a firm does not amount to a personal decree against the members thereof, who were, at the institution of the suit, residing in foreign territory, which can be enforced against them in a foreign country: (*Case law referred.*) [P 558 C 2]

Where a duly constituted agent of a partnership sued against has been served within the jurisdiction of the forum where the suit was initiated, but the partners are not personally served either within or out of jurisdiction, such services cannot create jurisdiction in a foreign Court against the non-resident partners on the ground of residence. [P 560 C 2]

But where the agent of the partnership was by virtue of an elastic power-of-attorney, carrying on business within the jurisdiction of the Court where the suit was initiated and was allowed to bring suits of all sorts with reference to the partnership there and the partners, though not resident there at the time, did, for many years, carry on business there and they were actually served with a concurrent writ of process out of that Court's jurisdiction, that is evidence of submission to found jurisdiction in the foreign Court. [P 561 C 2; P 562 C 1]

Defendants were members of a partnership who were carrying on business in Singapore, through an agent under a duly authorized power. They were sued for the recovery of money due by the plaintiff in Singapore, and the defendants were served with a concurrent writ in British India. Judgment was entered against the defendants. In a suit brought in the British Indian Court on the Singapore Court's judgment against the defendants.

Held: that the judgment of the Singapore Court could be personally enforced against the defendants: (*Case law discussed.*) [P 562 C 1]

C. V. Ananthakrishna Iyer—for Appellant.

V. C. Seshachariar and C. S. Venkatachariar—for Respondents.

Napier, J.—This is an appeal from the judgment and decree of the Additional Subordinate Judge of Madura, dismissing a suit by the plaintiffs against defendants 1 and 2 on a foreign judgment. Plaintiffs sought to recover Rs. 7,336-1-7

from defendants being balance of the amount with interest due under a decree obtained by them in Suit No. 106 of the Supreme Court of Singapore. The decree is Ex. A. The suit was brought by the plaintiffs against Oona Kavenna Suvenah Pillay, two other persons with whom this suit has no concern, Oona Kavenna & Co., and the defendants to the present suit as carrying on business in Singapore under the firm name of Oona Kavenna & Co. The allegation in the plaint in the Court of Singapore, so far as appears from a writ of summons for service out of the jurisdiction (Ex. C), is that all the defendants made two promissory notes of 2nd August 1905, jointly and severally payable to the plaintiffs and two pro-notes of the same date made in like manner payable to V. V. R. Somasundaram Chetty and endorsed to the plaintiffs. According to the evidence of the plaintiffs in the present suit, the pro-notes were executed by defendant 1's son, that is, defendant 1 in the Singapore suit, for himself and as agent for the firm of U. K. & Co. that is, the defendant's firm and by the other persons as sureties. It is not alleged that the present defendants either of them signed the pro-notes as it is admitted by the plaintiff that they had left Singapore in 1903 and 1904 respectively. He proves however that the amounts for which the pro-notes were given were debts due from the firm U. K. & Co. It appears that by the order of the Court dated 17th February 1906, a concurrent writ of summons was issued and ordered to be served on the two present defendants out of the jurisdiction (Ex. B) and that subsequently all parties were served with notice to show cause why judgment should not be entered up against the present defendants (Ex. D) and on the proof to the satisfaction of the Court of the service out of jurisdiction, leave was given to enter up judgment as prayed on 24th May 1906 (Ex. E) and judgment was so entered up on 30th May 1906, (Ex. A). To the present suit on this decree, various defences were raised by the two defendants, but the suit was dismissed on the ground that the defendants were not carrying on business in Singapore at the time of the institution of the suit in the Singapore Court, their agent being only engaged in winding-up the affairs of the firm and, that being so, the Court had no jurisdic-

tion to entertain the suit. In this Court, the defendants urge the various pleas set up in the lower Court and I now proceed to deal with them. The first plea is that accepted by the lower Court. I am unable to agree with the Subordinate Judge. There was no dissolution of the partnership and the plaintiffs' agent, P. W. 1, swears that the business was still being carried on. Even if they had dissolved partnership, their obligations continued in all things necessary for winding-up the business (Contract Act, S. 263). The Subordinate Judge himself uses the phrase "the business of the firm had practically failed." The dismissal of the suit on the ground relied on by the Subordinate Judge cannot be sustained.

The next plea is that defendant 1 in the Singapore suit was not in fact the agent for the defendants at the date of the suit. I agree with the Subordinate Judge that he was. It is contended that the power-of attorney given by defendant 2 in this suit to the son of defendant 1 in this suit, i. e., defendant 1 in the Singapore suit, was with reference to some private business of his own in Singapore. This is not so. The document (Ex. K) is given by him as a trader carrying on business under the name of Oona Kavenna Suvenah Pillay & Co., and appoints him agent for the business then being carried on by him and is signed by him with the firm name as well as his own. It is also inconsistent with his evidence in this suit in which he swears that he gave the power-of attorney as agent only. That plea therefore fails. It is next urged that there was in fact no service out of the jurisdiction on these defendants. I am satisfied on the evidence of Thiruvengadam, P.W. 3, that he did serve the defendants in India as sworn by him in his affidavit before the Court at Singapore (Ex. F). That plea therefore fails. It is next contended that defendant 1 in the Singapore suit was only made a party as a son of defendant 1 to make him personally liable. This contention was not raised before the lower Court and is clearly untenable. He had signed the pro-notes as agents for the firm in discharge of the firm's debts and was sued and served as defendant 1 as their agent. The service of the summons is proved by the plaintiff against P. W. 1. That plea therefore fails.

The facts, as I find them therefore are as follows: The two defendants were carrying on business in Singapore through their agent at the date of the making of the pro-notes, he having been duly appointed their agent by the power-of-attorney dated 16th March 1905, (Ex. K). He signed the pro-notes on 5th August 1905, as their agent in discharge of the firm's liabilities. The suit was brought against him as agent of the firm, against the firm and against the defendants as partners in the firm. The agent was duly served in the jurisdiction and the partners were served with a concurrent writ out of the jurisdiction in British India, they being British Indian subjects. It is argued by the defendants that even on these facts, the Court had no jurisdiction to pass a decree against them. The law is now settled as laid down by Fry, J., in *Rousillon v. Rousillon* (1), following *Schibsby v. Westenholz* (2) and *Copin v. Adamson* (3) and was lately affirmed by the Court of appeal in the same words in *Emanuel v. Symon* (4). The circumstances that give jurisdiction are, alternatively: (1) where the defendant is a subject of a foreign country in which a judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued, (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained. Selection of forum, submission by appearance and contract to submit are treated, in Mr. Dicey's "Conflict of Laws", under one heading "submission".

It is first argued that the defendants were resident by virtue of the presence of the agent carrying on business for the firm and that service on him is good service. An incorporated company is resident wherever it substantially carries on business and so a foreign corporation carrying on business by an agent can be made liable to the jurisdiction by service on the agent within the jurisdiction: see

Newby v. Van Oppen (5), *Haggin v. Comptoir D'Escompte De Paris* (6) and *LaBourgoyne* (7). But a partnership stands on a different footing. It is an aggregate of individuals having no corporate existence. It is true, that when a suit is filed against a firm, service on an agent at the principal places of business of the firm within the jurisdiction is good service on the firm, whether any members of the firm are out of the jurisdiction or not, under the rules of the Supreme Court. O. 48, (a), R. 1 and O. 30, R. 1, Civil P. C., of 1908, but even assuming that there was procedure corresponding to this in the Supreme Court of Singapore, that does not make judgment against the firm a personal decree against the foreign defendants which can be enforced in a foreign Court. This has been expressly decided in *Thambi Marakayar v. Hamed Marakayar* (8) and it is supported by the clear authority of *Russell v. Cambefort* (9). We have therefore only to consider the effect in a suit against the partners individually of service on an agent for the firm who held a power-of-attorney from one partner on behalf of the firm. The point was decided by this Court against the plaintiffs' contention in *Nallakaruppa Settiar v. Mahomed Iburam Saheb* (10). In that case the summons was served on one of the partners resident within the jurisdiction of the Court in Ceylon, but it was held that that service did not make the personal decree enforceable by a suit in this Court against a British Indian subject, a member of the partnership who was himself at the time not resident in the jurisdiction of the Ceylon Court.

It is argued that this decision is incorrect and reliance is placed on the *Bank of Australasia v. Harding* (11), *The Bank of Australasia v. Nias* (12), *Copin v. Adamson* (3), and *Fazal Shau Khan v. Gafur Khan* (13) and *Annamalai Chetty*

(5) [1872] 7 Q.B. 293=41 L.J.Q.B. 148 = 26 L.T. 164=20 W.R. 383.

(6) [1880] 23 Q.B.D. 519=58 L.J.Q.B. 508=61 L.T. 748=37 W.R. 703.

(7) [1899] Pr. P. 1.

(8) [1911] 12 I. C. 1006.

(9) [1889] 23 Q.B.D. 526=58 L.J.Q.B. 498=61 L.T. 751=37 W.R. 701.

(10) [1897] 20 Mad. 112.

(11) [1850] 19 L.J.C.P. 345 = 9 C.B. 661 = 14 Jur. 1094=82 R. R. 491.

(12) [1851] 20 L.J.Q.B. 284=16 Q. B. 717 = 15 Jur. 967=83 R.R. 698.

(13) [1892] 15 Mad. 82.

(1) [1880] 14 Ch. D. 351=49 L. J. Ch. 333=42 L. T. 679=28 W. R. 623=44 J. P. 663.

(2) [1871] 6 Q. B. 155=40 L.J.Q.B. 73 = 24 L. T. 93=19 W.R. 587.

(3) [1874] 9 Ex. 335 = 43 L.J. Ex. 161 = 31 L. T. 242=22 W. R. 658.

(4) [1908] 1 K. B. 302=77 L.J.K.B. 180 = 98 L.T. 301=24 T.L.R. 85.

v. Murugasa Chetty (14), a case decided by the Privy Council. This latter case was a suit in British territory against a French subject, not personally resident in British India, on a judgment obtained against him in Pondichery where he resided. It was sought to make him liable in British India by service on a relative within the jurisdiction of the District Court on the allegation that the business was a joint family business of which the relative was the managing member. The finding on these facts was against the plaintiff in the High Court and this was upheld by the Privy Council. The Board go on to make the following observation:

"In both Courts in India it was apparently assumed that the question of jurisdiction turned on S. 17, Civil P. C., and that, although the defendant was a foreigner, and although the cause of action arose in a foreign country, and although the defendant did not personally reside within the local limits of the jurisdiction of any Court in British India, and was not even temporarily in Arcot when sued there, yet he could be sued in the Arcot Court if he carried on business through an agent in the local limits of that Court's jurisdiction.

"This assumption appears to their Lordships to require more attention than it has received.

"Their Lordships see no reason for doubting the correctness of the decision of the case of *Girdhar Damodar v. Kassigar Hiragar* (15), where the defendant was a native of Cutch and the cause of action arose within the local limits of the jurisdiction of the British Indian Court in which the action was brought." The actual words cannot be relied on in support of the plaintiff's contention as their Lordships expressly reserve the point, but the approval of *Girdhar Damodar v. Kassigar Hiragar* (15), makes it necessary to examine that case. "The suit was brought by the plaintiff in the Court of Small Causes to recover from the defendant the sum of Rs. 1,300-11-6, being the price of the goods sold by the plaintiff to the defendant in Bombay. It was admitted that the defendant resided in Cutch out of the jurisdiction of the Court, and that he carried on business in Bombay by a munim. It was also the fact that no leave of the Court had been

obtained for the institution of this suit." It must be assumed from these words that the contract was entered into in Bombay by the munim on behalf of the defendant, that he was not resident in Bombay at the time the contract was made and that he was not personally served within the jurisdiction. Sir Charles Sargent, C. J., held that by carrying on business within it they accepted the protection of the territorial authority and might be fairly regarded by so doing as "submitting to the jurisdiction of the Courts of the country" and further in view of the great number of non-British subjects carrying on business in Bombay through munims and other agents, the legislature, in giving jurisdiction to the Court when the defendant carries on business within the local limits, must be assumed to have intended those provisions to apply to non-resident foreigners. It should be noted that the first ground on which the learned Chief Justice puts his judgment is not the ground of residence but of submission which I will deal with later. It appears therefore that the High Court of Bombay held that the legislature intended the provisions of the Procedure Act to apply to foreigners and also that the defendant had submitted to the jurisdiction and the Privy Council must have accepted either or both of these propositions; but the case did not raise the question of enforceability in Cutch of this judgment and the Board does not pronounce on this.

The two cases, in which the Bank of Australasia were plaintiffs, are treated in Dicey's "Conflict of Laws" as examples of other conditions which he groups together under the general head of submission; but there are observations as to residence and service on which the plaintiff relies. The Bank was one established under a local Act in Australasia, one of the sections of which provided that it should sue and be sued in the name of its Chairman. A suit was accordingly brought against the Bank and the Chairman served within the jurisdiction and judgment obtained. On that judgment suits were brought in the High Court of Justice against the two defendants and both the Court of Common Pleas and the Court of Queen's Bench in the two cases held the plaintiff entitled to recover. In the first case, *The Bank of Australasia v. Harding* (11),

(14) [1909] 23 Mad. 544=80 I.A. 220 (P.C.).

(15) [1898] 17 Bom. 662.

Wilde, C. J., uses the following language: "If the defendant had given a power-of-attorney, would not notice to his attorney be sufficient?" and Creswell J., referring to the Chairman, says: "Being his own appointed agent he had notice of the proceedings." (This observation does not appear in the judgment in the Law Journal Reports). In the second case *The Bank of Australasia v. Nias* (12), Lord Campbell, C. J., uses equally definite language: "Nor is there anything at all repugnant to the law of England, or to the principles of natural justice, in enacting that actions on such contracts instead of being brought individually against all the shareholders in the company, should be brought against the Chairman whom they have appointed to represent them. A judgment recovered in such an action, we think, has the same effect beyond the territory of the colony which it would have had if the defendant had been personally served with process and being a party to the record the recovery had been personally against him". The language of the learned Judges in these two cases seems to me to be applicable to cases where the persons sought to be made liable are not members of a company but are individuals who have appointed a person to represent them and it must be noted that this is not a company incorporated under the Companies Act when a suit would of course not be against an individual shareholder. It is an association of individuals authorized by a local Act to sue and be sued by their Chairman and the language of some of the Judges goes a long way towards making the presence of the agent with a right to sue residence and notice on him good service on which to found a suit on the judgment.

Copin v. Adamson (3) does not decide this point and will be considered on the second point. The last case, *Fazal Shau Khan v. Gafar Khan* (13), was one in which the defendant appeared by an agent and defended the suit. The Bench uses the following words: "It appears however from the evidence that the appellant carried on business by his agent within the limits of the territory. Moreover the defendant did not protest that the Court had no jurisdiction but appeared by an agent and defended the suit. Having done so and having taken

the chance of a judgment in his favour he cannot now when an action is brought against him on the judgment take exception to the jurisdiction." It is difficult to say on which of the two propositions the Court founded its judgment. On the facts, there was certainly a clear submission. On the whole, in spite of the language used in these judgments on which the plaintiff relies I am not prepared to hold that the law allows service on an agent of a partnership to create jurisdiction on the ground of residence.

The next condition is where the defendant has submitted to the jurisdiction in any of the three ways grouped together under that head. In the view I take this must be largely a question of fact in each case. In this case the two parties now sued did for many years carry on business as a firm in the jurisdiction of the Court of Singapore and each of the defendants was at one time managing the business there. Each of them did, at one time give a power-of-attorney to a relative to manage the firm's business during their absence. One of those powers has been exhibited in the case and has already been referred to. It is in English form and confers the widest powers. It authorizes the agent on behalf of the firm to demand, sue for, collect and receive etc., the rents and profits of any tenancies to take and use all lawful proceedings and means by distress or action or otherwise for recovering such rents and for enforcing the performance of any covenants or for evicting ejecting or recovering damages from tenants to demand sue for enforce payment of all monys securities or personal estate and to prove in any bankruptcy for any property due to adjust, settle compromise or submit to arbitration any debt, to commence, prosecute or enforce or defend answer or oppose all actions and other legal proceedings and demands touching any of the matters aforesaid or any other matters in which the defendant may be held interested and generally to act as his attorney in relation to all matters in which he may be interested. Now it is obvious that this power to sue on behalf of the defendants can only have reference to the Supreme Court of Singapore or the Courts subordinate to its jurisdiction. It is clearly established that if they had been plaintiffs in the suit there would

have been a selection of the forum and it is also clear that if in any contract there had been an agreement that suits should be decided by the Court of the place of business there would have been a contract to submit. I can see no reason why a power-of-attorney of this character which presumably is brought to the notice of persons dealing with the firm should not be evidence that the members of the firm adopted the Court of Singapore as the forum before which their claims were to be brought. Is there anything in the decisions which compels me to hold otherwise. This point does not appear to have been pressed on the Judges of this Court who decided the case *Nalla Karuppa Settiar v. Mahomed Iburam* (10). There was no power-of-attorney in that case the service having been on one resident partner and it may be that the facts in that case were not clearly as strong as they are in the present case.

The decision went entirely on the question whether the defendant was constructively resident and whether service on the resident partner was sufficient to found jurisdiction. The cases reported in *Shaik Atham Sahib v. Davod Sahib* (16) and *Sivaraman Chetti v. Iburam Sahib* (17), are of no assistance on this point. The question there was whether the defendant had in fact submitted himself to the jurisdiction by appearance in the suit. In one case it was held that he had and in the other that he had not. But this point does not arise in the present case. Nor is any assistance to be derived from the decision of the Privy Council in *Gurdyal Singh v The Raja of Faridkot* (18) which was an attempt to enforce an ex parte judgment recovered against a person who had not been served in any way was non-resident and was not carrying on business within the territory of the state. I can find no decision laying down that the facts such as are proved in this case are not evidence of submission in one of its forms. I am strengthened in the view that I take by the language of the Judges in the two Bank of Australasia cases to which I will now refer. The facts have already been set out. There a Colonial Act provided that all

actions and suits instituted by the Bank and all actions and suits prosecuted against the Bank shall be instituted by and prosecuted against the Chairman for the time being of the said Bank, and in the judgment of Wilde, C. J., in the case against *Harding* (11), he states as follows:

"It appears that the defendant was a partner in the company and that the Act provided that certain rights should be conferred on partners and that the business should be carried on under certain regulations all conducing to their benefit. It may be judicially taken that such an Act has been obtained at the request of the partners. By this Act it is contemplated that the business of the company could be more conveniently carried on if one member were sued instead of all and execution might be issuable against the property of the rest." The only point strongly argued was whether the remedy by execution was in substitution of the remedy against the partners individually. It seems to me that if the defendant had thought that this Act which was procured for his benefit could not be considered as a submission by him to the forum in which the Chairman was authorised to sue and be sued that point would have been taken in the two cases. The fact that the power of the Chairman to sue in the Courts was given by the statute and not by a power-of-attorney as in this case does not, I think, make any difference and one learned Judge as already pointed out treated the Chairman as his agent for this purpose. These two cases are authorities which have never been questioned and I am unable to distinguish them on principle from the present case. They are treated by Mr. Dicey as examples of submission and it is clear that they are not cases where the defendant's liability is based on the fact that he was the plaintiff in the lower Court or appeared in the suit or contracted with the other party to the suit to submit the matter of the suit to the jurisdiction of the Court. It must therefore be that submission in one form or other must be a mixed question of law and fact and where we find as appears in this case that the agent is specifically appointed to bring suits of all sorts with reference to the partnership in the forum in which he is subsequently sued, I cannot con-

(16) [1909] 8 I. C. 190=32 Mad. 469.

(17) [1895] 18 Mad 327.

(18) [1894] 22 Cal. 222=21 I. C. 171 (P.C.).

strue this as anything but a submission to the forum within the meaning of one of the conditions required for giving a jurisdiction. That Court having acquired jurisdiction and service out of jurisdiction by order of the Court being proved, the defendants *prima facie* are bound by the judgment and as they have not raised any defence to the suit the plaintiffs should have been given a decree in the lower Court. The decision of the lower Court is reversed. There will be a decree for Rs. 7,336-1-7 with costs. Subsequent interest at 6 per cent from date of plaint.

Sankaran Nair, J.—I agree.

S.N./R.K.

Appeal allowed.

* A. I. R. 1914 Madras 562

Full Bench

WHITE, C. J., AND SANKARAN NAIR
AND TYABJI, JJ.

In re *Solai Gounden* and others—Accused—Petitioners.

Criminal Revn. No. 637 of 1912, and Criminal Revn. Petn. No. 524 of 1912, Decided on 13th March 1913, from judgment of Sub-Divl. Magistrate Salem, in Criminal Appeal No. 113 of 1912.

* Criminal P. C. (5 of 1898), S. 106 (1) and (3)—Appellate Court can order security by bond even if accused convicted by second or third Class Magistrate—"Under this section" in Cl (3) refer to power given and not to Court.

An appellate Court has jurisdiction under S. 106, sub-S. (3) to order a person to execute a bond to keep the peace when he has been convicted of one of the offences specified in sub-S. (1) of that section, not by one of the Courts specified in that subsection, but by a second or third Class Magistrate. [P 563 C 1]

The words "under this section" in sub-S. (3), S. 106, have reference to the power given by the section and not to the Courts by which these powers are in the first instance exercisable: 21 Cal. 622 and 35 Cal. 434; *Diss. from* and; 29 Mad. 190 and 30 Mad. 48, **Overruled.**

[P 563 C 1]

C. S. Venkatachariar—for Petitioners.

Public Prosecutor—for the Crown.

Order of Reference

The chief question argued in this petition is whether an appellate Court has jurisdiction, under S. 106, sub-S. (3), Criminal P. C., to order the appellant to execute a bond to keep the peace when the appellant has been convicted of one of the offences specified in sub-S. (1) of the section not by one of the Courts specified in that subsection, but by a second or third Class Magistrate.

The pleader for the petitioner relies on

the cases reported as *Mahmudi Sheikh v. Aji Sheikh* (1), *Muthiah Chetty v. Emperor* (2); *Paramasiva Pillay v. Emperor* (3) and *Emperor v. Momin Malita* (4). The three latter cases are direct authorities in support of the contention that the appellate Court has no jurisdiction where the original conviction was by a second or third Class Magistrate.

But (as was pointed out by Benson, J., in Criminal Revision Case No. 37 of 1904 unreported), the decision in *Mahmudi Sheikh v. Aji Sheikh* (1) was under the Criminal Procedure Code of 1872, in which there was no provision corresponding to the present sub-S. (3), and was therefore inapplicable to the present case. In that case Benson, J., held that the appellate Court had jurisdiction where the original conviction was by a second or third Class Magistrate. It does not appear that this decision was brought to the notice of the Bench which decided the case of *Muthiah Chetty v. Emperor* (2). This latter case was followed without discussion in the case reported as *Paramasiva Pillay v. Emperor* (3), and in several other unreported cases in this Court, and it was also followed in the case reported as *Emperor v. Momin Malita* (4).

The correctness of the two Madras decisions was however doubted in the case reported as *Dorasami Naidu v. Emperor* (5), and was dissented from in the cases reported as *Emperor v. Bhausing* (6) and *Emperor v. Dharam Das* (7), where it was held that the appellate Court had jurisdiction even when the original Court was a second or third Class Magistrate.

In this state of the authorities, we think it desirable to refer the question as stated at the beginning of this order for the decision of the Full Bench, as we are inclined to doubt the correctness of the decision in *Muthiah Chetty v. Emperor* (2), and the cases which followed it having regard to the reasons stated in *Dorasami Naidu v. Emperor* (5).

(1) [1894] 21 Cal. 622.

(2) [1903] 29 Mad. 190=3 Cr. L. J. 461.

(3) [1907] 30 Mad. 48=5 Cr. L. J. 88.

(4) [1908] 35 Cal. 434=12 C. W. N. 752=8 Cr. L. J. 9.

(5) 30 Mad. 182=1 M. L. T. 343=4 Cr. L. J. 498.

(6) 1 I. C. 454=33 Bom. 33=10 Bom. L. R. 759=8 Cr. L. J. 267.

(7) 7 I. C. 412=33 All. 48=7 A. L. J. 910=11 Cr. L. J. 480.

(This case coming on for hearing upon perusing the order of reference and upon hearing the arguments of Mr. C. S. Venkatachariar, vakil for the petitioners, and of the Public Prosecutor on behalf of the Government, the Court expressed the following:

Opinion.—We are of opinion that the jurisdiction of an appellate Court to order a person who has been convicted of one of the offences mentioned in sub-S. (1), S. 106, Criminal P. C., is not restricted to cases where the conviction was by one of the Courts specified in the subsection. The words “an appellate Court” are quite general and the word “also” indicates that the powers given by the section may be exercised by the Courts mentioned in sub-S. (1) and by any appellate Court.

We think the words “under this section” in sub-S. (3) have reference to the powers given by the section and not to the Courts by which these powers are, in the first instance, exercisable. We are unable to agree with the decision of *Muthiah Chetty v. Emperor* (2) and in the other cases referred to in the order of reference in which that decision was followed. We would answer the question which has been referred to us in the affirmative.

S.N./R.K.

Reference answered.

A. I. R. 1914 Madras 563

SADASIVA AIYAR AND SPENCER, JJ.

Chakkangal Govinda Menon—Defendant 1—Appellant.

v.

Chakkangal Chathu Menon and others—Defendants 2 and 3 and Plaintiffs—Respondents.

Second Appeal No. 2551 of 1912, Decided on 10th January 1914, from decree of Tempy. Sub-Judge, Palghat, in Appeal Suit No. 97 of 1912.

(a) **Transfer of Property Act (4 of 1882), S. 60—Mortgage money becoming payable—Redemption suit cannot be resisted on ground that money is payable within certain date.**

When mortgage money has become payable under the terms of the mortgage deed a redemption suit cannot be resisted on the ground that money is payable only within certain dates.

[P 563 C 2]

(b) **Transfer of Property Act (4 of 1882), S. 91 (b)—Invalid mortgage is valid till rescinded—Mortgagee claiming under such document is entitled to redeem.**

A mortgage impugned as invalid is valid until rescinded, and a mortgagee claiming under such a document is entitled to redeem under S. 91 (b).

[P 563 C 2]

V. Ryru Nambiar—for Appellants.

C. V. Ananthakrishna Aiyar—for Respondents.

Judgment.—The first contention in this second appeal (filed by the first mortgagee in a suit to redeem) is that the suit is premature because it was brought after 13th March 1911 (that is, on 21st April 1911, and before August 1911. This contention is based on a term of the mortgage document dated 1897. That term is that the mortgagors can redeem by payment in any year before 30th Kumbam of that year. The Malayalam year begins and ends in August of the calendar year and the mortgagee's contention is that the mortgagors should pay the mortgage money after August and before 13th March in any year and not after 13th March and before August. They also contend that the suit for redemption should be likewise brought before 13th March and after August. We reject this contention so far as the right to bring the suit to redeem is concerned, because S. 60, T. P. Act, clearly gives a right to the mortgagor to bring a suit to redeem “at any time after the principal money has become payable.” The date fixed in the document for payment is 12th March 1899, and hence a suit can be brought for redemption on any date after 12th March 1899.

The next contention is that the plaintiffs who claim to redeem as subsequent mortgagees have obtained a document which is invalid as against the tarwad of the mortgagors and hence that the second mortgagees ought not to be allowed to redeem.

It may be that the mortgagor's tarwad can avoid the subsequent mortgage given by its karnavan, but we think that until it is avoided by the tarwad in a proper suit the second mortgagee, as one interested in the mortgaged properties, is entitled to redeem under S. 91 (b), T. P. Act. Though the first and second mortgagees in this case are branches of the mortgagor's tarwad, they are in the same position (so far as their right to raise contentions in respect of questions relating to the mortgage transactions are concerned) as if they were strangers who had obtained the said mortgages from the tarwad.

The question how far the mortgagor's tarwad is bound by a second mortgage cannot be raised by the first mortgagee

in a suit for redemption by the second mortgagee unless the second mortgage is wholly invalid and is not merely voidable either in whole or in part.

The second appeal is therefore dismissed with costs. Time for redemption is extended till 13th March 1914.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 564

WHITE, C. J. AND ABDUR RAHIM, J.
Rajah of Venkatagiri—Appellant.

v.

Mukku Narsaya and others—Respondents.

Appeals Nos. 197 and 174 of 1905, Decided on 26th April 1910, against decree of Dist. Judge, Nellore, in Original Suit No. 11 of 1901.

(a) Madras Estates Land Act (1 of 1908), Ss. 3 (7) and 6—Lower Court's decree is final decree for S. 3 (7)—After final decree rights under S. 6 cannot be claimed—Burden of proof of occupancy right is on tenant—Enhancement of rents—Resumption raises presumption against occupancy—It is doubtful if the rule 'once a tenant always a tenant' applies to cases where landlord in tending to determine the tenancy fails—Tenant re-occupying land after ejectment—Landlord accepting rent—No adverse possession in suit for ejectment.

An appeal is not such a rehearing of the suit as to have the effect of rendering a statute retrospective in its effect where no such effect is to be gathered from the terms of the statute itself: 23 *Mad.* 91, *Dist. and Quilter v. Mapleson*, (1882) 9 Q. B. D. 672, *not Appr.*

[P 565 C 2]

The words "final decree" in the last paragraph of S. 3 (7), Madras Estate Land Act, 1908, mean final with reference to the Court which passes the decree and they are none the less final, for the purposes of section, because an appeal was pending when the Act came into operation.

[P 565 C 1, P 566 C 1]

The right conferred on tenants by S. 6, Madras Estates Land Act, is cut down in a case to which S. 3 (7) of the Act applies. Ryoti land, in respect of which before the passing of the Act, the landholder has obtained a final decree of a competent civil Court establishing that the ryot has no occupancy right, is "old waste" within the meaning of S. 3 (7).

[P 566 C 1]

Where the tenants, in a suit in ejectment, plead occupancy rights and the lands have been granted on amaram tenure, it is on the tenants to show that the lands were not resumable.

Where the landlord from time to time raised the rent and resumed possession for some time, and there is nothing to show that tenant disputed his right to do so, a presumption arises against the right of occupancy: 7 *M. I. A.* 128-*Ref.*; 18 *M. I. A.* 438, *Dist.*

[P 567 C 1]

It is doubtful whether the rule applying to the Madras Presidency, that a tenant who has lawfully come into possession as such from year to year or a term of years cannot, by

setting up, however notoriously during the continuance of such relation, any title adverse to that of the landlord inconsistent with the legal relation between them acquire by limitation title as owner or any other title inconsistent with that under which he was let into possession, should be applied to cases where the landlord has shown by an unequivocal act that he intends to exercise his option and determine the tenancy, even though he may not have succeeded in doing so: 26 *Mad.* 535; *Archbold v. Scully*, (1862) 11 *Eng. Rep.* 769; 18 *Bom.* 507; 27 *Bom.* 515; 21 *Bom.* 394; 21 *Bom.* 509; 14 *Cal.* 523; 35 *Cal.* 470 and 27 156 *Cons.*

[P 568 C 1, 2]

A tenancy was determined and the land resumed by the landlord but the tenants subsequently got back without the landlord's permission. The landlord accepted the situation and continued to receive the rent at the old rate. There was no evidence to show an assertion of an adverse title twelve years before the institution of the suit for ejectment.

Held: that the suit was not barred by time.

[P 569 C 2]

(b) Transfer of Property Act (4 of 1882), Ss. 51 and 108 (h)—S. 51 is not applicable between landlord and tenant—Tenant not entitled to compensation for building erected by him in absence of contract—Mere non-interference would not entitle tenant to compensation but encouragement to improvement would—S. 108 applies to fixture by tenant and S. 51 is applicable to transferee of absolute interest—Improvements by tenant are at his risk.

Per *White, C. J.*—S. 51 does not in terms apply as between landlord and tenant.

[P 569 C 2]

Both under the Hindu and Mahomedan Law, as well as under the Common Law of India, a tenant who erects a building on land let to him can only remove the building and cannot claim compensation in eviction: 27 *Mad.* 211, *Ref.*

[P 569 C 2]

If there is no express contract, unless the lessor is estopped from suing for possession, the lessee cannot claim compensation, if the lessor is estopped from recovering possession the Court can say: "You are estopped, but we will not enforce this equity against you if you pay the tenant such compensation as we think fair."

[P 570 C 1]

The mere fact that the landlord knew the improvements were being effected but did not interfere is insufficient to entitle the tenant to compensation for improvements unless the landlord has created or encouraged a hope or expectation in the tenant that he shall have a certain interest in land: 21 *All.* 496; 17 *Bom.* 736; *Ramsden v. Dyson*, (1866) 1 *H. L.* 126; 6 *M. H. C. R.* 245; 29 *Cal.* 871; and 29 *Bom.* 508; *Ref.*

[P 570 C 2]

Abdur Rahim, J.—The Court would infer a contract to pay compensation if the landlord by his conduct encouraged or raised an expectation in the tenant spending money in making improvements that the latter would not be evicted at all, or at least not without being compensated for the value of such improvements, and the improvements were in fact made under such expectation. Such a contract is inferred to relieve the tenant from the fraud of the landlord. The doctrine of equitable estoppel

should not be extended as between a landlord and his tenant to a case where all that can be alleged against the former is that he did not interfere and merely remained passive with the knowledge that the tenant was making improvements under a mistaken belief that he had a more stable interest in the land than that of a tenant-at-will or a tenant from year to year: 6 *M. H. C.* 245; and 29 *Cal.* 84, *Diss. from*; 21 *All.* 496; 27 *Cal.* 570; 17 *Bom.* 736; and 29 *Bom.* 580, *Ref.*; *Ramsden v. Dyson*, (1866) *L. H. L.* 129; *Applied*. [P 571 C 1, 2]

Section 108 only deals with the right of the tenant to remove the fixtures he has placed in the land and S. 51 applies only to the case of a transferee of an absolute interest in land.

[P 572 C 1]

If a tenant, knowing the extent of his interest in the land in his possession, chooses to spend money upon a title which he must know would soon come to an end, this is his own folly and he cannot ask the owner of the land to recoup him for such expenditure. [P 571 C 2]

Judgment.—This is an appeal by the defendants against a decree obtained by the Rajah of Venkatagiri for recovery of possession of a certain village. Mr. Seshagiri Aiyar, on behalf of the appellants, has taken the point that having regard to the fact that the Madras Estates Land Act, 1908, came into force during the pendency of this appeal, the appeal must be decided with reference to the law as laid down in that enactment. The Advocate-General, on behalf of the respondent took the objection that this question could not be raised as it was not made a ground of appeal in the memorandum of appeal. We are of opinion that it is open to Mr. Seshagiri Aiyar to take the point notwithstanding that the question is not raised in his grounds of appeal. Mr. Seshagiri Aiyar contended that an appeal being by way of rehearing we should apply the law as it stands at the date of the hearing of the appeal. If we applied that law, he contended inasmuch as he was, when the Act came into operation, in possession of ryoti land he was entitled to the benefit of the enactment contained in S. 6 (1) of the Act as amended by the Act of 1909. He argued that the land in question was not "old waste" as defined by S. 3 of the Act of 1908 since it did not come within the purview of the last paragraph of that section, for the reason that as an appeal was pending when the Act came into the force there had been at that time no "final decree of a competent civil Court."

Although we should have expected to find the qualification of the right created by S. 6 in the section itself and not in

the section which defines "old waste," the intention of the legislature is clear, viz., to prevent a man being deprived of the benefit of a judgment which he had obtained before the Act came into force.

It is to be observed that there is not to be found in the sections of the Code which relate to the powers of an appellate Court or in the rules, any provision which corresponds to O. 58, R. 1, of the English rules of the Supreme Court, that all appeals shall be by way of rehearing.

In *Kristnama, Chari v. Mamagammal* (1) there is an observation by Sir Bhashyam Aiyangar that when an appeal is preferred from a decree of a Court of first instance the suit is continued in the Court of appeal and reheard either in whole or in part. This observation was with reference to the question of limitation then before the Court. We doubt if it can be relied on as supporting what we understood to be Mr. Seshagiri Aiyar's proposition. His proposition came to this: that under the Code and rules an appeal is a re-hearing of the suit so as to have the effect of rendering a statute retrospective in its effect even though no such effect is to be gathered from the terms of the statute itself.

In *Quilter v. Mapleson* (2), the observation of Jessel, M. R., that on a rehearing such a judgment may be given as ought to be given if the case came at that time before a Court of first instance was made with reference to the English rule under the Judicature Act that appeal should be by way of rehearing, and the same remark applies to the observation of Bowen, L. J. In the same case that if the law had been altered pending an appeal it would be pressing rules of procedure too far to say that the Court of appeal could not decide according to the existing state of the law. In *Quilter v. Mapleson* (2) the Court was of opinion that the section in question was in terms retrospective.

We express no opinion as to whether S. 6, Madras Estates Land Act 1908, is in terms retrospective. Assuming it is, the retrospective rights created are cut down in a case to which the last paragraph of S. 3 (7) applies.

As regards the words "final decree" occurring in this paragraph we are of

(1) [1903] 26 Mad. 91.

(2) [1866] 9 Q. B. D. 672=52 L. J. Q. B. 44=47 L. T. 562=81 W. R. 75.

opinion that they mean final with reference to the Court which passes the decree and that they are none the less final for the purposes of the section because an appeal was pending when the Act came into operation. S. 13 of the Code of 1882, as it seems to us, does not help Mr. Seshagiri Aiyar. For the purpose of the law of res judicata Explan. 4 says that a decision liable to appeal may be final within the meaning of the section until an appeal is made. The explanation was only for the purposes of the section. Moreover it does not find a place in the Code of 1908.

In S. A. No. 1158 of 1906, the lower appellate Court, reversing the decree of the Munsif, dismissed a suit in ejectment on the ground that the defendants have occupancy right. The Madras Estates Land Act came into operation after the decree of the lower appellate Court and before the hearing of the second appeal. This Court, whilst doubting whether the Judge was right in holding that the tenants had occupancy rights, was of opinion that the S. 6, Cl. (1), Madras Estates Land Act 1 of 1908, as amended by Act 4 of 1909, conferred on the defendants permanent right of occupancy and they dismissed the appeal. The same view would seem to have been taken in S. A. No. 1592 of 1907. No doubt in S. A. No. 1158 of 1906 it was said that it was immaterial that a decree for possession had been already passed. But the decree there referred to would seem to have been the decree of the Munsif which had been reversed by the lower appellate Court. The present case therefore, where there was an existing decree for possession at the time the second appeal was heard is clearly distinguishable.

Assuming S. 6 of the Act of 1908 to be retrospective it does not help the defendants if the land was "old waste" within the meaning of the section. We are of opinion that the land is old waste as defined by S. 3 (7) since it is ryoti land in respect of which before the passing of the Act the landlord had obtained a final decree of a competent civil Court establishing that the ryot has no occupancy right.

The result therefore is, assuming S. 6 to be retrospective the right conferred upon the tenants by the section is cut down by the definition of "old waste" in

S. 3 (7), and the defendants in this case cannot rely upon the section.

The question whether the defendants have right of permanent occupancy in the lands from which the plaintiff now seeks to eject them came before this Court in the year 1899 on appeal from the Subordinate Judge of Nellore in O. S. No. 45 of 1897 *Narasayya v. Venkatagiri Rajah* (3). This Court, affirming the decree of the Subordinate Judge, held against the alleged right of permanent occupancy, but dismissed the plaintiff's suit on the ground that the notices to quit which he had given to the defendants, were insufficient. The sufficiency of the notices which have been given in the present suit is not contested.

The question of the defendant's alleged right of permanent occupancy had been investigated once again in the present suit by the District Judge of Nellore, the matter not being res judicata by reason of the judgment of this Court, and in a very careful and exhaustive judgment he arrives at the same conclusion as that come to by the Subordinate Judge in the suit of 1894 and by this Court in appeal from the decree in that suit. We think this conclusion is right. There is no documentary evidence to show the origin of the defendant's title or to show the terms on which their predecessors-in-title obtained possession in the first instance or continued in possession after 1802, the date of Lord Clive's letter when the defendant's ancestors were relieved from the obligation of rendering military service. It is not disputed that the village in question forms part of the Venkatagiri zamindari of which the plaintiff is the proprietor. On the other hand, the defendants and their ancestors have been in possession, with intervals during which the lands were resumed by the plaintiff's predecessors for some 200 years. The defendant made some attempt to prove that their ancestors got into possession under grants from the plaintiff's predecessors, but we think the District Judge was perfectly right in disbelieving the evidence tendered by the defendants in support of these alleged grants. The case made by the plaintiff in his plaint is that the defendants were "allowed to continue" in possession after 1802. There is a good deal of evidence to show that the defendant and their an-

cestors were described as amaramdars, and although the precise nature of an amaram tenure is by no means clear it seems to have been generally assumed that lands held on amaram tenure are resumable: see Wilson's Glossary p. 21; *Unidi Rajah Raji Bommarauze Bahadur v. Pemmasamy Venkatadry Naidoo* (4). We think it is clear, in fact, it was not seriously contested, that the lands were resumable in 1802: see *Sitaramarazu v. Ramchandra Razu* (5), *Sanniyasi v. Razu Zamindar of Salur* (6), *Mahadevi v. Vikrama* (7), *Radha Prosad Sing v. Budhu Dashad* (8).

The fact would seem to have been that after 1802 the defendant's ancestors were allowed to continue in possession on payment of rent, and the defendant's ancestors and the defendants, with some intervals during which the plaintiff and his predecessors resumed possession, have been in possession until now.

Two points tell against the right of permanent occupancy claimed by the defendants. The plaintiff's ancestors have from time to time raised the jodi or rent and there is no evidence to show the defendants disputed their right to do so. This is not conclusive (see Appeal No. 43 of 1903) but it is some evidence against the right of permanent occupancy claimed by the defendants. The other fact is that the plaintiff's ancestors resumed possession of the lands from 1835 to 1849 and again from 1876 to 1882. As regards the period 1835 to 1849, there is no evidence that the defendants contested the plaintiff's right to resume. As regards the period 1876 to 1882, there is some evidence though of a very unsatisfactory character that the defendants denied the right.

We think the present case is governed by the decision of the Privy Council in the case of *Unidi Bajah Raji Bammaraazu Bahadur v. Pemmasamy Venkatadry Naidoo* (4). Where the lands in question formed part of the Zamindari of Karventnagar in Madras and were held on amaram tenure and where the letter of Lord Clive of 1802, to which reference was made, relieving the zamindar from military services, had been sent to the

zamindar. In that case their Lordships observe. "It is a possible case, looking at the extensive powers with which the zamindar is invested, that the grant being originally 'amaram' and resumable might when the military service was dispensed with and circumstances had changed, have been converted into a perpetual grant upon a fixed payment. Had this been the case, it ought to have been distinctly pleaded, and the grants themselves if produced, would have shown whether such defence could be supported."

In the present case the defendants do not plead a grant in 1802 though they allege that the zamindar (para. No. 8 of the written statement) "entered into arrangements with the defendants' ancestors by which the jodi payable by them was slightly increased and permanently fixed and the defendants' ancestors were thereafter to be in possession of their village as their absolute property with all powers of alienation. "There is no evidence to support this allegation of an "arrangement" having been come to in 1801. We think the case of *Forbes v. Meer Mahomed Tuquee* (9), where the defendants were able to prove a grant *pro servit is et evlependis is services* which though obsolete might again be required to be performed is clearly distinguishable from the present case.

We are of the opinion that the plaintiff has apart from the question of limitation established his right to resume the lands in question on giving reasonable notice to the defendants.

The question of limitation is, in our opinion one of greater difficulty. Though the rent has been raised from time to time, it has been uniform since 1876 and has been paid up to a short time before the institution of the suit.

The defendants were out of possession from 1876 to 1882 during which period the plaintiff has resumed possession and collected the rent direct, from the ryots. In 1882, the defendants got back into possession. The defendant's case is that by 12 years' possession they have acquired a prescriptive title to a permanent right of occupancy subject to the payment of the rent fixed in 1876 and regularly paid by them since they got back into possession in 1882.

(4) [1857-59] 7 M. I. A. 128=4 W. R. 121 (P. C.).

(5) [1881] 3 Mad. 967.

(6) [1884] 7 Mad. 269.

(7) [1891] 14 Mad. 855.

(8) [1895] 22 Cal. 983.

(9) [1867-70] 13 M. I. A. 438=5 B. L. R. 529 =14 W. R. 28 (P. C.).

So far as this Presidency is concerned it would seem to be well settled that a person who has lawfully come into possession as tenant from year to year or a term of years cannot by setting up however notoriously during the continuance of such relation, any title adverse to that of the landlord inconsistent with the legal relation between them acquire by limitation title as owner or any other title inconsistent with that under which he was let into possession, *Seshamma Shettati v. Chickoya Hegade* (10). But "if after the determination of tenancy the tenant remains in possession as trespasser for the statutory period, he will by prescription, acquire a right as owner of such limited estate as he might prescribe for" see *Seshamma Shettati v. Chickoya Hegade* (10). In *Parameswaram Humlanno v. Krishanan Tengal* (11) the adverse possession held to have commenced after the former tenancy had been determined and the plea of limitation was upheld.

The doctrine enunciated in these two cases as we have said would seem to be well established in this presidency and to be consistent with the law of England. In *Archbold v. Scully* (12), the House of Lords held it was not within the power of a tenant by any act of his own to alter the relation in which he stands to his landlord. Lord Wensleydale cites the observations of Lord Redesdale in an earlier case: "I take it to be that whenever a person comes to the possession either by the judgment of law or his own agreement and holds that possession, he and all who claim under him must hold it according to his right to the possession, and cannot qualify it by any other right." A disclaimer of the lessor's title by the lessee may be a ground of forfeiture, but it does not in itself make the statute of limitation run against the lessor: see Lightwood's *Time Limit on Actions*, p. 107 citing *Archbold v. Scully* (12). We do not find that the doctrine has been formulated in the other High Courts in India. In fact in Calcutta and Bombay, the view would seem to be that the assertion of the adverse right coupled with possession for the statutory period is enough. In *Vithalbowa v. Narayan*

Daai Thite (13), the view taken was that the assertion of a permanent right of occupancy during the subsistence of a tenancy-at-will would bring the law of limitation into operation and in *Thakore Fatesingji v. Bamanji A. Dalal* (14), it was held by Batty, J., that a tenant in India is not precluded by an admission of tenancy from showing that the nature of the tenancy asserted by him to the knowledge of the landlord has been for the prescribed period pro tanto adverse to the right of the landlord to evict. The cases of *Gopal Rao v. Mahadeo Rao* (15), and *Bulesab v. Hanmanta* (16) would appear to have been decided on the ground that the assertion of the adverse right coupled with the possession for the statutory period was sufficient independently of the question whether when the right was asserted the relation of landlord and tenant subsisted or not. In *Drobomoyi Supta v. Davis* (17) the plea of limitation was upheld on the ground that the landlord was aware that the tenants were claiming to hold with rights of permanent occupancy, and in *Icharan Singh v. Nilmoney Balidar* (18), it was held that a person could plead tenancy, and, in the alternative, a prescriptive title by adverse possession of a limited interest.

The decision of the Privy Council in *Beni Pershad Koeri v. Dudhnath Roy* (19), where it was held that a notice by a tenant for life that he claimed perpetual right of occupancy did not make his possession adverse, would seem to have proceeded on the ground that when the adverse right was set up, the landlord could not sue for possession.

We feel some doubt as to whether we ought to apply the doctrine enunciated in *Seshamma Shettati v. Chickya Hegade* (10), in a case where the landlord has shown by an unequivocal act that he intends to exercise his option and determine the tenancy: see *Srinivas Ayyar v. Muthusami Pillai* (20), even though he may not have succeeded in doing so.

(13) [1894] 18 Bom. 507.

(14) [1903] 27 Bom. 515=5 Bom. L. R. 274.

(15) [1897] 21 Bom. 394.

(16) [1897] 21 Bom. 509.

(17) [1887] 14 Cal. 323.

(18) [1908] 35 Cal. 470=12 C. E. N. 636=7 C. L. J. 493.

(19) [1900] 27 Cal. 156=26 I. A. 216 (P.C.).

(20) [1901] 24 Mad. 246.

(10) [1902] 25 Mad. 507=12 M. L. J. 49.

(11) [1903] 26 Mad. 535.

(12) [1861] 11 E. R. 769=9 H. L. C. 360=7 Jur. (n. s.) 1160=56 L. T. 60.

In such a case it seems to us that it might well be held that the landlord could not be heard to say that there is a subsisting tenancy which prevents the acquisition of a limited title under the law of limitation. The landlord is not bound to exercise his option and repudiate the tenancy, but if he does, even though he does not succeed in evicting the parties in possession, we doubt whether he should be allowed to set up a subsisting tenancy as a ground for preventing the acquisition by prescription of a limited interest.

In the present case a notice to quit was given in 1884 and (see para. 13 of the judgment of the District Judge) the Judge was of opinion that this notice was not reasonable, but it would seem to have been a six months' notice (see Ex. 6), and that efforts were made to serve it: see Exs. 6 A and 6 B.

There is no evidence as to what was done under this notice, but the Judge seems to have been of opinion that it was not a reasonable notice. We doubt if the subsequent receipt of rent by the landlord could be relied on as waiver of the notice since it was equally consistent with the defendants' claim that they had permanent rights of occupancy (they have never denied their liability to pay rent) as with the plaintiff's claim that the lands were resumable. In this state of things we should be inclined to hold that the plea of limitation was made out if there was satisfactory evidence of the assertion of an adverse title by the defendants when they got back into possession in 1882. The evidence of defendant 52, that the tahsildar had been told in 1876 that the Rajah had no power to resume possession of the village since it had been granted permanently, cannot be relied on, since this witness denied the fact of resumption in 1876, which is now admitted. Further, this evidence, even if true, would not help the defendants since they would appear to have done nothing to resist the resumption in 1876, though there is some evidence that the zamindar had executed pattas to the defendants from 1876 to 1882 and that they refused to receive the pattas and execute muchilikas: see the evidence of plaintiff 4's witness, the kurnam of the village in cross-examination. The defendants got back in 1882. Assuming they got back without

the permission of the plaintiff and he accepted the situation and continued to receive the rent at the rate fixed in 1876, there is nothing to show that they got back under the assertion of the adverse right which they set up in the suit of 1891. The rent was paid and received as before and there is nothing to show that the landlord accepted the rent as payable by them as tenants from year to year or that they paid the rent as an incident of their permanent tenure.

In the absence of the evidence to show an assertion of an adverse title 12 years before the suit we must hold that the plea of limitation is not made out.

We think the District Judge was right and that this appeal should be dismissed with the costs.

In Appeal No. 174.

White, C. J.—This is an appeal by the plaintiff against so much of the decree in ejectment obtained by him as directs the payment of compensation to certain of the defendants. In cases to which the Transfer of Property Act applies the rights of the tenant are defined by S. 108 (h) of that enactment and the extent of the right is the same in cases not governed by the Act: see *Ismail Khan Mahomed v. Jaigun Bibi* (21). I do not think S. 51 of the Act applies in terms as between landlord and tenant. The observations in *Ismail Kani Rowthan v. Nazarali Sahib* (22) may be said to indicate a contrary view, but those observations are very guarded, and they are moreover obiter. Even if the section applied, I do not see how, in this case, it could be said the defendants believed in good faith they were "absolutely entitled" to the property in question. There have been at least two resumptions of the property by the zamindar. There is no trustworthy evidence that these resumptions were resisted by the defendants. There have been enhancements of rent and there is nothing to show those enhancements were not accepted without protest. Both under the Hindu and the Mahomedan law as well as under the common law of India, a tenant who erects a building on land let to him can only remove the building and cannot claim compensation in eviction: *Ismail Kani Rowthan v. Nazarali Sahib* (22).

(21) [1900] 27 Cal. 570 = 11 C. W. N. 210.

(22) [1904] 27 Mad. 211 = 14 M. L. J. 25.

The further question is: Do the facts of this case bring it within any principle of equity which entitles the defendants to say, if we are evicted, we must be paid compensation? At the highest the evidence shows the plaintiff knew the improvements were being effected and did not interfere. This is clearly not enough to estop the plaintiff in a suit for possession: see *Beni Ram v. Kundan Lal* (23), and in my opinion it is not enough to give the defendants a right to compensation. In fact, I should be disposed to hold, if there is no express contract, unless the lessor is estopped from suing for possession, the lessee cannot claim compensation. If the lessor is estopped from recovering possession the Court can say: "you are estopped but we will not enforce this equity against you if you pay" the tenant such compensation as we think fair.

There are however no doubt, cases in which Courts in this country have granted compensation on what I may call general equitable grounds, without considering the question whether the facts gave rise to an estoppel against the lessor which would disentitle him from suing to recover possession. Assuming a right to compensation may arise in a case in which the lessor is not estopped from recovering possession I am of opinion, on the facts, there is no such right in this case.

The learned Judge in the Court below relied on *Dattatraya Rayajipai v. Sridhar Narayan Pai* (24). In that case compensation was awarded to the tenant, the Court being of opinion that the facts brought the case within the principle of the decision in *Ramsden v. Dyson* (25), but there were special circumstances in that case from which the Court was able to draw the inference that the plaintiff by his conduct afforded hope and encouragement to the defendant that he would be allowed to remain in peaceable possession or at least would not be ejected without a reasonable return for the expenditure incurred by him. The case of *Mahalatchmi Ammal v. Palani Chetty* (26) is, no doubt, an authority in the defendant's favour, but with all respect, I doubt if this decision is

good law: see the observations in *Ismail Kani Rowthan v. Nazārāli Sahib* (22).

Even accepting the principle laid down in *Nundo Kumar Nasker v. Bonomali Gayan* (27), in my opinion, the facts of this case do not come within the principle there stated.

In *Municipal Corporation of Bombay v. Secretary of State* (28) the Court held, on the facts that the defendants acted on a belief which was referable to an expectation created by Government that their enjoyment of the land would be in accordance with that belief and that the Government knew that the defendants were acting in this belief so created. In this view of the facts the Court held the defendants were entitled to the benefit of the dictum formulated by Lord Kingsdown in *Ramsden v. Dyson* (25).

In *Ramsden v. Dyson* (25), the House of Lords held against the alleged equitable rights set up by the defendant, Lord Kingsdown dissenting from Lord Cranworth, Lord Wensleydale and Lord Westbury. There is nothing however in so far as I can see in the judgments of their learned Lords which is inconsistent with Lord Kingsdown's proposition. The proposition is this: If a man, under a verbal agreement with a landlord for a certain interest in land, or under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and, upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation. I do not think the facts of the present case bring the case within Lord Kingsdown's dictum. In my opinion the evidence does not show that there has been a hope or expectation in the tenant which was created or encouraged by the landlord.

I think this appeal should be allowed with full costs.

Abdur Rahim, J.—I agree that this appeal should be allowed as I have no doubt that in the circumstances referred to by the learned Chief Justice, the tenants could not have believed in good faith when they dug the wells in the land that they had a permanent right to the

(23) [1899] 21 All. 496=26 I. A. 58 (P.C.).

(24) [1893] 17 Bom. 736.

(25) [1847] 1 L. R. H. L. 129=12 Jur. (n. s.) 506=14 W. R. 926.

(26) [1870-71] 6 M. H. C. R. 245.

(27) [1902] 29 Cal. 871.

(28) [1905] 29 Bom. 580=7 Bom. L. R. 27.

land or that the landlord would grant them such a right. If they had acted under such belief they would have been entitled to insist that they should not be ejected at all or that if ejected compensation should be paid to them for the improvements which they had effected under such belief provided they proved that they made the improvements in circumstances which would induce a Court of equity to imply a contract between them and the landlord that the landlord would not eject them or in case he ejected them that he would pay them the value of the improvement.

The Court would infer such a contract if the landlord, by his conduct encouraged or raised an expectation in the tenant spending money in making improvements that the latter would not be evicted at all or at least not without being compensated for the value of such improvements and the improvements were, in fact made under such expectations. Such a contract is inferred in order to relieve the tenant from the fraud of the landlord. This, I take it, is the extent to which the doctrine of equitable estoppel is well established: *Ramsden v. Dyson* (25), *Beni Ram v. Kundan Lal* (23), and *Municipal Corporation of Bombay v. Secretary of State* (28). We are not called upon to decide in this case, having regard to its undoubted facts the question whether if the tenants believed that they had a permanent right to the land and in such belief, but without that belief being created or actively encouraged by the landlord, made the improvements to the knowledge of the landlord and without any warning or interference by him, they could be effected at all or whether in any case the landlord should not pay them the value of improvements. The opinions delivered by the learned Lords in *Ramsden v. Dyson* (25), especially that of the Lord Chancellor Lord Cranworth (p. 141), makes it clear that in cases of this nature the Court of equity would raise an equitable estoppel against the owner of the land less readily in a case where the tenant makes permanent improvements on the land than where a stranger makes similar improvement. And the grounds for such a distinction are obvious. The tenant making permanent improvements might well have relied on the honour of the landlord not

to evict him so long as the rent was regularly paid. While ordinarily a similar interpretation could hardly be placed on the conduct of a stranger in spending his money upon another's land. And I do not think the doctrine of equitable estoppel has been or should be extended as between a landlord and his tenant to a case where all that can be alleged against the former is that he did not interfere and merely remained passive with the knowledge that the tenant was making improvements under a mistaken belief that he had a more stable interest in the land than that of a tenant-at-will or of a tenant from year to year. This is what I gather from what is laid down in *Beni Ram v. Kundan Lal* (23), in *Ismail Khan Mahomed v. Jaigun Bili* (21), in *Ismail Kami Rowthan v. Nazarali Sahib* (22), in *Dattatraya Rayajipai v. Shridhar Narain Pai* (24) and *Municipal Corporation of Bombay v. Secretary of State* (28).

The contrary view which is supported by *Mahalatchmi Ammal v. Palani Chetty* (26) and a dictum of the learned Judges in *Nando Kumar Naskar v. Bonomali Gayan* (27) seems to be against the weight of authority. The tenant should know under what terms he has been let into possession, and the law lays no duty upon the landlord to remind his tenant of his title under which he holds the land. So far as the present case is concerned the cases of *Beni Ram v. Kundan Lal* (23) and *Ramsden v. Dyson* (25) clearly lay down the principle from which it follows that if a tenant knowing the extent of his interest in the land in his possession, as is the case here, chooses to expend money upon a title which he must know would soon come to an end that is his own folly and he cannot ask the owner of the land to recoup him for such expenditure. It has been suggested that unless the lessor is estopped from suing for possession the tenant would not be entitled to claim compensation. I am not prepared without the question being argued at the Bar to give my adherence to it. Such a proposition was not advanced during argument and it seems to me that there may be cases where the landlord would not be estopped from recovering possession but only estopped from recovering possession without paying for the improvements effected by the tenant. I may

mention that there is a class of cases in which the Court has refused to grant mandatory injunction for the removal of permanent buildings erected on his holding by a ryot having a right of occupancy, if the landlord has been guilty of laches or delay in bringing his action. But these cases stand on a different principle. As regards S. 108 T. P. Act, that only deals with the right of the tenant to remove the fixtures he has planted in the land and S. 51 of the same Act apparently applies only to the case of a transferee of an absolute right in land. Nor are we concerned in this case with the right under the Hindu or Mahomedan law of a tenant or a trespasser to remove buildings or the structures erected by such a person.

S.N./R.K. *Order accordingly.*

A. I. R. 1914 Madras 572

BENSON AND SADASIVA AIYAR, JJ.

Netumprakkot Kumath Veetil Sankunni Menon—Appellant.

v.

Nelumprokkotti Kumath Veetil Govinda Menon—Respondent.

Second Appeal No. 1402 of 1910, Decided on 6th March 1912, from decree of Dist. Judge, South Malabar, in Appeal Suit No. 14 of 1910.

(a) Limitation Act (9 of 1908), Art. 62 — Money received by junior member — Suit by karnavan—Art. 62 applies.

Article 62 applies to a suit by the karnavan of a Malabar tarwad against a junior member thereof for money due to the tarwad and received by the latter as money had and received for the use of the owner, i. e., the tarwad: 32 Cal. 527; 30 Mad. 298 and 9 B. L. R. 348, Ref. [P 573 C 1, 2]

(b) Limitation Act (9 of 1908), Art. 49 — Art. 49 applies to things in specie.

Suit for money had and received is not one "for specific moveable property" within the meaning of Art. 49, as that article applies to the recovery of things in specie. [P 572 C 2]

(c) Limitation Act (9 of 1908), Art. 120 — Art. 120 is applicable as last resort.

Article 120 should only be applied as a last resort when no other article is applicable: 26 Cal. 504, Ref. [P 573 C 1]

C. V. Ananthakrishna Iyer — for Appellant.

J. L. Rosario—for Respondent.

Judgment.—The plaintiff is the appellant before us in the second appeal. As karnavan of the Malabar tarwad, he brought this suit for the recovery of tarwad-money (Rs. 3,000) which the defendant (a junior member of the tarwad)

has been withholding from him (the plaintiff), the defendant having denied the plaintiff's title to recover the amount as tarwad-money from 6th November 1906 to the plaintiff's knowledge. The cause of action is stated in para. 7 of the plaint to have accrued on 6th November 1906. The suit was brought on 30th September 1909.

The facts have been found in the plaintiff's favour by the lower Courts, and the only question we have to decide is whether, on those facts, the suit is barred or not, the lower Courts having dismissed the suit as barred.

The lower Courts have held that either Art. 61 or Art. 81, Sch. 2, Lim. Act, applies. Art. 61 applies to a "suit for money payable to the plaintiff for money paid for the defendant." The plaintiff, in this case, did not pay any money for the defendant (to any creditor of the defendant or otherwise) but claims money belonging to the plaintiff which the defendant had all along admitted to be tarwad-money till November 1906. Neither does Art. 81 apply as the plaintiff was not surety and the defendant was not a principal debtor in respect of the tarwad-money in the hands of the defendant. The lower Courts seem to us to have been misled by the nature of the previous transaction which resulted in the defendant (a junior member of the plaintiff's tarwad) becoming possessed of the tarwad-money in 1904.

If neither Art. 61 nor Art. 81 applies, what is the proper article to be applied to the facts? The plaintiff's (appellant's) vakil contended before us that Arts. 49, 60, 145, or the general Art. 120, applied. Art. 49 relates to suits for specific moveable property or for compensation for wrongfully taking or detaining the same. We do not think that a suit for money or for compensation for wrongfully detaining money can be brought under this article, as money is not specific moveable property. Money has been held to come within the phrase "moveable property" in Art. 89 (by a principal against his agent for moveable property received by the latter and accounted for); but it cannot be held to come within the meaning of the phrase "specific moveable property" specific property which is recoverable in specie, i. e. the very property itself, not its substitute. In a suit for money, specific coins or notes are not

claimed; only coins or notes of certain value. O. 21, R. 31, Civil P. C., uses the expression "specific moveable." R. 30 which precedes R. 31, relates to the execution of decrees for payment of money and R. 31 to decrees for specific moveables, thus showing that the words "specific moveable" cannot include money.

Article 60 is also inapplicable, as the plaintiff did not make any deposit of money with the defendant but the defendant got the tarwad-money into his hands from the persons with whom it had been deposited. Art. 145 is likewise inapplicable as the defendant was not a depositary or pawnee. The last article relied on by the appellant is the residuary Art. 120, but it should be applied only as a last resort—see *Sharoof Dass Mandal v. Jagessur Roy Chowdhry* (1),—if no other article is applicable, and we have therefore to see if no other article applies. We are of opinion that the correct view is that the defendant received the money for the use of the plaintiff as representing the tarwad. In that view Art. 62 is applicable. The application of this article is fully discussed in *Mahomed Wahib v. Mahomed Ameer* (2). As observed in Blackstone's Commentaries, Vol. 3, p. 162, an action lies when one has had and received money belonging to another without any valuable consideration given on the receiver's part, for the law construes this to be money had and received for the use of the owner only, and implies that the person so receiving promised and undertook to account for it to the true proprietor, and if he unjustly detains it, an action on the case lies against him for the breach of such implied promise and undertaking and he will be made to repair the owner in damages equivalent to what he has detained in violation of such his promise. This is a very extensive and beneficial remedy applicable to almost every case where the defendant has received money which *ex aquo et bono* he ought to refund. In the present case, as in the case of *Mahomed Wahib v. Mahomed Ameer* (2) the money was received by a cosharer of the plaintiff and it may be said that these words very aptly describe the present case. The defendant has received moneys belonging to the

plaintiff which *ex aquo et bono* he ought to refund. The plaintiff's cause of action therefore is for money had and received to the plaintiff's use, and the money is nonetheless received to the use of the plaintiff because the defendant unjustly detained it for his own benefit. *Subbanna Batta v. Kunhanna Batta* (3) was applied where money was received by a benamidar for the plaintiff. See also the decision of the Privy Council in *Syad Lootf Ali Khan v. Afzaloonissa Begum* (4).

The period of limitation under Art. 62 is three years from the date of receipt of the money, 1904, and the suit is therefore barred. We therefore dismiss the second appeal with costs.

S.N./R.K.

Appeal dismissed.

(3) [1907] 30 Mad. 298=17 M. L. J. 224=2 M. L. T. 332.

(4) [1872] 9 B. L. R. 248=16 W. R. 20 (P.C.).

A. I. R. 1914 Madras 573

WHITE, C. J., AND AYLING, J.

Muthaya Manigaran—Petitioner.

v.

Lakku Reddiar—Respondent.

Civil Revn. Petn. No. 894 of 1910, Decided on 28th February 1912, from decree of Sub-Judge, Tuticorin, in Small Cause Suit No. 713 of 1910, D/- 26th October 1910.

(a) Contract Act (9 of 1872), Ss. 55 and 63—Time essence of contract—Promisor's failure—Promisee's intimation of rescission after long time—Damages held to be difference of rates at date of breach and not of intimation to rescind.

Where in a contract for sale of goods, time being the essence of the contract, the promisor fails to deliver the goods on the prescribed date and, long thereafter, the promisee intimates by a letter to the promisor his intention to rescind the contract and claim damages for the breach, the promisee is entitled only to the difference between the contract price of the goods and their market value on the day of the breach and not to the difference between the contract price and the market value on the day when he gives notice of the breach.

[P 574 C 1; P 576 C 1]

(b) Contract Act (9 of 1872), S. 63—Time can be extended by consent of both.

Section 63 does not enable a promisee, by himself, to extend the time for performance of the contract so as to secure an advantage to himself without the consent of the promisor.

[P 574 C 2]

(c) Contract Act (9 of 1872), Ss. 55 and 73—S. 73 provides for damages for breach—Aggravated damages by promisee's act after breach cannot be claimed.

Section 55 read with S. 2, means this: On the promisor's failure to perform within the

(1) [1899] 26 Cal. 564.

(2) [1905] 32 Cal. 527=1 O. L. J. 167.

contract time, he (the promisor) loses the power to enforce the contract, that is, to claim any advantage due to himself thereunder. The promisee, on the other hand, has the option of enforcing it or not as may suit him. He may drop it altogether, and in some cases, it would be to his advantage to do so. If he elects to enforce it, he can only do so by suing under S. 73 for damages for breach, the contract itself being for performance within a date which is past, is impossible of execution in terms and the only damages he can claim are those mentioned in S. 73 and do not include any aggravation of damages caused by the promisee's action or inaction subsequent to the breach. The promisee cannot repudiate the contract at any time he pleases: *Oyle v. Earl Vane*, (1842) L. R. 2 Q. B. 275; *Ashmore & Co. v. Cox & Co.*, (1899) 1 Q. B. 435; *Nickoll and Knight v. Ashton, Eldridge & Co.*, (1900) 2 Q. B. 298, *Expl. and Dist.* [P 576 C 2]

T. R. Venkatarama Sastri—for Petitioner.

T. V. Seshagiri Aiyar—for Respondent.

White, C. J.—The question raised on this petition is as to the date with reference to which damages should be assessed in an action for breach of contract. The facts are these: on 12th May 1909 the plaintiffs and the defendant entered into a contract for the delivery by the defendant of six candies of cotton at an agreed rate within 60 days of the date of the contract. The defendant failed to deliver within the 60 days, which expired on or about 12th July. On 4th September, the plaintiffs wrote a letter to the defendant in which they referred to the agreement and intimated that if defendant failed to deliver the cotton within one week after the date of this letter, he would be liable for the loss that might befall the plaintiffs according to the market rate at the date of the letter. The defendant took no notice of this letter. On 3rd October, the plaintiffs wrote to the defendant another letter in which they referred to their previous communication and gave notice to the defendant that as he had failed to deliver the cotton after the notice given, he was liable, on the footing of the market rate at the date of this second letter and they demanded payment on that footing. They then sued the defendant. The Subordinate Judge, by way of damages, gave the plaintiffs the difference between the market rate prevailing in October, that is, at the time the second notice was given and the contract rate.

I am unable to agree with the Sub-

ordinate Judge that the plaintiffs are entitled to damages on this footing. The Judge refers to S. 63, Contract Act, which empowers a promisee to extend the time for the performance of the promise. Of course it would have been open to the parties to extend the time by agreement, but there is no evidence of any consent by the defendant to any extension of the time and this is not a case in which it can be said that silence has given consent. In my opinion, it is clear that S. 63 does not entitle a promisee, for his own purposes and without the consent of the promisor, to extend the time for performance which had been agreed to by the parties to the contract. The view of the learned Subordinate Judge was that at the time the suit was instituted, the contract of 12th May was a subsisting contract. In support of this view, Mr. Seshagiri Iyer relied strongly on the terms of S. 55, Contract Act. He contended that under that section the contract was voidable at the option of the promisee, that is, the plaintiffs, and as they had not avoided the contract, they were entitled to treat it as a subsisting contract at the date of the institution of the suit.

Now, in my opinion, S. 55 entitles a party to a contract, where time (as in this case) is of the essence of the contract, to say if he is sued upon the contract: "Time is of the essence of this contract; you have failed to comply with the stipulation as to time; I repudiate the contract". It does not enable the promisee to say: "I elect to keep alive this broken contract in the hope that I may hereafter recover heavier damages for the breach of the contract than I should be entitled to recover at the time of the breach of the contract." Mr. Seshagiri Iyer contended that the only way by which a promisor, who had broken his stipulation as to time, could protect himself, if the promisee did not avoid the contract, would be, to give notice that the contract was at an end. It seems altogether unreasonable to place any such obligation on a promisee when ex concessio the contract has been broken with reference to a matter which goes to the root of the contract. The object of S. 55 is to protect the promisee and is analogous to S. 39 as shown by the illustration to S. 39. This illustration is the statement

of a case in which the promisee would be at liberty to put an end to the contract; so, under S. 55, where a stipulation entered into by the promisor, as to time which is of the essence of the contract, is broken, the promisee is entitled to repudiate or put an end to or avoid the contract. No doubt S. 55 deals with the effect of a breach of a stipulation which is of the essence of the contract and does not deal with the question of damages, but the plaintiffs would only be entitled to damages, on the footing of the market rate in October on the assumption that the contract was a subsisting contract in October. The contract in this case was broken in July and, in my opinion, came to an end in July and there is no evidence of any agreement to extend by the parties.

The cases to which Mr. Seshagiri Iyer refers are clearly distinguishable. The case of *Ogle v. Earle Vane* (1) turned on the question where there was a new contract to which the Statute of Frauds applied. The Court held there was no new contract but an extension of time by agreement. Lush, J., said p. 284: "I see no reason why after a breach of contract by non-delivery at the proper time, the buyer should not wait at the express or implied request of the seller with an understanding between the parties that if the buyer should wait, he would still be entitled if the seller turned out ultimately unable to deliver to do that which he was entitled to do in the first instance, namely go into the market and buy at the then price." Here the right of the buyer to go into the market and buy at the "then price" is based on the express or implied consent of the seller.

In the case of *Ashmole & Co. v. Cox & Co.*, (2) there was an agreement by the defendant to sell hemp to the plaintiff, the shipment to be made between certain dates. The agreement contained a provision that if the goods did not arrive from loss of the vessel or other unavoidable cause, the contract was to be avoided. It became impossible (in a business sense) for the defendants to ship the hemp between the specified date. They shipped hemp on a later

date, in September and on 27th October declared against the contract. The plaintiffs refused to accept this declaration and returned it to the defendants who in November wrote that it was the only declaration they were in a position to make. The plaintiffs brought an action and it was held that they were entitled to damages with reference to the market price in November, when the defendants notified their liability to make a declaration in accordance with the contract. In this case the defendants, by making the shipment in September and by declaring that shipment against the contract, intimated that they treated the contract as a subsisting contract and having done that, they could not be heard to say they were not liable for damages on the basis of the market price when they finally notified their inability to make a declaration in accordance with the contract.

In the case of *Nickoll and Knight v. Ashton, Edridge & Co.*, (3), where the defendants had failed to perform their contract within the time agreed upon, the Court held that they were protected by the terms of the contract and were not liable. Mathew, J., however dealt with the question of the measure of damages as if the plaintiff had been entitled to recover. In that case the event which rendered the contract impossible of performance occurred in December 1899, and in that month notice of the fact was given to the plaintiff. The contract was for the delivery of goods during January 1900; with reference to the question of damages, Mathew, J., observed: "It appeared that towards the end of December, the plaintiffs might have obtained another cargo at the then market-price which was much lower than the price at the end of January. But it was insisted for the plaintiffs that they were entitled to wait and watch the rising market until the end of January and then claim their damages on the footing of the then market-price. In my opinion that contention was wholly untenable. Having regard to the decision in *Roth & Co. v. Tayson* (4), I think the plaintiffs were bound to endeavour to

(1) [1842] 2 Q. B. 275=7 B. and S. 855=36 L. J. Q. B. 175.

(2) [1899] 1 Q. B. 436=63 L. J. Q. B. 72=15 T. L. R. 55=4 Com. Cas. 48.

(3) [1900] 2 Q. B. 298=69 L. J. Q. B. 640=82 L. T. 761=16 T. L. R. 370=5 Com. Cas. 252=9 Asp. M.C. 94.

(4) 1 Com. Cas. 303=73 L. T. 628=8 Asp. M. C. 120.

mitigate the loss by acting as ordinary men of business would have acted, that is to say, by determining the liability at the earliest date at which they were able to obtain another cargo." In the case before us I think damages should be assessed with reference to the market-rate at the expiry of the 60 days agreed upon as the time for delivery in the contract. We must set aside the decree of the Subordinate Court. The case must go back to the Subordinate Judge to be dealt with on this footing. The plaintiff must pay the costs in this Court, the other costs to be dealt with by the Judge.

Ayling, J.—The facts of the case out of which this revision petition arises are simple. Defendants contracted on 12th May 1909 to deliver to plaintiff 6 candies of cotton at Rs. 147 a candy within 60 days. He failed to deliver. Neither party took any action on the expiry of the term allowed (12th July 1909). On 4th September 1909, plaintiffs wrote a letter Ex. B demanding delivery of the cotton within a week. To this defendant made no reply. On 3rd October 1909, plaintiff wrote Ex. C rescinding the contract and claiming Rs. 228 as damages, being the difference between the contract price and the market-price on that date.

He subsequently brought this suit for the recovery of this amount and the Subordinate Judge has given him a decree as sued for.

Defendant (petitioner) contends that plaintiffs are only entitled to damages on the basis of the difference between the contract price and the price on 12th July 1909, when the contract was broken by his failure to deliver. This is the only point argued.

The view of the learned Subordinate Judge, that the power to extend the time of delivery which plaintiff claims is conferred by S. 63, Contract Act, seems to be untenable and is not seriously put forward before us. S. 63 deals only with concessions on the part of the promisee advantageous to the promisor. As stated in *Cunningham and Shephard* on the Contract Act: "It is clear however that as the act of the promisee must be in the nature of a concession advantageous to the promisor rather than to the promisee, so the consequence of the act must be the relieving of the promisor wholly or in part from his liability on the contract. The section cannot be invoked to

support an extension of time by the promisee for his own benefit."

The only possible basis for plaintiff's claim is in fact S. 55, which makes the contract on failure of performance within the fixed time, "voidable at the option of the promisee." It is contended by Mr. Seshagiri Iyer that this section confers on the promisor the discretionary right, although the promisee may have broken the contract by non-fulfilment within the time allowed, of tacitly treating the contract as subsisting for as long as he likes until it suits him to formally rescind it; that damages should be assessed with reference to price at date of rescission, and that the promisee may defer rescission to such a date as will enable him to secure the largest amount in the shape of damages.

As some sort of safeguard against this being pushed to obviously unreasonable lengths, he admits that the promisor may put an end to the contract on the expiry of the fixed term or afterwards by specifically stating his unwillingness to perform. S. 55 contains no suggestion of such a proviso and one is *prima facie* inclined to hold that a reading of that section which requires such an unauthorized modification to make it reasonable and workable is not the correct one. It appears to me that S. 55, read with S. 2 (i), means nothing more than this. On the promisor's failure to perform within the contract time, he (the promisor) loses the powers to enforce the contract that is to claim any advantage due to himself thereunder. The promisee, on the other hand, has the option of enforcing it or not as may suit him. He may drop it altogether and in some cases it would be to his interest to do so. If he elects to "enforce" it, he can only do so, by suing under S. 73 for damages for breach; for the contract itself, being for performance within a date, which is past, is impossible of execution in terms. The damages for which he can obtain compensation under S. 73 are those "which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it, which cannot include any aggravation of damages caused by the promisee's action or inaction subsequent to the breach.

This appears to be the natural and equitable meaning of the Act, and applying it to the present case I think the damages should be reduced to the difference between the contract price and the price on 12th July 1909. I concur in the order proposed by the learned Chief Justice.

S.N./R.K.

*Appeal allowed.***A. I. R. 1914 Madras 577**SUNDARA AIYAR AND SADASIYA
AIYAR, JJ.*Pichikala Mangamma*—Appellant.

v.

Pami Ramamma and others—Respondents.

Second Appeal No. 842 of 1911, Decided on 13th August 1912, from decree of Sub-Judge, Cocanada, in Appeal Suit No. 58 of 1910.

Specific Relief Act (1 of 1877), S. 4—Unregistered agreement of sale agreeing to execute proper sale deed but reciting transfer of possession as owner, is admissible in suit for specific performance though creating present right—Registration Act (1908), S. 49.

An unregistered document purporting to be an agreement for sale of immovable property over Rs. 100 in value, contained the following provision. "I shall execute a sale deed on proper stamp paper." After setting out the receipt of consideration, it stated: "I have sold to you and put you now alone in possession of the jeroyiti land" and further on: "I have executed this agreement in your favour, having agreed to your enjoying the same freely hereditarily from son to grandson with power to alienate the same by sale or gift."

Held: that in a suit for specific performance, the document was admissible in evidence as what the parties purported to enter into was an agreement to sell and the document was not the record of any conveyance in praesenti.

Even if a present right was created, the document was still admissible in evidence in a suit for specific performance: 14 *Mad.* 55 and 6 *I.C.* 346, *Rel. on.* [P 577 C 2]

G. Narayana Murthi—for Appellant.*P. Nagabhushnam*—for Respondents.

Judgment.—The decision of the point argued in second appeal is not free from difficulty. The point is whether Ex. A in this case is inadmissible in evidence on the ground that it was not registered. The suit is for specific performance. The document purports to be an agreement for sale and it says: "I shall execute a sale deed on proper stamp paper." The difficulty arises from other clauses in the instrument which, it is contended, show that Ex. A itself was intended to pass the property. After setting out the receipt of the consideration for the sale, viz. the

discharge of part of the debt due to the intended vendee on a mortgage, it says: "I have sold to you and put you now alone in the possession of the jeroyiti land." Before the clause agreeing to execute the conveyance, we have this clause: "Therefore I have executed this agreement in your favour, having agreed to your enjoying the same freely hereditarily from son to grandson with power to alienate the same by sale or gift." This clause is immediately followed by the covenant to execute a sale deed. Having given our best consideration to the construction of this document, we have come to the conclusion that the latter clause was put in only to indicate the terms of the conveyance to be thereafter executed. The vendor agreed to execute a conveyance, having already agreed under Ex. A that, by that conveyance, the vendee should enjoy the property hereditarily. Cl. 1: "I have sold to you," in our opinion, really means, "I have entered into a binding agreement to sell to you." Possession was given at once, but possession was to be held under the conveyance to be executed subsequently.

As already stated, what the parties purported to enter into was an agreement to sell. In our opinion, this document was not intended to be the record of any conveyance in praesenti by the vendor to the vendee, but merely embodies the terms of the conveyance to be executed subsequently.

In this view, it is unnecessary to consider the cases that have been cited. The test is whether, according to the intention of the parties as expressed in the instrument, there is a present conveyance of the property, or only an agreement to create a future right. There is authority for the proposition that, even if a present right is created, the instrument would be admissible as evidence in a suit for specific performance: see *Nagappa v. Devu* (1) and *Upendra Nath Banerjee v. Umesh Chandra Banerjee* (2).

We hold therefore that this document should not have been rejected by the lower appellate Court. We reverse the decree of the Subordinate Judge and remand the appeal for fresh disposal according to law.

S.N./R.K.

Appeal allowed.(1) [1891] 14 *Mad.* 55.(2) [1910] 6 *I. C.* 364.

A. I. R. 1914 Madras 578 (1)

SUNDARA AIYAR AND SADASIYA
AIYAR, JJ.

Secretary of State—Defendant—Appellant.

v.

Aylavajjula Ramabrahmam—Plaintiff—Respondent.

Second Appeal No. 99 of 1911, Decided on 6th August 1912, from decree of Sub-Judge, Kistna, in Appeal Suit No. 470 of 1909.

Provincial Small Cause Courts Act (9 of 1867), Sch. 2, Art. 3—“Act” refers to some distinct act—Mere breach of contract by Government is not such act.

Article 3, Sch. 2 applies to a suit relating to some distinct act done by an officer of Government. A mere failure on the part of Government to carry out a contract cannot be regarded as such an act.

A suit to recover from Government a sum less than Rs. 500 under a contract for the repair of a tank, is of a Small Cause nature, and an order or decree made therein is not open to second appeal: 7 I. C. 993, *Expl.*; (Case law referred.) [P 578 C 2]

L. A. Govindaraghava Iyer—for Appellant.

P. Narayanamurti—for Respondent.

Judgment.—The suit in this case was for recovering the amount due to the plaintiff under a contract entered into by him with the Government, whereby he undertook to repair a tank and to build a pipe sluice. The plaintiff's case was that the plaintiff had performed his part of the contract and was entitled to the amount due to him under it. The defendant pleaded that the plaintiff had not carried out the work undertaken by him. The District Munsif dismissed the suit, but, on appeal, the plaintiff got a decree in the Subordinate Judge's Court. Defendant appeals to this Court.

A preliminary objection is taken that no second appeal lies in this case, as the amount sought to be recovered is less than Rs. 500 and the suit is of a small cause nature. It is contended for the defendant that a suit of this kind is exempted from the cognizance of the Small Cause Court by Art. 3, Sch. 2, Provincial Small Cause Courts Act. That article is in these terms: “A suit concerning an act or order purporting to be done or made by any other officer of the Government in his official capacity or by a Court of Wards, or by an officer of a Court of Wards in the execution of his office.” The question is whether this can be regarded as a suit concerning an act purporting to

be done by an officer of Government in his official capacity. We are of opinion that it cannot. The article applies to a suit relating to some distinct act done by an officer of Government. We do not think that a mere failure to carry out a contract can be regarded as such an act. In *Rajmal Manikchand v. Hanmant An-yaba* (1) it was held that the expression “an act purporting to be done” in S. 80, Civil P. C., was not applicable to the failure to perform a contract. *Chhagan-lal Kishoredas v. Collector of Kaira* (2) merely held that S. 80 was not confined in its operation to torts but was applicable wherever there was a distinct act done by an officer of Government. In that case there was a declaration made by an officer in virtue of a power vested in him under the statute and that was held to amount to an act. In *Bunwari Lal Mookerjee v. Secretary of State* (3), the Calcutta High Court held that a suit for compensation for damages for injury done to an article of the plaintiff carried by a State Railway did not come within the purview of Art. 3 and was cognizable by a Small Cause Court. In *Mothi Rangaya Chetty v. Secretary of State* (4) this Court held that a suit for damages sustained by the plaintiff in consequence of the Postal Department delivering an article without collecting the value of it due from the addressee (the article being sent by V. P. P.) was not a suit which could be held to relate to an act done by the postal officer concerned in his official capacity. We must uphold the preliminary objection and dismiss the second appeal with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1896] 20 Bom. 697.

(2) [1910] 7 I.C. 993=35 Bom. 42.

(3) [1890] 17 Cal. 290.

(4) [1905] 28 Mad. 213=15 M.L.J. 226.

A. I. R. 1914 Madras 578 (2)

SUNDARA AIYAR AND SADASIYA
AIYAR, JJ.

Usuman Khan—Appellant.

v.

Nagalla Dasanna and others—Respondents.

Second Appeal No. 382 of 1911, Decided on 2nd September 1912, from decree of Dist. Judge, Cuddapah, in Appeal Suit No. 29 of 1910.

Adverse Possession—Agreement to transfer possession to mortgagee as owner on failure to redeem in fixed period—Mortgagee's possession becomes adverse—There is nothing to

prevent parties from agreeing what the character of possession to be held by mortgagee should be from certain date.

An agreement between mortgagor and mortgagee that, from a certain date or on the expiry of term fixed, for payment, the mortgagee could take possession of the mortgaged property and enjoy it as full owner, is valid and binding on the mortgagor.

The mortgagee, who takes possession by virtue of such agreement and who remains in possession for over 12 years acquires a title to the property by prescription.

The parties can agree that the character of possession to be held by the mortgagee should be from a certain date.

A executed a mortgage in favour of B in 1876. The deed provided that if the debt remained unpaid on the expiry of eight years, B would take possession of the mortgaged property as owner.

In 1885, A had the possession delivered to B by transfer of patta. He also executed a deed by which he relinquished all the rights in the land. In 1908 A's heir sued for redemption of the property:

Held: that A became full owner of the property on the expiration of 12 years from the date when possession as owner was given to B by A. [P 579 C 2, P 580 C 2]

T. V. Seshagiri Aiyar and S. Gopalaswamy Aiyengar—for Appellant.

V. Ramesam and J. Janakiramaya—for Respondents.

Judgment—This is a suit for redemption. Defendant 3's father obtained a mortgage from defendant 1's husband in the year 1876. According to the terms of that mortgage, the amount of the debt was to be paid at the expiration of eight years. Then it goes on to say: "In case of the interest on the said principal accruing every year or the principal not being paid, you shall, immediately on the expiry of the stipulated period of eight years, take possession of the said land, etc., and shall happily enjoy the same in succession from son to grandson and as long as the sun and moon last." The mortgagee was not entitled to possession immediately according to the terms of the document, but he was to take possession of the property as owner after the time fixed for payment elapsed. On 2nd July 1885, defendant 1's husband sent a petition, Ex. 2, to the Tahsildar in order that patta for the land might be transferred to defendant 3's father. The petition stated: "I have put Nagalla Vobalakandu in possession for Rs. 1,475, being principal and interest due by me according to the document executed and registered on 26th August 1876 * * * Therefore please remove my name." If Ex. A is a redeemable mort-

gage, then apparently Ex. 2, taken by itself, it might be argued, would not affect the plaintiff's right to redeem but Ex. 1 throws further light on what led to the petition, Ex. 2. Ex. 1 is a receipt for a sum of Rs. 250 paid on the date of the document, 20th November 1885. It contains the recital:

"As, owing to my inability to pay to you the money due under the deed of mortgage, I have, on 2nd July 1885, relinquished the lands and for patta being issued to you." It then acknowledges, payment of a sum of Rs. 250 which is stated to be paid out of grace to the executant of the receipt. The language of the recital is, in our opinion, conclusive that at the time when Ex. 2 was put in, there was a relinquishment of all right to the property by defendant 1's husband. That relinquishment, we shall assume for the decision of the case, to be invalid to extinguish the right of redemption. But it shows that defendant 3's father was to hold possession from this date as owner with full rights to the property. Admittedly, defendant 3 has been in possession of the property ever since, i. e., for a period much longer than 12 years. The question is whether that possession has made him the absolute owner of the property by prescription. The argument for the appellant is that his possession must be taken to have been under the rights possessed by him under Ex. A as mortgagee, and it is strenuously argued by Mr Seshagiri Aiyar, the learned vakil for the appellants, that a mortgagee who is entitled to take possession under the mortgage, cannot be permitted to acquire any higher right by virtue of his possession. It is, no doubt, true that defendant 3 was entitled to take possession under Ex. A and we shall assume that possession so taken would be held by him as mortgagee. But assuming all this, what was there to prevent both the mortgagor and the mortgagee from agreeing that the mortgagee should from a certain date hold possession as owner? Such an agreement may not be valid to confer immediate title on the mortgagee, but, as far as we are aware, there is no principle of law which prevents both parties from agreeing what the character of the possession to be held by the mortgagee should be from a certain date. It is quite true that the mortgagee cannot,

by a mere assertion of his own or by any unilateral act of his, convert his possession as mortgagee into possession as absolute owner. That is a principle in favour of the mortgagor which prevents the mortgagee from altering the legal character of his possession by his own act or assertion. That has been laid down in several cases, one of the earliest of which is *Ali Muhammad v. Lalta Bakhsh* (1). But they have no bearing on the question of the effect of an agreement between both parties that the mortgagee should hold possession as owner and not as mortgagee.

The cases cited by Mr. Seshagiri Aiyar do not establish the position taken up by him. *Kurri Veerareddi v. Kurri Bapireddi* (2) merely laid down that where there is an ineffectual sale, the vendee cannot set up that he has acquired any title by estoppel. It did not deal with the result of possession in him for more than the statutory period. To allow the defendant to set up a title by estoppel in such a case would be virtually allowing him to escape the provision of the Transfer of Property Act, which requires a registered conveyance to effect a sale. In the Privy Council case of *Sri Rajah Papamma Rao v. Sri Vira Pratapa H. V. Ramachandra Razu* (3) their Lordships held that possession was given to the mortgagee in his character as mortgagee. In that view he was of course, liable to be redeemed. In *Dasharatha v. Nyahal Chand* (4), the Court held that possession was obtained and held by the defendant as mortgagee. The character of the possession must, of course, determine what right would be acquired by virtue of possession. In *Byari v. Puttana* (5), the ineffectual conveyance was executed by one of the members of an Alayasantana tarwad with the consent of two others. Such consent, of course, could not be binding on the tarwad. The person who executed the conveyance and those who consented to it had no severable interest in the tarwad property. The result therefore was that the former character of the possession which began previously to the conveyance was not altered by the con-

veyance or by the consent of some members only of the tarwad which could not operate as against the tarwad as a whole. We are of opinion that both parties were entitled to agree in what character defendant 3 should hold possession and that the plaintiff who purchased the equity of redemption from defendant 1 cannot now claim to redeem, on the footing that defendant 3's possession has throughout been as mortgagee.

We dismiss the second appeal with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 580

SUNDARA AIYAR AND SADASIWA
AIYAR, JJ.

T. P. Kanthimathinatha Pillay—Appellant.

v.

Muthusami Pillay and others—Respondents.

Second Appeals Nos. 1076 to 1080 of 1911, Decided on 13th August 1912, from decree of Dist. Judge, Tinnevely, in Appeal Suits Nos. 167, 202, 174, 176 and 169 of 1910.

Madras Estates Land Act (1 of 1908), Ss. 59 and 60—Rent suit under Act 1 of 1908 is maintainable though patta not proper under the old Act—No provision in new Act to make unmaintainable suit maintainable—Rent becomes due as per terms settled and not from end of fasli—Time runs when rent becomes due—Limitation Act (9 of 1908), Art. 110.

A suit for rent, instituted after the Act (1 of 1908) came into force, is maintainable though it would not have been if it were instituted before the passing of that Act, on the ground that the patta tendered by the landlord to the tenant was not a proper one under the prior Act 8 of 1865.

Act 1 of 1908 however does not contain any provision which would render a suit subsequently maintainable which was not maintainable at the institution: 14 I. C. 329; 14 Bom. 516 and 7 M. H. C. R. 312, *Expl.* and *Dist.*; (Case law referred).

Time runs for the claim for the rent of a fasli year from the time that the rent became due according to the terms of the tenancy and not from the end of the fasli: 27 Mad. 143, *Dist.* and 27 Mad. 241, *Ref.* [P 581 C 1, 2]

T. R. Venkatarama Sastri—for Appellant.

M. D. Devadoss—for Respondents.

Judgment—With respect to the rent for Fasli 1315 we agree with the lower Court that the claim is barred by limitation; time runs, not from the end of the Fasli, but from the time that the rent became due according to the terms of

(1) [1909] 1 All. 655.

(2) [1906] 29 Mad. 336=16 M.L.J. 295 (F.B.).

(3) [1896] 19 Mad. 249=23 I. A. 32 (P.C.).

(4) [1892] 16 Bom. 134.

(5) [1891] 14 Mad. 38.

the tenancy. Reliance was placed on the decision of the Privy Council in *Rangayya Appa Rao v. Bobba Sriramulu* (1) by the learned vakil for the appellant, but that case does not help him. In *Arunachallam Chettiar v. Kadir Rowthen* (2), which was decided after the Privy Council case, the rule laid down in *Chinnipakam Rajagopalachari v. Lakshmidoss* (3) was re-affirmed. The second appeal must, therefore be dismissed so far as the claim for Fasli 1315 is concerned.

With regard to Fasli 1316 and 1317, the lower appellate Court has found that patta was not properly tendered. This finding is binding on us in second appeal as we are unable to see any legal objection to it. But it is contended that, as the suit was instituted after the Estate Lands Act 1 of 1908 came into force, and as tender of patta is not a condition precedent to the maintainability of a suit for rent according to the provisions of that Act, the plaintiff's claim is sustainable notwithstanding the finding of the appellate Court. This contention, in our opinion, should be upheld. In a case, to which one of us was a party, *Veerabhadra Raju v. Kumari Naidu* (4), the point was expressly decided. That case was subsequently followed in another case. We do not consider it necessary, therefore to deal with the question at any length. We may add to the reasons given in that judgment, that it was laid down in *Rangayya Appa Rao v. Kadiyala Ratnam* (5) that tender of patta was not necessary to complete the landholder's right to rent but was only a condition to be fulfilled if a suit had to be instituted or legal proceedings taken for the enforcement of the landholder's right. In *Venkata Narasimha Naidu v. Sajja Sattayya* (6), the question was, whether a distraint made while Act 8 of 1865 was in force without tender of patta was lawful or not. The lawfulness of a distraint must be judged by the law in force when it is made. What was unlawful then, is not made lawful by any provision in the Estates Land Act. In

Archakan Seshachelam v. Kallur Venkata (7) the suit was for rent. When the case was tried by the Court of first instance, Act 8 of 1865 was in force; when the suit was instituted it was not maintainable. There is nothing in Act 1 of 1908 rendering a suit not maintainable at its institution maintainable subsequently. In *Javanmil Jitmal v. Muktabai* (8), all that was decided was that a document which, for want of execution before a village Munsif, could not be acted on by the Courts, could not be put in evidence in a suit instituted after the provision requiring execution before a village Munsif was removed. That decision has, in our opinion, no application to this case. If the document was incompetent to affect the rights of its parties at its inception, an express provision of law would be required to make it valid subsequently; and there was no such provision in the later enactment which was relied on in that case. There is nothing in *Gopalasaamy Mudally v. Mukkee Gopalier* (9) which supports the respondent's contention. The learned counsel for the respondent argues that retrospective effect should not be given to S. 53, Estate Lands Act. But the appellant's case does not require any such thing being done. When his suit was instituted, the law did not require that he should have previously tendered a patta to his tenant before suing him for rent. It is the appellant that wishes to enforce a condition while the law did not impose it at the time of the institution of this suit. Following the judgment in *Veerabhadra Raju v. Kumari Naidu* (4) we hold that the suit for the rent of Faslis 1316 and 1317 is maintainable.

The decree of the District Judge will, therefore, be modified and the plaintiff will have a decree for the amount claimed as rent for Faslis 1316 and 1317, with interest at 6 per cent. from the date of plaint up to date of payment. The parties will pay and receive proportionate costs in all the Courts.

Second Appeals Nos. 1077 to 1080 follow.

S.N./R.K.

Decrees modified.

(1) [1904] 27 Mad 143=31 I. A. 17=16 M.L.J. 486. (P. C.)

(2) [1906] 29 Mad. 556=16 M. L. J. 436=1 M. L. T. 315.

(3) [1904] 27 Mad. 241=14 M. L. J. 67.

(4) [1912] 15 I. C. 393.

(5) [1890] 18 Mad. 249.

(6) [1911] 9 I. C. 738=35 Mad. 189.

(7) [1912] 14 I. C. 329.

(8) [1890] 14 Bom. 516.

(9) [1871-74] 7 M. H. C. R. 312.

A. I. R. 1914 Madras 582SUNDARA AIYAR AND SADASIWA
AIYAR, JJ.*Vadivalam Pillay*—Defendant—Appellant.

v.

Natesam Pillay—Plaintiff—Respondent.

Second Appeal No. 1702 of 1910, Decided on 16th July 1912, from decree of Dist. Judge, Trichinopoly, in Appeal Suit No. 34 of 1909.

Hindu Law—Debts—Alienation by undivided member—Consideration partially binding on family—Suit by other member to recover share was decreed on condition of paying proportionate share of binding debts.

The plaintiff sued to recover one-half of the suit properties on the ground that the sale effected by the defendant, who was an undivided member of the plaintiff's family, was not valid and binding on him. It was found by the lower Court that the sale did not bind the plaintiff's half-share but a portion of the consideration for the sale was borrowed for purposes binding on the family.

Held: that the plaintiff would be entitled to recover the half share only on condition that he pays to the defendant his half-share of the debt which was held binding on the family: 30 *Mad.* 89, *not Foll.* [P 583 C 1, 2; P 584 C 1]

T. V. Seshagiri Iyer—for Appellant.

T. Natesa Iyer—for Respondent.

Judgment.—A question of Hindu law of some importance has been raised for decision in this second appeal. The necessary facts may be very briefly stated. One Manikam and Chinnappa were two Hindu brothers. They were living separate for a considerable time. The plaintiff is the son of Manikam. He sues to recover one-half of certain lands which were sold by Chinnappa in 1898. Evidently, the lands in question, as well as other property belonging to the brothers, were managed by Chinnappa. The plaintiff's case was that he and Chinnappa were undivided members and that the sale made by Chinnappa was not binding on him. He therefore claimed to recover one-half of the properties sold, treating the sale of the other half as valid, as Chinnappa was entitled to alienate his own share for consideration.

Several questions of fact were raised by the defendant which it is unnecessary to refer to for the purpose of this judgment. The lower Courts found that family was undivided. The appellate Court also overruled the contention of the defendant that the plaintiff's right to a share of the family properties was

extinguished by the statute of limitations; no good reason is shown for interfering in the second appeal with the finding on this latter question.

Mr. Seshagiri Iyer argued that the plaintiff was estopped by his conduct from disputing the alienation made by Chinnappa, but the finding of the Munsif on the question of estoppel was against him and no facts have been brought to our notice which would show that the plaintiff was estopped. The second appellate Court held that out of Rs. 500, the consideration of the sale deed, Ex. 8, executed by Chinnappa, Rs. 250 was borrowed by him for purposes binding on the family consisting of himself and his nephew, the plaintiff, but that the remaining Rs. 250 was not binding on the plaintiff. On these facts, he had to decide what decree the plaintiff was entitled to. He came to the conclusion that the plaintiff was entitled to a decree for the half-share claimed by him without making any payments to the defendant. In doing so, he considered himself supported by the authority of the decision in *Marappa Gaundan v. Rangaswami Gaundan* (1).

In second appeal, it is contended by the learned vakil for the appellant that the view taken by the Judge is wrong. Mr. Seshagiri Iyer asks us to proceed on the basis that the amount, Rs. 250, which is found to have been borrowed for family purposes, must be regarded as a charge on the plaintiff's share of the property. He argues that the family having benefited to the extent of Rs. 250 by the sale, the plaintiff cannot recover his share without paying the amount. In effect; he asks us to treat Chinnappa as having sold his own half-share for the portion of the consideration which has been held to be not binding on the family and the other half-share for the portion held to be binding. Mr. Natesa Iyer for the respondent asks us to do just the contrary, that is, to hold that Chinnappa must be taken to have sold his own half-share for the portion of the consideration held binding on the family and the remaining half-share for the portion held not to bind the family. We can find no legal principles on which we can adopt either of these courses. According to accepted equitable principle, in the absence of anything appearing to the contrary, the con-

(1) [1900] 23 *Mad.* 89.

sideration for sale must be distributed over the whole of the property sold in proportion to the value of each part. On this principle, the whole of Rs. 500 must be distributed over the shares belonging to the plaintiff and Chinnappa respectively. There is no ground for supposing that one portion of the consideration was allocated to a particular half-share and the other portion to the other half-share. The valid portion of the consideration as well as the invalid portion must be distributed over each of the half-shares of the plaintiff and Chinnappa respectively. The result would be that the plaintiff would be bound to pay one-half of the Rs. 250, held binding on the family that is Rs. 125, before he can recover possession of the half-share claimed by him.

Only one decided case, *Marappa Gaundan v. Rangaswami Gaundan* (1), bearing on the point, has been brought to our notice, namely the case relied on by the District Judge. That case was in its facts similar to the present one. A Hindu father sold certain property. The sale was held to be invalid, but a portion of the consideration was found to have been used for the benefit of the family, namely for the discharge of the mortgage of the family property. The sale was impeached by the alienor's son. Subramania Aiyar, J., held that the son was entitled to recover his half-share without repaying any portion of the consideration which was used for the benefit of the family. With great deference to the learned Judge, we find it difficult to accept the reasoning on which his judgment is based. He was much influenced by the practical inconvenience which, according to him, was likely to arise if the alienee was allowed in such a case to claim reimbursement of a portion of the consideration found to be binding on the family. The learned Judge observes: "Now a sale of joint property by a coparcener, though made without legal necessity, is in this presidency valid to the extent of the vendor's share. Suppose that that share is really worth the whole of the amount paid by the vendee as the price, why should he get anything more? Next, suppose that that share is really worth less than the price paid, the vendee cannot in such a case reasonably ask for a charge for more than the difference between the real

value of the share which he gets and the price he has actually paid. It is scarcely necessary to say that questions as to such valuation are often not capable of easy or satisfactory settlement." The whole of this reasoning proceeds on the assumption that when a coparcener sells his share as well as the share of the other members, the other coparceners are entitled to raise the question as to what is the real value of the share of the alienor.

It cannot be doubted that a coparcener is entitled to part with his own share in any family property for any consideration he pleases. It is equally clear that as between the vendor and the vendee, in the absence of any contract to the contrary, the consideration for a sale will be apportioned between all the items of the properties sold in case of dispute. There seems to be no reason for allowing the alienor's coparceners to ask the Court to adopt any other principle. It may be, as observed by the learned Judge, that questions as to valuation are often not capable of easy or satisfactory settlement, but assuming it to be so, the right of a coparcener to sell his own property being now well recognized, the equities as between the vendee and the other coparceners have to be adjusted by the Court in the best manner possible. Nor does such adjustment seem to present any insuperable difficulties. No question is raised in this case of any collusion between the vendee and Chinnappa, and it is difficult to find any reason for proceeding on any other view than the principle already enunciated of apportioning the consideration on the whole of the property sold. The learned Judge proceeds to say: "The simpler and better view undoubtedly is that if the vendee wishes to stand by a sale which is valid only partially, such as the present, he must be content with the vendor's share, but that if he wishes to repudiate the transaction altogether his remedy is only against the vendor in a suit for the return of the price paid on the ground that the consideration for the payment failed." It is hardly necessary to say that the remedy proposed might be altogether useless in many cases. On the whole the proper course in this case appears to be to direct that the decree of the lower appellate Court be modified by decreeing

to the plaintiff a half-share in the properties sold by Chinnappa after division by mates and bounds on condition that he pays to the defendants Rs. 125 with mesne profits from the day that he deposits the said amount of Rs. 125 into Court and give notice thereof to the defendants.

The memorandum of objections relates only to the form of decree, and as we have already dealt with it no further order is necessary. The defendants will pay two-thirds of the plaintiff's costs throughout.

S.N./R.K.

Order accordingly

*** A. I. R. 1914 Madras 584**

SUNDARA AIYAR AND SADASIVA

AIYAR, JJ.

Maruthamalai Gownden—Appellant.

v.

Palani Gownden—Respondent.

Second Appeal No. 845 of 1911, Decided on 9th August 1912. from decree of Sub-Judge, Coimbatore, in Appeal Suit No. 204 of 1910.

*** Decree—Setting aside—Minor—Statement by plaintiff that "There is no fit and proper person to act as guardian" for minor defendant is not fraudulent and is no ground to set aside decree—Civil P. C. (5 of 1908) O. 32 R. 4 (4).**

In a suit to set aside a decree on the ground of fraud, plaintiff alleged that in the suit, which gave rise to the decree sought to be set aside, the present defendant (then plaintiff) stated that there was no fit and proper person to be appointed guardian ad litem of the plaintiff and got the head clerk of the Court appointed guardian, who did not defend the suit, while plaintiff was living with his mother and maternal grandfather.

Held: (1) that such statement was no more than an opinion by the defendant that there was no one fit and proper to be appointed guardian and could not be made by itself a ground to avoid a decree on the ground of fraud.

(2) that the plaintiff could not, by a fresh suit, get the decree set aside unless either there was no appointment of a guardian ad litem at all or the appointment was induced by fraud or what the Court would regard as practically tantamount to fraud: 20 All. 675; 11 B. H. C. R. 182 and 28 All. 137. *Dist.*

[P 584 C 2, P 585 C 2]

T. Rangachariar and V. Narasimha Aiyangar—for Appellant.

C. K. Mahadeva Aiyar—for Respondent.

Judgment.—This is a suit by a minor to set aside the decree passed against

him in Original Suit No. 1165 of 1906 on the ground of fraud. That decree was passed both against the plaintiff and his father. The suit was for a debt due by the father in connexion with a certain partnership transaction. The plaintiff in that suit, that is the defendant here, asked that the father should be appointed as guardian ad litem. The father refused to act as guardian; then, on the defendant's application, the head clerk of the Court was appointed as guardian ad litem. The fraud charged in the plaint is that the defendant knew very well that the plaintiff was living with his mother under the protection of his maternal grandfather, and that the maternal grandfather was a person fit and willing to act as guardian for the minor.

In other words the charge is that the defendant was guilty of fraud by suppressing information which he had. The District Munsif dismissed the suit. On appeal the Subordinate Judge reversed his judgment and set aside his decree. The Subordinate Judge's judgment proceeds on the ground that there was a deliberately false statement in the affidavit put in by the defendant in support of his application to appoint the head clerk as guardian ad litem. The statement referred to is that there was no fit and proper person alive who could be appointed guardian ad litem for the minor appellant in Original Suit No. 1165. This affidavit had not been put in evidence before the District Munsif, but it was admitted by the Subordinate Judge. It is difficult to see how the statement that there was no fit and proper person, who should be appointed as guardian ad litem, could be regarded as deliberately false. It amounted to no more than a statement that, in the view of the defendant, there was no one who was fit and proper to be appointed. The Court acted on that affidavit and appointed the head clerk as guardian ad litem. It may be that the Court should have made further inquiry before acting on that affidavit and called upon the defendant to state what relations the minor had with a view to ascertain whether any of them would be fit and proper to be appointed as guardian ad litem. The appointment was the result of a judicial order based on evidence which the Court considered sufficient. If it was really insufficient that is no

justification for holding that the defendant was guilty of fraud. It is not alleged that there was any collusion between the head clerk and the defendant in pursuance of which the defendant applied for the appointment of that officer as guardian ad litem, nor is it alleged that the defendant induced the head clerk not to put in a defence. The proceedings in the suit were regular, so far as they went, though it may be that the Court might have taken more care in making the appointment of a guardian ad litem. The case of *Hanuman Prasad v. Muhammad Ishaq* (1) is not analogous to the present case. There the Court did not appoint anyone as guardian ad litem. It was the duty of the plaintiff in the suit to get such appointment made. A relation of the minor interfered and conducted the proceedings, but it was found by the Court that he acted with gross negligence. Two other cases were relied on for the respondent, viz. *Ramchandra Das v. Joti Prasad* (2) and *Babaji bin Kusaji v. Maruti* (3). In these cases the question arose in the course of the proceedings in which the guardian ad litem was appointed, and the point that the Court had to decide was whether the appointment should be upheld. The present is a very different case. The plaintiff cannot, by a fresh suit, get the decree set aside unless either there was no appointment of a guardian ad litem at all or the appointment was induced by fraud or what the Court would regard as practically tantamount to fraud. It is then urged that the head clerk, who was appointed as guardian ad litem, did not defend the suit, but the ground on which the plaintiff came to Court was not that there was gross negligence in the conduct of the suit by the guardian ad litem such as would justify the Court in setting aside the decree. Consequently no issue was framed on any such question, nor does the Subordinate Judge base his judgement on that ground. We reverse the decree of the Subordinate Judge and restore that of the District Munsif with costs here and in the lower appellate Court.

S.N./R.K.

*Appeal allowed.***A. I. R. 1914 Madras 585**

BENSON AND SUNDARA AIYAR, JJ.

Peri Lakshminarasimham Pantulu Garu—Appellant.

v.

Ramachandra Mardaraja Deo Garu—Respondent.

Second Appeal No. 1259 of 1910, Decided on 17th January 1913, from decree of Dist. Court Judge, Ganjam, D/- 29th March 1910, in Appeal Suit No. 86 of 1909.

Madras Estates Lands Act (1 of 1908), S. 77—No distraint against intermediate tenure-holder by zamindar nor can he recover from intermediate tenure-holder cess levied under Madras Local Boards Act (3 of 1890), S. 73.

Section 77 does not authorize a zamindar to levy distraint against an intermediate tenure-holder. [P 586 C 2]

Nor can the zamindar levy a cess which has been collected from him under S. 73, Madras Local Boards Act and which he is entitled to recover from an intermediate tenure-holder by means of distraint against the latter. [P 586 C 1]

V. Ramesam—for Appellant.*S. Swaminathan*—for Respondent.

Judgment.—In this case, the suit was instituted to set aside a distraint upon the plaintiff's land made by the defendant who is a zamindar. The plaintiff is an intermediate tenure-holder under the defendant. The distraint was levied in order to recover a portion of certain arrears of cess which had been collected from the defendant under S. 73, Madras Local Boards Act and which portion he was entitled to recover from the plaintiff.

The first question argued before us is that S. 77, Estates Lands Act, does not authorize the zamindar to levy distraint against an intermediate tenure-holder and we think the language of S. 77 is clear to support that contention. This, in fact, is not disputed by the learned vakil for the respondent. S. 77 says: "At any time after an arrear of rent has become due the land-holder may, in addition to any other remedy to which he is entitled by this Act, in respect of any arrear of rent which has accrued due within the next preceding 12 months, distrain upon his own responsibility the moveable property of the defaulting ryot". There can be no doubt that the plaintiff is not a ryot within the meaning of the Estates Lands Act. But it is argued that Ss. 73 and 74, Madras Local Boards Act, give

(1) [1906] 28 All. 137=2 A. L. J. 615=(1905) A. W. N. 229.

(2) [1907] 29 All. 675=(1907) A. W. N. 225.

(3) [1874] 11 B. H. O. R. 182.

power to a zamindar to recover arrears of cess as arrears of rent, and that, since the zamindar has got power to recover arrears of rent from the ryot by distraint, he has similar power as against an intermediate tenure-holder from whom he is entitled to recover arrears of cess paid by him.

The argument is *prima facie* untenable. S. 73 says " Provided that in all cases where a person holds lands with or without a right of occupancy as an intermediate land-holder on an under tenure created, contained or recognized by a land-holder, it shall be lawful for the land-holder to recover from the intermediate land-holder the whole of the tax paid by the land-holder in respect of lands-held by the intermediate land-holder less one-half the tax assessable on the amount of any kattubadi, jodi, poruppo or quit-rent payable by the intermediate land-holder to the land-holder"; and S. 74 says that " every land-holder (or intermediate land-holder as the case may be) shall, in collecting or recovering the portion which may be due to him," under the proviso referred to, " be entitled to exercise the same power as may, under any Act or regulation which nowhere is, or hereafter may be, in force, be exercised by any landholder in the collection and recovery of rent " The learned pleader for the respondent wants us to say that every landholder is entitled to exercise in collecting a cess the same powers as those which any land-holder may possess as regards rent. But such power of a land-holder must be considered with reference to the person against whom the power is to be exercised. There is no Act or Regulation which authorizes the landlord to levy distraint upon the property of a tenure-holder for recovery of rent. S. 77, Estates Lands Act, as we have pointed out, only authorizes a landlord to levy distraint upon the moveable property of the ryot. Thus even if we read the word " any " as meaning any one of the class of land-holders vested with the largest possible powers for recovery of rent, it is not shown that any land-holder has got power to levy distraint upon the property of a person other than a ryot. But we may observe that the words " any land-holder " in S. 74, Local Boards Act, possibly mean such land-holder. We are of opinion

that S. 77, Estates Lands Act, does not apply. The result will be that the distraint will be declared to be illegal and will be set aside. We must therefore ask the District Judge to inquire and find what damages, if any, were sustained by the plaintiff by reason of the distraint complained of. Further evidence may be taken on the point. The finding will be submitted within three months from the date of the receipt of this order and ten days will be allowed for filing objections.

(In compliance with the order contained in the above judgment, the District Judge of Ganjam submitted the following:)

Finding. - I have been required by the High Court to submit my finding on the following issue :

" What damages, if any, were sustained by the plaintiff by reason of the distraint complained of ? "

When the matter was taken up for inquiry, the vakils on both sides informed me that they had no fresh evidence to adduce. The distraint complained of was admitted. Plaintiff's vakil stated that his client, who is a rich and influential person, was put to considerable indignity and suffered much pain of mind and that he is entitled to substantial damages. He admitted that his client did not suffer any actual pecuniary loss by reason of the distraint. The vakil for the respondent stated that his client acted *bona fide*, that the provisions of law as to distraint were not clear and that plaintiff is not entitled to damages, unless he proves actual pecuniary loss and, in any event, is only entitled to nominal damages. I am of opinion that the plaintiff is entitled to damages even though he has not proved actual pecuniary loss. The plaintiff is a well-to-do man and there can be little doubt that a distraint of moveable properties is looked upon as a disgrace. In the present case the distraining officers entered his house and took away a silver rose-water sprinkler and some other articles. The distraint has been held by the High Court to be illegal and consequently, plaintiff is entitled to some damages. The defendant, when he took it upon himself to distrain property, did so at his own risk and his ignorance of law is no excuse however difficult or complicated the law on the subject might

be. The fact that he acted without any malice and in the bona fide belief that he was entitled to distrain, can only go in mitigation of damages.

As there is no evidence of any actual pecuniary loss to plaintiff and as it has not been shown that the defendant acted with malice or any ulterior motive I am of opinion that Rs. 50 would be a reasonable sum to award to the plaintiff.

(This second appeal coming on for final hearing this day after the return of the finding of the lower appellate Court upon the said issue, the Court delivered the following:)

Judgment.—We accept the finding and reversing the decrees of the Courts below award the plaintiff Rs. 50 damages with interest at 6 per cent from this date to the date of payment. The defendant will pay the plaintiff's costs throughout.

S.N./R.K.

Appeal allowed.

A. I. R. 1914 Madras 587

BENSON AND SUNDARA AIYAR, JJ.

Meenakshi Ammal—Plaintiff—Appellant.

Pudikalapattigremam Rama Aiyar and others—Defendants—Respondents.

Second Appeal No. 2065 of 1910, Decided on 13th December 1912, from decree of Sub-Judge, South Malabar, in Appeal Suit No. 351 of 1909.

Hindu Law—Maintenance — Daughter-in-law — No right for maintenance against father-in-law's self-acquired property—(Obiter)—Maintenance claimed not on ground that defendant owns property burdened with right — Hindu law does not apply.

According to Hindu law, there is no legal obligation on the part of a father-in-law, having no ancestral assets, to give maintenance to his daughter-in-law from out of his self-acquisition: 22 *Mad.* 305, *Cons.*; and 2 *B. L. R. A. C. J.* 15 (*F. B.*) *Foll.*

Obiter—The Hindu law as such has no obligatory force where maintenance is claimed against a person not on ground that the property coming by inheritance to him is burdened with the maintenance of the person claiming it but on the ground that Hindu law-givers have placed such a duty on the defendant. The Court would have to decide the question in accordance with equity, justice and good conscience. [P 588, C 1, 2 & P 589 C 2]

T. R. Ramachandra Aiyar—for Appellant.

C. V. Ananthakrishna Aiyar—for Respondent.

Judgment.—This is a suit by a Hindu widow for arrears of maintenance

against her father-in-law and his sons. The plaintiff was married to a deceased son of defendant 1, the father-in-law. Defendant 1 originally had some ancestral property along with a brother, but he relinquished it at the partition between himself and his brother's sons, reserving to himself only a waste building site. This relinquishment was before the plaintiff's marriage and his sons, including the plaintiff's husband never took exception to it. The lower Courts have dismissed the suit on the ground that defendant 1 was not in possession of any ancestral property although he was possessed of considerable property acquired by himself as an officer in the service of Government.

It has been contended on plaintiff's behalf in second appeal that the partition deed contained a clause that defendant 1's brothers and sons should there-after make no claim to the properties in defendant 1's possession which they admitted by the terms of the deed to be his self-acquired properties: that it must therefore be taken that the release of their right or claim of right to those properties was the consideration for defendant 1's relinquishment of the rights of himself and his sons to a half-share of the ancestral properties, that in effect defendant 1 exchanged with his brother's sons a half right in his ancestral property for their claim of a half share in the properties which he asserted to be his self-acquisitions and that she is therefore entitled to maintenance out of his self-acquired property. But on a reference to the partition-deed we are unable to give any such effect to it. It does not appear from it that defendant 1's brother's sons laid any claim to his self-acquisitions. On the other hand it merely records an admission on their part that the properties in his possession were his own acquisitions and that they had no right to them. The reason for his not enforcing his right to an equal share of the ancestral property is stated to be his sympathy towards them. There is no clause in the document that could be construed as a release or relinquishment in defendant 1's favour of any claim which his nephews had in the properties which he alleged to be his own. We cannot therefore see any equitable consideration for fastening on defendant 1's private acquisitions an obligation which

would attach to ancestral property in his hands.

It is next contended that defendant 1 had realized the amount due to plaintiff's husband on a mortgage bond executed by a third party; but both the lower Courts have found that, though the bond stood in the name of the plaintiff's husband, he was only a benafidat for defendant and had no beneficial interest in it. And this finding we see no reason not to accept in second appeal.

The next point urged is that the plaintiff would be entitled to some maintenance, at any rate, as defendant 1 was still in possession of an ancestral paramba. Admittedly, no income was derived from it. This is the ground on which no maintenance was allowed to the plaintiff as derivable from it. It is argued on plaintiff's behalf that she is entitled to make the paramba profitable and to derive maintenance out of it or to have the paramba sold to provide for her maintenance. It is not necessary to consider the exact manner in which her right with respect to the paramba could be legally enforced against defendant 1 as the learned vakil for the respondents is willing that the plaintiff should have a decree for Rs. 50 in lieu of a fifth share if the paramba to which her husband would have been entitled if a partition had taken place between him and the defendants before his death.

The main contention in second appeal is that the plaintiff was entitled to maintenance against defendant 1 as her husband died in commensality with him, even though he was not in possession of any ancestral property. According to Hindu Law, it is argued, a person is bound to maintain his daughter-in-law even if possessed only of property acquired by himself. It is not denied that the established principle according to the decisions of all the High Courts is that ordinarily a widow is entitled to maintenance from the survivors of her husband's undivided family only if the family possessed joint ancestral property during her husband's lifetime. The contention is that there are some exceptions to this rule which proceed on the special obligation to maintain one's very close relations. We may at once observe that even if there were such a rule according to the Hindu Law we would not be bound to give effect to

it. The rules of Hindu Law are binding on the Court only where it is necessary to decide "any question regarding succession, inheritance, marriage or caste or any religious usage or institution." In so far as a right to maintenance is a charge on the inheritance of any person according to the Hindu Law, the rules laid down by it would be enforceable. But where maintenance is claimed against a person not on the ground that the property coming by inheritance to him is burdened with the maintenance of the person claiming it, but on the ground that the Hindu Law-givers have placed such a duty on the defendant, the Hindu Law, as such, has no obligatory force. The Court would have to decide the question in accordance with equity, justice and good conscience. The rules and precepts of Hindu Law-givers might often be entitled to great respect in deciding the rule of justice in such cases. But the weight due to them would depend on the circumstances of each case including the conditions of modern society and the conceptions of equity and justice which the Court considers it right to give effect to.

We do not find however that according to Hindu Law-givers a person is bound to maintain his daughter-in-law even though he has no ancestral property in his hands. Our attention has been drawn to some observations of Subramania Aiyar, J., in *Rangammal v. Echammal* (1). This question did not arise for decision there as the suit was by a daughter-in-law against her mother-in-law, who had inherited the property of the father-in-law and the property itself was found to be ancestral property in the father-in-law's hands while he was alive, having been inherited by him from his maternal grandfather. The learned Judge observed: "In regard to such property, the female would have been entitled to claim maintenance even in the lifetime of the person inheriting it. This view seems to be warranted, especially as the theory, that the right of a widowed female to maintenance is dependent on the possession by the party called upon to provide the maintenance of assets derived from the husband of the female claiming the maintenance appears to have had little or no foundation in the Smritis or commentaries, according to

(1) [1899] 22 Mad. 305=9 M. L. J. 14.

Messrs. West and Buhler (Digest of Hindu Law, Edn. 3, pp. 245-252) and Dr. Jolly (History of the Hindu Law, pp. 134 and 135). The latter learned author refers to a passage from the writings of Kamalakara to show that it is incumbent on sons and grandsons to maintain indigent widows and daughters-in-law, though no wealth of the father may be in existence. He also explains that the passage in the Smriti Chandrika relied on in support of the contrary view does not really touch the point. He further points out that in the Saraswati Vilasa, S. 622, the duty of a father to provide for his son's widow is stated unconditionally. The passage in the Digest of Messrs. West and Buhler referred to is as follows: "Looking then to the constitution of a Hindu family, to the restrictions placed on a woman's activity and the prohibition in a united family against her making a board and the maledictions pronounced on those who fail to provide for the helpless members of their family, the conclusion may be hazarded that Colebrook and others had sufficient grounds for the opinions to which the actual practice of the people generally conforms in the Bombay Presidency. In a united family, it would seem that in some form maintenance may be claimed by the widow of a deceased member as a right not dependent on property, though in a measure regulated by it, but on the capacity only of her relatives in the order of nearness to her husband." The learned authors also say that, according to Vyavahara Mayukha, the widow's right to subsistence does not depend on the possession of ancestral wealth; and Nilakanta's interpretation of a text from Kathiayana is referred to by them.

It will be observed that the passage refers to the rights of all widows generally and not to the special claim of a son's widow against the father-in-law. But the law is now fully established to the contrary by the decisions of all the High Courts. Dr. Jolly also lays down the same general rule as West and Buhler with regard to maintenance of widows generally. The passage from Kamalakara is also cited in support of this general proposition, although a daughter-in-law is specifically mentioned in the text. The learned author refers to a text of Sankha in favour of a daughter-in-law and to Nandapanditha's commentary on

a text of Vishnu which also relates to widows generally. On the other hand, in a text ascribed to Manu by the author of the Smriti Chandrika, it is stated that "a mother and a father, in their old age, a virtuous wife and an infant son must be maintained even though doing a hundred times that which ought not to be done: "see Smriti Chandrika Chap. 11—1, verse 34. The Mitakshara lays down "where there may be no property but what has been acquired, the only person whose maintenance out of such property is imperative are aged parents, wife and minor children." The correctness of Dr. Jolly's interpretation of the Smriti Chandrika, Chap. 11—1, verse 34, seems to be doubtful.

The question was fully considered by a Full Bench of the Calcutta High Court in *Khetramoni Dasi v. Kasinatha Das* (2) and the majority came to the conclusion that according to the Hindu Law, there was no legal obligation on the part of a father-in-law having no ancestral assets to give maintenance to his daughter-in-law. Even supposing that some ancient sacred text-books could be found in support of a contrary conclusion the authority of the Mitakshara is almost paramount in this Province. As already observed, the question has to be decided according to equity, justice and good conscience. Would it then be right to uphold the appellant's contention as in accordance with the sound equitable rule to be laid down in this case? An adult son has no right to maintenance against his father. How can his wife's right be regarded as standing on a higher footing? The son's marriage may have been performed after he attained his majority. It may have been performed by him of his own will and perhaps without the father's advice and consent. How could it be held that his widow is entitled to maintenance against his father in such cases?

Again, it can hardly be contended that the widow of a son divided from his father in his lifetime would have any claim against her father-in-law. A brother has no right to maintenance against a Hindu out of his individual property, at any rate, if he is not an infant and under the guardianship of his

(2) [1863] 2 B. L. R. A. C. J. 15=10 W. R. 89 (F. B.).

brother. The considerations in favour of the appellant's contention have been summarized in the passage cited above from West and Buhler. But the difficulties in upholding the contention in favour of the liability of the father-in-law or any other member of the undivided family of a widow are equally, if not more, serious. We cannot but have grave doubts about the desirability of fettering the inducement to acquire property by burdening the acquirer with the maintenance of persons who take no part in the labour of acquiring. It is natural that we should find conflicting views taken on the question by Hindu law-givers. It may also be that in practice many Hindus take the responsibility of maintaining widows whom they may not be bound in law to support. But when we find that so early as at the time of Vijnaneswara, the view prevailed that there should be no obligation on a person to support any one except his closest relatives, namely parents, wife and infant children out of his own self-acquisitions or by his own labour, we do not think it will be right to lay down any broad rule that a Hindu is bound to give maintenance to his daughter-in-law out of the fruits of his own industry. There may be special circumstances which may make it equitable and just in a particular case to uphold such a claim, but in the present case our attention has not been drawn to any such circumstances. It does not appear that the plaintiff's husband was a minor when he was married to her. It is not shown that the circumstances under which the marriage took place were such as to justify us in holding that the defendant 1 is responsible for the plaintiff's maintenance. The partition between him and his brother's sons was before the plaintiff's marriage. The plaintiff herself is not a minor and is not shown to have been a minor at the time of her husband's death. She left her father-in-law's house soon after her husband's death and did not try to establish a claim upon the defendant 1 by living with him as a member of his family. We must hold that, in the circumstances, the lower Courts were right in refusing to make defendant 1, liable to give her maintenance out of his self-acquisitions.

We modify the decrees of the Courts below by directing defendants 2 to 4

(defendant 1, having died pending the appeal) to pay Rs. 50 to the appellant out of the assets of the deceased defendant 1, with interest at 6 per cent per annum from this date till the date of payment. We further modify them by directing that the parties do bear their own costs throughout.

S.N./R.K.

Decrees modified.

A. I. R. 1914 Madras 590

BENSON AND SUNDARA AIYAR, JJ.

Veeranan Ambalam and others—Defendants—Appellants.

v.

Karuppayya Pillai—Plaintiff—Respondent.

Second Appeal No. 252 of 1910, Decided on 8th November 1911, from decree of Dist. Judge, Madura, in appeal Suit No. 701 of 1907.

Madras Revenue Recovery Act (2 of 1864), Ss. 42 and 2—Sale for arrears of water-cess is free of encumbrance.

A sale for arrears of water-cess payable under Act would convey a title to the purchaser free of encumbrances. [P 590 C 2]

C. S. Venkatachariar—for Appellants.

K. N. Aiyah—for Respondent.

Judgment.—We are of opinion that a sale for arrears of water-cess would convey a title to the purchaser free of encumbrances. "Public revenue" is defined in S. 1, Act 2 of 1864 to include cesses payable to Government on account of water supplied for irrigation and therefore includes the cesses payable under Act 7 of 1865. S. 42, Act 2 of 1864 declares that all lands brought to sale on account of arrears of revenue shall be sold free of all encumbrances. The plaintiff in this suit therefore obtained a title free of the appellant's mortgage. The cases relating to sales for arrears of income and abkari revenue have no bearing on the question before us. It is further urged that the sale for arrears of water-cess was invalid as no notice was given to the inamdar. But this point was not raised in either of the lower Courts even if it was open to the appellant to raise it.

The second appeal is dismissed with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 591**Full Bench**

WHITE, C. J. AND MILLER, AND SADA-SIVA AYYAR, JJ.

Kandappa Achari—Defendant — Appellant.

v.

Pathipati Vengama Naidu—Plaintiff Respondent.

Appeal No. 60 of 1913, Decided on 24th January 1913, from appellate order of Dist. Judge, North Arcot, in Appeal Suit No. 44 of 1910, D/- 15th February 1911.

Madras Hereditary Village Offices Act (3 of 1895), S. 3 (4) and 5—S. 5 is applicable to emoluments mentioned in S. 3 (4).

Section 5 is applicable to emoluments of hereditary offices in a proprietary estate of the classes mentioned in Sub-Cl. 4, S. 3.

[P 591 C 2]

N. Chandrasekhara Aiyar and *M. Subbaraya Aiyar*—for Appellant.

S. Swaminathan—for Respondent.

Order of Reference.—As the case was heard ex parte on the 15th instant, we have allowed Dr. Swaminathan the learned counsel for the respondent to argue the question again. He has brought to our notice a decision of the learned Chief Justice and Krishnaswami Aiyar, J., in *Veerabhadra Achari v. Suppiah Achari* (2) and C. M. A. No. 226 of 1904, which are contrary to the decision in *Motiyala Papayya v. Kosuri Muramallu* (1). The former case, however was argued only on one side. We have considered the question again carefully and do not see sufficient reason to depart from the opinion formed by us at the previous hearing which we find is in accordance with another case, *Kanam Naidu v. Latchanna Dhora* (3). The scheme of the Act appears to have been to divide the offices coming within its purview into four convenient classes for the purpose of dealing with certain questions relating to different kinds of offices separately. The offices include both those in villages in proprietary estates and in raiyatwary tracts. Cl. (1) for instance would include the offices referred to therein both classes of villages. If the object of the four clauses was, as we conceive it was, to bring under each clause certain kinds of offices the effect of the exception in Cl. 3 would only be not to include certain offices in proprie-

tary estate in that clause so that the rules of succession laid down in S. 11 and the provisions of S. 7 of the Act might not extend to the excepted offices. There seems to be no reason to suppose that the legislature intended to make any distinction between the same classes of offices in proprietary and non-proprietary villages with regard to the question of the alienability of the emoluments attached to them. Cl. 4 itself is perfectly general in its language and would include the offices mentioned therein both proprietary and non-proprietary villages. Having regard however to the judgment of *Veerabhadra Achari v. Suppiah Achari* (2), we consider it desirable to have the question authoritatively decided. We refer to a Full Bench the question whether S. 5 of Act 3 of 1895 is applicable to emoluments of hereditary offices in a proprietary estate of the classes mentioned in sub-Cl. 4 of S. 3.

(This appeal coming on for hearing on Monday 20th January 1913, in pursuance of the said order of reference before the Full Bench constituted as above, upon perusing the order of reference and upon hearing the arguments of Messrs. N. Chandrasekhara Aiyar and M. Subbaraya Aiyar, vakils, for the appellant, and of Mr. B. Narasimha Row for Dr. S. Swaminathan, counsel, for the respondent and the case having stood over for the consideration till this day the Court expressed the following:)

Opinion

White, C. J.—I have great doubts, but as my learned brothers are both of opinion that the question referred to us should be answered in the affirmative, I do not propose to dissent.

Miller, J.—In this matter I am of opinion that the learned Judges who are responsible for the reference to the Full Bench are right in the conclusion at which they have arrived.

I think it must be conceded that the construction put upon S. 3 of Madras Act 3 of 1895 by the learned Chief Justice and Krishnaswamy Aiyar, J., in *Veerabhadra Achari v. Suppiah Achari* (2) is that which its language most naturally suggests but the reasons for holding that it is not that which ought to prevail are to my mind, very strong: they are stated in the judgment in *Mutiyala Papayya v. Kosuri Muramallu* (1), and I may re-state them.

(1) [1912] 13 I. C. 322.

(2) [1910] 5 I. C. 477=33 Mad. 488.

(3) [1900] 23 Mad. 492.

Artisan offices were governed by Regn. 6 of 1831 whether they were situated in proprietary villages or not and no reason or at any rate no reason worth a moment's consideration has been suggested and the learned Judges who decided *Mutyala Papayya v. Kosuri Muramallu* (1) were unable to conceive of any reason why those situated in proprietary villages should have been deliberately omitted from Act 3 of 1895 while those in other villages are governed by that Act.

There is, so far as I can see, no difference whatever from the point of view of the necessity of inalienability or from the point of view of succession to the office between the one class and the other. I cannot in these circumstances believe that the legislature deliberately retained the one class within the Act and omitted the other. It is then necessary by reason of the language of S. 3. to hold that that which was not done deliberately was done by inadvertence. We should, I think, before taking this course do all that reasonably can be done to reconcile the language of the Act with what was beyond reasonable doubt the intention of the legislature. And this may be done in the way suggested by Benson and Sundara Aiyar, JJ. The language of S. 3 is I venture to think singularly unhappy in more than one respect but I see nothing unreasonable in reading the section as the learned Judges have done. I may paraphrase it somewhat with a view to put more clearly what I think it really means. It may be read as if it ran:

The offices to which the provisions of this Act are applicable are divided into the following four classes:

(1) Those offices provided for in the Village Cess Act, where that Act is, or may be enforced; this, I think, must be the real, though perhaps it is not the apparent, meaning of S. 3 (1).

(2) Those offices provided for by Act 2 of 1894.

(3) Artisans' offices.

(4) Other hereditary offices in proprietary estates not being artisans' offices already included in (3) or the karnam's office provided for elsewhere.

I have transposed classes (3) and (4) as perhaps making the matter slightly clearer, but that, of course, makes no

difference. I have also made the word "artisan" do duty for all the persons described in S. 3 (4).

The object of the classification is, I have no doubt, that suggested in the order of reference to enable the draftsman in Ss. 7, 8, 9, 10, 11 and 12 to refer to the classes by number instead of setting out in each section the offices to which that section was intended to be applicable. The different classes are differently treated both as regards the control of the incumbents by the Collector and the proprietor and as regards the succession to the office in the event of a vacancy. There is no other apparent reason why there should be a division into classes at all.

The exclusion of artisans' offices from class (3) is because they are included in class (4) and are to be dealt with differently from the offices included in (3) and the express exception was necessary because they are hereditary village offices in proprietary estates as are those in (3).

I do not think this construction does violence to the language of S. 3, but if it does, I think we ought, at the risk of some straining, to adopt a construction which gives effect to what was so clearly intended rather than a more natural one which frustrates the intention of the legislature.

The authorities are not numerous. In *Kannam Naidu v. Latchanna Dhoru* (3) and *Raja of Vizianagaram v. Danti Veda Challiah* (4) it seems to have been assumed that the artisan offices in zamindari villages are included in S. 3. In *Chinmayya Asari v. Annayappa Mudali* (5), and Civil Miscellaneous Appeal No. 226 of 1904, these offices are held to be excluded, but without discussion of the question. The two cases, in which the matter has been discussed, are *Veerabhadra Achari v. Suppiah Achari* (2), where one view was taken, and *Mutyala Bapayya v. Kosuri Muramallu* (1), to which I have already referred, where the contrary conclusion was arrived at.

For the reasons which I have given, I think the latter decision is correct, and I would answer in the affirmative the question referred to us.

Sadasiva Aiyar, J.—The answer to the question referred to the Full Bench

(4) [1905] 28 Mad. 84=14 M. L. J. 458.

(5) [1897] 7 M. L. J. 264.

depends on the interpretation of S. 3, Act 3 of 1895. S. 3 says (omitting immaterial portions): "This Act shall apply to the following classes of village offices."

(3) The other hereditary village offices in proprietary estates except the officers forming Cl. (4) below.

(4) The hereditary offices of village artisans."

Now if we take Cl. 3 alone, it means that the Act shall not apply to the excepted hereditary offices forming Cl. 4—if those offices are held in villages situated in proprietary estates, i. e., it shall not apply to village artisans etc., in proprietary estates but shall apply only to other hereditary village offices (other than village artisans etc.), in proprietary estates. If we take Cl. 4 alone, it means that the Act shall apply to the hereditary offices of village artisans in all villages, that is, proprietary estate villages as well as raiyatwari villages. What is the object of the legislature in excluding the offices of village artisans in proprietary estate villages in Cl. 3 but again including them in Cl. 4 of the same section? One very reasonable view is that, though the words of Cl. 4 include, as it stands, offices of all village artisans whether in proprietary estate villages or in non-proprietary estate villages, because Cl. (3) excepted the offices of village artisans in proprietary estates, the wide words of Cl. (4) must be confined to the offices of village artisans in villages other than proprietary estate villages. Another tenable view is that Cl. (3) excepted artisans' offices in proprietary estates merely for purposes of defining and limiting a class of village servants who were intended to be brought under that class for convenient reference in subsequent sections of the Act that Cl. (4) included those offices for similar convenience of definition and reference, and that so far as the operative opening words of S. 3 were concerned, those offices were also intended by Cl. (4) to be brought under the operation of the Act. The first of the two views was taken in *Veerabhdaran Achari v. Supiah Achari* (2), while the second was taken in *Muthyala Bapayya v. Kosuri Muramallu* (1). In such cases of ambiguity, considerations based on the scheme of the Act and the previous history of legislation relating to the matters dealt

with in the Act might properly be referred to for deciding which of the two views ought to be taken: see Maxwell on Statutes, Chap. 3 and S. 1, Chap. 4.

Having in mind such considerations, I am inclined to take the second of the above two views. I need not detail the said considerations as they have been set out with sufficient fulness in *Muthyala Bapayya v. Kosuri Muramallu* (1) above referred to and as I further concur in the views formulated in the judgment just now pronounced by my learned brother Miller, J.

S.N./R.K.

Order accordingly.

A. I. R. 1914 Madras 593

MILLER AND ABDUR RAHIM, JJ.

Nelatooru Venkatarangacharyulu and another—Appellants.

v.

Nedathur Krisnamacharyulu and others—Respondents.

Civil Appeal No. 246 of 1911, Decided on 25th November 1912, from decree of Dist. Judge Nellore, in Original Suit No. 12 of 1909.

Civil P. C. (5 of 1908), S. 92—S. 92 and S. 14 of Act 20 of 1863 are analogous—Option to follow either — Plaintiff not bound to follow both—Collector's consent obtained in November 1908 held valid.

Section 92, Civil P. C., and S. 14 of Act 20, of 1863, so far as the forms of relief to which they relate are the same, appear to offer a choice to persons interested in the trust; they may proceed under either but are not bound to proceed under both, for that might lead to a deadlock, if perchance the Collector were to consent to a suit and the District Judge to refuse leave.

A Collector's consent was given in November 1908 to a suit for the reliefs: (1) the removal of certain trustees, (2) the appointment of others and (3) the vesting of the property in the newly appointed incumbents. The suit was instituted in 1909 when the new Code was in force.

It was contended in respect of the prayer (1) that the Collector's consent was invalid, because in 1908 there was no provision of law enabling a suit to be instituted for the relief with the Collector's consent.

Held: that the consent was valid.

[P 593 C 2; P 594 C 1]

T. V. Seshagiri Aiyar—for Appellants.

P. Subrahmaniam—for Respondents.

Judgment.—It seems clear that the suit instituted with the consent of the Collector is a good suit for all reliefs referred to in S. 92, Civil P. C. That section and S. 14 of the Act 20 of 1863, so far as the forms of relief to which they relate are the same, appear to offer a choice to persons interested in the

trust; they may proceed under either. It cannot be that they are bound to proceed under both; for that might lead to a deadlock if perchance the Collector were to consent to a suit and the District Judge to refuse leave. It is not necessary to read the sections as involving this possibility and they ought not therefore so to be read. The Collector's consent was given to a suit for these reliefs: the plaintiffs prayed for the removal of certain trustees, the appointment of others and the vesting of the property in the newly appointed incumbents. The consent was given in November 1908, and the suit was instituted on 27th January 1909. It is now contended that in respect of the prayer for the removal of the trustees, there is no valid consent, because in 1908 there was no provision of law enabling a suit to be instituted for that relief with the Collector's consent.

The sanction or consent shows that the Collector had considered the question on the merits and made inquiries and there is no doubt that he deliberately consented to the prayer for the removal of the trustees. Now, when the suit was instituted the Court had to see that the Collector had consented to it and that his consent was sufficient to warrant its entertainment at the time of the suit. It formed a consent deliberately given for the protection of the trust and for the purpose of enabling a suit to be instituted for a particular relief, and there seems no reason why it should say: "I must treat this consent as no consent, because it was made before the end of 1908"; till then the Court could not have given the particular relief on a suit instituted on that consent; but that does not make the consent a nullity. The Collector, of course, was able to give his consent irrespective of any provision of the Code, but under the old Code this consent would have been ineffective; even with it the Court could not entertain a suit to remove a trustee; in 1909 the Court was able to do so; it found a consent already given and it was entitled to accept it as sufficient. The decree dismissing the suit must be reversed and the suit remanded for disposal according to law. We do not decide that all the reliefs asked for in the plaint can be given in this suit. It may be that having regard to the provisions S. 92 or to

those of Collector's consent, some of the claims are inadmissible. That question and the question should it arise, whether any omission can be cured by a further consent obtained from the Collector after the suit, must be left for decision by the District Judge.

The costs of this appeal will abide the result.

S.N./R.K.

Suit remanded.

A. I. R. 1914 Madras 594

SANKARAN NAIR, J.

A. Krishnasamy Iyer—Petitioner.

v.

Chandravadhana—Respondent.

Criminal Revn. No. 400 of 1912, and Criminal Revn. Petn. No. 317 of 1912, Decided on 21st February 1913, from order of Deputy Mag., Ranipet, in Misc. Criminal Case No. 80 of 1908, D/- 3rd April 1912.

Criminal P. C. (5 of 1893), S. 488 — "Child" means minor — Prostitution is not profession of earning livelihood.

The word "child" in S. 488 means one who has not attained the age of majority.

For the purposes of the said section, prostitution cannot be treated as a profession by which a girl can earn her livelihood.

[P 594 C 2, P 595 C 1]

T. Narasimha Iyengar—for Petitioner.

C. Sydney Smith—Contra.

Order.—An order was passed under S. 488, Criminal P. C., directing the petitioner to pay to each of his illegitimate daughters maintenance at the rate of Rs. 7 a month. He now applies for an alteration of such allowance on account of a change in his and their circumstances.

The petitioner is a pleader and he alleges that his income has been considerably reduced of late. The Magistrate finds that his income might be fluctuating, but there has not been such a change as would justify a reduction in the rate of maintenance awarded. In revision, I cannot interfere with that finding.

The eldest daughter is now said to be 17 years old, and it is urged that she is no longer a "child unable to maintain itself" under S. 488. The word "child" has not been defined in the Criminal Procedure Code. In England it has got apparently various statutory definitions. But in the absence of any definition or anything to the contrary in an Act, I am of opinion that a "child" is a person who has not reached full age. It is only then

that she becomes competent to enter into any contract or enforce her claims. As this daughter has not attained the age of majority, i.e. 18, I think she is a "child" within the section.

Then it is urged that she able to maintain herself. Her mother is a dancing-girl and a prostitute. She and her sisters live with her. The petitioner has, the Magistrate finds, failed to prove his allegation that his daughter already follows that profession. But it is said that at that age they become dancing-girls and follow that life. But the law will not treat prostitution as a profession by which a girl might earn her livelihood and "maintain itself" under S. 488, Criminal P. C. It is against public policy to do so.

It is also said that this woman might earn a livelihood by honest labour. It is not alleged that she belongs to the labouring class. She has not been married nor has the petitioner made any attempts to get her married. There is no evidence to show that any employment was or is open to her.

For these reasons I must hold that no such state of circumstances has been proved as would entitle the petitioner to any modification of the order.

The petition is, therefore, dismissed.
S.N./R.K. *Petition dismissed.*

*** A. I. R. 1914 Madras 595
Full Bench**

WHITE, C. J. AND SANKARAN NAIR
AND TYABJI, JJ.

Pokkunuri Balamba—Defendant—Appellant.

v.

Kakaraparti Krishnayya and others—
Plaintiffs—Respondents.

Second Appeal No. 2003 of 1911. Decided on 1st April 1913, from decree of Dist. Judge, Kistna, in Appeal Suit No. 824 of 1910.

* (a) Married Women's Property Act (3 of 1874), Ss. 2 and 6—Insurance for the benefit of wife and children—Claim for insurance money towards decree — Para. 2, S. 2 does not refer to married daughter — Object of S. 6 is to create trust for benefit of wife and children—Insurance company to pay to official trustee when no special trustee appointed — Beneficiary is not to get the money.

A Hindu male insured his life "for the benefit of his wife and children" and died leaving a daughter. The plaintiff, who held a decree against the insured, claimed the insurance money towards the decree.

Held: (by the Full Bench) that para. 2 of

S. 2, would not refer to the daughter of the assured even if she were marrieds but that though a beneficiary under the trust, she would not be entitled to enforce her claim against the insurance office or a creditor. [P 606 C 2; P 608 C 2]

Per *White, C. J.* and *Sankaran Nair J.*—S. 6 applies to a policy of insurance effected by a Hindu male for the benefit of his wife or children, or of his wife and children, or any of them. [P 605 C 1]

Per *White, C. J.*—The words of S. 6 "for the benefit of his wife, or of his wife and children, or any of them" should be construed as "for the benefit of his wife or of his children or of his wife and children, or any of them."

[P 604 C 2]

Section 6 is in the interest of the wife and children but the primary object is to enable a man to make provision for his wife and children by insuring his life for their benefit, without executing a separate deed of trust. But while it dispenses with the necessity for separate deed of trust, it does not affect the law of contract or the law of trusts as regards the persons entitled to enforce the contract under the policy. When by virtue of the section a trust is created, the person entitled to enforce the rights of the beneficiary is the trustee, where a trustee has been appointed. But if no special trustee has been appointed, the money is payable, under para. 2 of the section, to the Official Trustee, even though, under the policy the Insurance Company had agreed to pay it to the beneficiary. In other words the beneficiary is not entitled in any case to enforce his or her rights under the policy.

Per *Tyabji, J.*—The expression "married woman" in para. 2, S. 3, Act 3 of 1874 does not refer to the daughter of the assured, even if she is married. [P 608 C 1]

(b) Trusts Act (2 of 1882), S. 32 — Doctrine of advancement does not apply in case of insurance for benefit of wife and children.

If a man insures his own life in his daughter's name, on his death she may sue for the policy money, because the fact that she is a daughter raises the presumption that there was an "advancement" to her by way of gift but in the present case the words "for the benefit of his wife and children," rebut that presumption, inasmuch as it cannot be held that although there is no gift to the wife under the doctrine of "advancement", yet there is a gift to such of the children as may be daughters. [P 606 C 2]

(c) Married Women's Property Act (3 of 1884), Ss. 4, 5, 7, 8 and 9, are governed by Para. 2, Sch. 2.

Sections 4, 5, 7, 8 and 9 of Act 3 of 1874 do not apply where either of the spouses professed the Hindu religion at the time of the marriage. [P 604 C 1]

V. Ramadoss — for Appellant.

T. Ramachandra Rao — for Respondents.

Order of Reference

Sankaran Nair, J.—(17th February 1913).—Defendant 1 is the daughter and defendants 2 and 3 are the sons, of one deceased Venkaratnam, who insured his life for Rs. 2,000 which the Insurance

Office agreed to pay to his wife and children. The plaintiff got a decree against Venkataratnam and he claims the insurance money towards the decree including the Rs. 400 that fell to defendant 1.

The first question for decision is whether the money insured is protected by the Married Women's Property Act (3 of 1874), or whether it is a part of the estate of the deceased. The Judge following the decision reported as *Oriental Government Security Life Assurance Co., Ltd. v. Vantedu Ammiraju* (1), as he was bound to do, held that the Act did not apply. This is an appeal from that decision.

It is argued before us that that judgment ought not to be followed, and that the Act is applicable to cases like the one before us. S. 6, Act 3 of 1874, runs thus:

"A policy of insurance, effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed to be a trust for the benefit of his wife, or of his wife and children, or any of them according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband, or to his creditors or form part of his estate." The Act applies to the whole of British India. Now the words of the section seem to be clear, and, according to it, the policy of insurance effected by the deceased Venkataratnam should enure for the benefit of defendant 1 and others. But it is argued that S. 2 shows that this S. 6 does not apply to Hindus. The clause relied upon runs thus:

"But nothing herein contained applies to any married woman who at the time of her marriage professed the Hindu, Mahomedan, Buddhist, Sikh or Jaina religion, or whose husband at the time of such marriage professed any of those religions." Now it is obvious that this clause applies only to a married woman who professed any of the religions referred to in the section, or who may be a follower of any other religion, say Christianity, but whose husband professed any one of those religions. The proviso therefore does not apply to all Hindus and it applies to others than Hindus. It does not apply to males who profess those

religions. That this is so appears to be clear to me from the next clause which enables the Governor-General in Council to exempt from the operation of the Act members of any race. If therefore males who follow those religions have to be excluded, it must be by an order of the Governor-General in Council. This appears to be superfluous if the exemption clause applied to them also. The last clause of that section only states that S. 4, Succession Act, shall not apply, and shall be deemed never to have applied to any marriage one or both parties to which professed any of the above religions and is confined solely to that provision of the Succession Act. It appears to me therefore that S. 6 does clearly apply, and I am confirmed in this view by a consideration of the general scheme of Act 3 of 1874, which shows also why the clause in S. 2 is confined to the married women referred to therein. In order to understand it, it is necessary to make a brief reference to Act 10 of 1865. That Act, with the exception of S. 4, dealt with property which was taken by succession, either under a will or under intestacy, and it was provided by S. 331 that, with reference to such property, the Act should not extend to Hindus, Mahomedans or Buddhists. But S. 4 provided that "no person shall by marriage acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried." This section applied also to property taken otherwise than by succession, and as this provision was deemed to be a proper one with regard to property taken by way of succession, and as it affected the property relations of married people, it was deemed more convenient to affirm the broad principle than to have the property taken by succession alone regulated by that law. This clause therefore went further than the rest and enacted the law which was peculiar to marriage and had nothing to do with succession, while the rest of the law dealt with matters peculiar to succession and had nothing to do with marriage. Part 6, which is headed "On the Effect of Marriage," does not touch this question. Now, there was no restriction as regards the com-

(1) [1911] 19 I. C. 253=35 Mad. 162.

munities affected by S. 4 ; Hindus and Buddhists were not excluded.

This Act was passed in 1865, and in 1870 the Married Women's Property Act was passed in England (33 and 34 Vict., Chap. 93), and it was deemed advisable to enact some provisions of that Act in India which was done by Act 3 of 1874. The legislature then proceeded on the view that, as the Hindus, etc., had their own marriage law and their own succession law, it was undesirable to interfere with them and that the new provisions to be enacted need be made applicable only to those whose law of succession was governed by the Succession Act. Accordingly, it was provided by the last clause in S. 2 that S. 4, Succession Act, shall not apply, and shall be deemed never to have applied, to any marriage one or both parties to which professed at the time of marriage any of those religions. The Sikh and Jaina religions were added as a doubt was entertained whether the Sikhs were Hindus and the Jainis were Buddhists, as was thought at the time when the Succession Act was passed. Now, it will be noticed that all the sections except S. 6 referred to laws which were peculiar to English marriage. S. 4 of Act 3 of 1874, which was S. 1, English Act of 1870, was intended to get rid of the right of the husband acquired by marriage under English law to strip his wife of her wages and earnings. S. 5 also, which is para. 1, S. 10, English Married Women's Property Act, had reference to the peculiar marriage law of England.

Under that law, as it then stood, if a wife effected a policy of insurance on her own life or on her husband's life otherwise than by separate property and died in her husband's lifetime, the husband, in the capacity of her administrator, became the absolute owner of the property. If a married woman had already separate property, and if she chose to make any arrangement by means of that separate property in any suit that may be instituted by her to enforce it, the husband must be a party, might raise any questions he liked and could rip up a good deal of domestic life to decide the question whether she had private property. The section avoided any such question as to what is separate property and laid down a rule that, if the wife contracts with an insurance office and

provides the money by which the insurance is effected, the Insurance Office shall ask no question as to whether the property in question was her separate property or not. But the Insurance Office should be liable to the wife and to the wife alone. S. 7 of the Act referred to legal proceedings by and against a married woman. It also was intended to place beyond doubt the difficulties which arose on account of the English marriage law. So, too, Ss. 8 and 9. Now, all those sections, with the exception of S. 9, which were taken from the Married Women's Property Act of 1870, had reference to the disabilities of married women under the English law. S. 9 was intended to get rid of the husband's liability and was consequential on the removal of the wife's liabilities and deprivation of his rights by marriage. These sections had no reference whatever to the disabilities of married women under the Hindu law, and therefore S. 2 distinctly declared that these provisions shall not apply to any married woman who professed the Hindu or any other of the religions referred to therein.

Now, S. 6 stands on a different footing. It had nothing to do with any marriage law, but dealt with the question of contract or of trust. Shortly before this Act 3 of 1874 was passed, the Legislature had passed the Contract Act, by which it is enacted, following the English Law, that the parties to a contract alone shall be entitled, save in exceptional cases, to enforce the contract. A third party to a contract, to whom the Insurance Office may have promised the money due under a policy of life insurance, cannot therefore enforce it. But it was deemed desirable for obvious reasons that there should be an exception in favour of wife and children, and that part of S. 10, English Women's Property Act, which refers to this matter, was enacted as S. 6, Act 3 of 1874. It will be noticed that S. 10 of the English Act was split into two separate sections, Ss. 5 and 6, in Act 3 of 1874, consistent with the intention to make S. 6 generally applicable and S. 5 inapplicable to Hindus. The reason is clear. The rule that debarred the wife from enforcing the provision in the contract between the husband and the Insurance Office in her favour is not a rule that depended upon any marriage law. Unlike the other sections of the Act, it

dealt with a question which had reference not only to the Christians, but also to the Hindus and Mahomedans. The section did not interfere with the Hindu or Mahomedan marriage laws and did not contravene the general policy disclosed by the other provisions not to interfere with such laws.

I am not at all sure that the Legislature, in enacting the Contract Act, did not depart from the Hindu Law, under which it is not at all clear that the wife and children were not entitled to claim the insurance money. I can therefore easily perceive the distinction between S. 6 which relates to married men and the other sections of the Code which refer to the disabilities of married women under the English Law and changes consequent thereon. For these reasons, I think the Legislature advisedly exempted only married women from the provisions of the Act.

I am also of opinion that the premiums paid by the deceased Venkataratnam were his own self-acquired property. The Judge states that Venkataratnam "received a house from his brothers as his share of the family property and that in due course he sold it," that it is therefore for the defence to show that he did not use this property and the sale proceeds, and that otherwise the presumption is that all property in the hands of Venkataratnam was family property. But it was apparently not brought to the notice of the Judge that the insurance policy was taken out in 1888 and that the sale of the house was only in the year 1904. The presumption therefore raised by the Judge does not apply. *Prima facie*, what is paid as premium is a man's own property. I am accordingly of opinion that the plaintiff has not succeeded in proving that this is joint family property.

It has also been further argued before us that, even if the Act does not apply, defendant 1 and the others named in the policy must be treated as beneficiaries for whose benefit the policy was taken out by the deceased Venkataratnam. According to English Law, if a man purchase real property or an annuity, stock or other chattel interest, or take a bond in the name of a stranger, the equitable ownership results to the person who advanced the purchase-money. But an exception has always been recognized to this doctrine; that is, that if the person

from whom the consideration moved stands in loco parentis to the person in whose name the purchase is made, then gift or advancement is presumed. This is what is stated by Lord Romilly in *Garrick v. Taylor* (2), which was confirmed in appeal: "If a purchase be made by one in the name of another, the presumption is that the latter is a trustee for the person who pays the money, unless the parties stand in the relation of parent and child."

The same principle has been applied to policies of life insurance in *Pfleger v. Browne* (3), which was a case where an Insurance Office issued a policy on Pfleger's life the premiums of which were paid by Pfleger but the amount was payable to Browne. It was held that the onus of proof, when the benefit of it was claimed by Browne, lay on the latter even though the policy stood in his name.

The exception in favour of the children was recognized in *In re Richardson Weston v. Richardson* (4). In that case, the question was whether the policy of life insurance effected by a man on his own life, but in his daughter's name, was for his benefit or for that of his daughter. He retained the policy in his own possession and he paid all the premiums himself from time to time except the last which, on account of his want of money, his son paid. Kay, J., held that "the legal right to call upon the office to pay the sum assured was clearly in the daughter, and not in the executor, the contract on the insurance company having been to pay her. That she was a daughter was sufficient to raise the presumption that there had been an advancement to her." He further held that the mere retention by the father of the policy in his own hands did not show that the beneficial interest was not intended to pass to her.

On the other hand the decision of the case *In re Policy No. 6402 of the Scottish Equitable Life Assurance Society* (5), in which many of these cases are referred and principles explained, is an

(2) [1860] 29 Beav. 79=30 L. J. Ch. 211=7 Jur. (n.s.) 116=3 L. T. 460=9 W. R. 181. =54 E. R. 556=131 R. R. 463.

(3) (1860) 28 Beav. 391=54 E. R. 416=126 R. R. 187.

(4) (1883) 47 L. T. 514.

(5) (1902) 1 Ch. 282=71 L. J. Ch. 189=85 L. T. 720=50 W. R. 327=18 T. L. R. 210.

instance where the Court refused to draw such presumption, though the policy was taken on a man's life "for the behoof of" a lady who was his deceased wife's sister and with whom he had gone through the ceremony of marriage. The question therefore is whether the relationship of the parties is such that we should presume a gift or an advancement in favour of the person in whose name the policy stands. In India, S. 82, Trusts Act, states that where property is transferred to A for a consideration paid or provided by B, the property is presumed to belong to A unless it appears that B did not intend to pay or provide such consideration for the benefit of A. In the Madras Presidency at any rate, there is an increasing disposition to make provision for the benefit of a person's wife, children including daughters, as against his joint family, to whom his property would survive at his death, or as against the male heirs. Accordingly, Turner, C. J., and Muthusami Aiyar, J., decided that where notes were purchased in the name of a wife out of funds belonging to the husband, "the presumption is that he intended that the notes transferred to his wife should become her property." *Narayana v. Kishna* (6). This view has been accepted in Madras in the case of Hindu females. I have very little doubt that, when persons in the position of Venkataratnam take the policy in the name of either the wife or daughters, they intend it for their benefit and they must be deemed to be the beneficiaries under the policy.

Various insurance offices in Southern India issue policies under which the moneys are to be paid to the daughters on their marriage. The consideration in such cases is not only the health, etc., of the person who pays the premiums, but also considerations affecting the daughter. I have no doubt that all these persons who have been effecting these insurance policies always treated the policy money as the property of the daughter payable to her at a certain fixed period. It is not open to the father or husband to revoke that disposition without the consent of either the wife or the daughter. I would accordingly hold that in this case there was a gift or advancement in favour of the daughter

(6) (1885) 8 Mad. 214.

and that the plaintiff is not entitled, therefore to claim the share due to her.

As a beneficiary, there is no doubt that the defendant would be entitled to bring a suit against the Insurance Company for the recovery of the amount. No doubt, in England, it has been held that if she is not the beneficiary, and the amount is only payable to the daughter on the father's death, then the daughter is not entitled to sue. It is probable that in India this question may require further consideration on account of the ruling of the Privy Council in *Nawab Khwaja Muhammad Khan v. Nawab Hosaini Begam* (7). The facts in this case show this was a settlement similar to the one in that case. But it is unnecessary to consider this question further in this case as the daughter is not the claimant. In *Oriental Government Security Life Assurance Co. Ltd., v. Vantedu Ammiraju* (1) the conclusions are, no doubt, opposed to mine in this case, but there the question was not considered. It was assumed that the Married Women's Property Act in its entirety did not apply to Hindus. There the counsel for the Insurance Office conceded in appeal the rights of the plaintiffs to recover the money. The question of advancement or gift or trust was not raised in that case.

I doubt therefore whether that is authority to be followed. But as the question is of general importance it is desirable that it should be decided by a Full Bench. We accordingly refer to the Full Bench the questions involved for decision:

(1) Whether Act 3 of 1874 applies to Hindu married males or not?

(2) Whether in cases similar to the one before us, the daughter is not entitled to enforce her claim against the Insurance Office or a creditor?

Sadasiva Aiyar, J.—I agree with my learned brother in the finding of fact that the deceased paid his premia out of his self-acquired moneys, and it is unnecessary to repeat the reasons given by him for arriving at that conclusion. The further question arising in the case, and which we have resolved to refer for the opinion of a Full Bench is of great importance. That question is whether, when a Hindu male has insured his life

(7) [1910] 7 I. C. 237=32 All. 410=37 I. A. 152 (P. C.).

with a company by an agreement under which the Insurance Company undertook to pay the insurance money on the death of the insured to his wife and children, the said wife and children, or at least the children, are entitled to that money, or whether such money is part of the estate of the deceased to which his male children who are his heirs are alone entitled. This question has been answered in favour of the second alternative in the case reported as *Oriental Government Security Life Assurance Co. Ltd. v. Vantedu Ammiraju* (1). As at present advised, and with the greatest respect, I feel grave doubts as to whether that decision does not require re-consideration. The question involved might be considered under four heads:

- (a) Whether under the Contract Act, the wife and children can enforce a promise made by the Insurance Company as if the wife and children were promisees under the Contract Act.
- (b) Whether the wife and children can take advantage of S. 6, Married Women's Property Act 3 of 1874, and claim that a trust for their benefit was created when the policy of insurance was effected.
- (c) Whether, even if the Contract Act and the Married Women's Property Act did not apply, the wife and children could sue under the common law prevailing in India as near relations of the insured intended to be benefited by the insured.
- (d) Whether under the Trusts Act the wife and children became the cestui que trust and the company became trustees, and thus the trust could be enforced by the wife and children.

As regards the first point it was held in *Venkata Chinnaya Rau v. Venkataramaya* (8) that a third person who was not a party to a contract could sue the promisor though the consideration proceeded from the third person's step-mother and not from third person himself. Innes, J., held that the consideration moved indirectly from the third person and hence the third person himself became a promisee under the Contract Act. He relied upon the old case of

Dutton v. Poole (9), decided in 1868. Kindersley, J., held that under S. 2 (d), Contract Act, the consideration need not flow from the promisee and hence even a third person could sue as promisee though no consideration flowed from him. *Dutton v. Poole* (9) went upon the ground that, having regard to the near relationship between the plaintiff and the party from whom the consideration moved, the plaintiff might be considered to be a party to the consideration and that was also the ground on which Innes, J., based his decision.

According to the argument of Kindersley, J., near relationship between the brother and the person from whom the consideration moved was not important under the Contract Act. This case of *Venkata Chinnaya Rau v. Venkataramaya* (8) seems to have been approved of in *Samuel v. Ananthanatha* (10). If *Venkata Chinnaya Rau v. Venkataramaya* (8), decided in 1881, is good law, then the wife and children of the insured are entitled to sue as if they were parties to the contract itself between the insured and the Insurance Company. But Pollock and Mulla point out (see their notes to S. 2, p. 17) that in the two cases of *Venkata Chinnaya Rau v. Venkataramaya* (8) and *Samuel v. Ananthanatha* (10), Cls. (a), (b) and (c), S. 2, Contract Act, have been overlooked and Cl. (d) alone has been considered. Though under Cl. (d) the consideration may move from the promisee or any other person, under Cls. (1), (b) and (c) no man could be called a promisee and no man could therefore become entitled to bring a suit as promisee unless he has accepted the proposal of the promisor and thus comes under the definition of "promisee" in S. 1 (c). Here the wife and children were not asked by the promisor whether they assented to the proposal to benefit them, and they did not accept any such proposal and hence cannot come under the Contract Act definition of "promisee". So also in *Venkata Chinnaya Rau v. Venkataramaya* (8) the beneficiary under the agreement was not a party to the agreement as he had not accepted any proposal and hence cannot be called a "promisee" under the Contract Act. However I am willing to follow *Venkata Chinnaya Rau v. Venkataramaya* (8),

(9) [1868] 2 Lev. 210.

(10) 6 Mad. 351.

(8) [1882] 4 Mad. 137.

as it was decided so far back as 1881, and its authority has not been expressly overruled, though, if I were to construe the sections of the Contract Act itself, I am inclined to agree with the criticisms of Pollak and Mulla.

The next branch of the question relates to S. 6, Married Women's Property Act. In the *Oriental Government Security Life Assurance Co. Ltd. v. Vantedu Ammiraju* (1) it was held that no person following the Hindu law can take advantage of that section because S. 2, para. 2, provided that that Act should not apply to any married woman who or whose husband at the time of her marriage professed the Hindu religion. It seems to me there are three answers to the argument based on S. 2. In the first place S. 6 speaks of a policy of insurance effected by any married man, and hence the words in S. 2, which exclude the applicability of the Act to a Hindu married woman, cannot have any bearing upon the provisions of S. 6 which relate to a policy of insurance effected by any married man and not by any married woman whether Hindu or otherwise. In the second place, even if S. 2 will exclude a married Hindu woman from the benefit of a policy effected by her husband, his children cannot come under the phrase "married women" in S. 2 and if the insurance was in favour of the children also S. 6 must apply because S. 6 says that the insurance shall be deemed to be a trust for the benefit of his wife and children or any of them according to the interests so expressed. Because the wife cannot take, I do not see why the children should not take. In the third place, the title of Act 3 of 1874 says that it is an Act, not only "to explain and amend the law relating to certain married woman" but also an Act "for other purposes," referring evidently to the beneficial insurance provision laid down in S. 6. The preamble says that it is expedient to make provision for insurance on lives by persons married before or after that date. It does not say that the provision is restricted to insurances on lives of other than those of the Hindu, Mahomedan, Buddhist, Sikh or Jain religions. Though the Act is called the Married Women's Property Act, this question of insurance was also considered as an important matter falling to be dealt with by the

Act, and the provisions under S. 6 have nothing to do with the religion of the parties, but are beneficial provisions, the reasons for enacting which are applicable whether the husband who insures his life belongs to one religion or to another. It is clear from the history of the legislation that that provision, as Mr. Hobhouse says, was necessitated by the old doctrine of the English Courts, that a husband as such had no insurable interest in his wife's life and similar doctrines. It was also necessitated by the view of English Courts, that such a policy even when allowed by statute overriding the common law, would only be in the nature of a voluntary settlement and hence would be liable to the dangers to which such settlements are exposed. It is well known that the legislature wanted to encourage those life insurance policies which make provisions for wife and children and not to subject such policies to the dangers to which they were subjected under the English decisions, Judges of English Courts being too much bound down by technicalities and precedents. In introducing the Bill : (see extra supplement of 2nd August 1873 of the Gazette of India), Mr. Hobhouse said : "Some gentlemen connected with Insurance Offices in this country applied to the Government a short time ago stating that those provisions," i. e., the provisions of the English statute which overruled the English decisions, "were found exceedingly beneficial and they did not see why they should not be applied to India. We now propose therefore to introduce an Act which should embody for India the same provisions as those which had been thought fit for the people of England."

It will be found from this quotation that the religion of the parties had nothing to do with the introduction of these provisions in the Act; just as the "people of England" were sought to be benefited by the English Act, and protected against the English decision, so the people of India were sought to be protected by the introduction of this S. 6 in the Married Women's Property Act. Mr. Hobhouse in another speech said (see Extra Supplement dated 6th September 1873, p. 12 of the Gazette of India) : "We must remember that a wife's contributions to the family wealth did not usually consist in payment of money.

She may bring to her husband no money at all and yet may be a very treasure to him even if measured by a mere pecuniary standard. If the wife kept the household together, brought up the children, governed his servants, conducted all his petty dealings with tradesmen, and performed other similar domestic duties, the husband might be a far richer man for her services, although he might provide all the actual money that comes into the family. Then, if he chose that his wife should take every year so much out of the common stock, or out of his stock, and spend it in an insurance for herself or her children, why should she not do so? If the husband chose that that should be done with his property from time to time, Mr. Hobhouse did not see it was a matter for legal question, or that there should be any legal difficulty placed in the way of the wife's enforcing the contracts. It might be the most prudent, the most wise, and the most beneficial arrangement for the whole family, the very best mode of making a provision for them, and it also might be, and often was a matter of absolute justice as between husband and wife which he or his creditors ought not to dispute at any future time. Mr. Hobhouse, therefore thought that we ought not to import nice legal questions into such transactions; the broad intelligible mode of treating them was that if the wife contracted independently with the Insurance Office, and paid the money, the Insurance Office should ask no questions, but should be liable to the wife and to the wife alone.

"Section 6 provided that: "A policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife or of his wife and children or any of them, shall enure and be deemed to be a trust for the benefit of his wife or of his wife and children, or any of them, according to the interests so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband, or to his creditors, or form part of the estate."

"Mr. Hobhouse could not say that he attached a great deal of importance to that section. In the first place, such transactions were not very often effected because people did not like putting their property beyond their control. In the

second place, the thing could be done as the law now stood. The effect of the section would be to place such an arrangement on a safer basis.

"At present, it would be in the nature of what lawyers call a "voluntary settlement" and without leading the Council into technicalities relating to voluntary settlements, he would only state that in contests with the creditors of the settlor, those settlements stood on a less favourable footing than settlements made for valuable consideration. We propose to follow the example of the English legislature in enacting that settlements effected in this particular way should be good as against creditors, but at the end of the section there was an express reservation of the rights of creditors in the case of fraud. He did not attach much importance to that; for fraud would vitiate any transaction whether it was expressly so provided or not. And he did not believe in those fore-sighted, long-headed arrangements for the purpose of defrauding creditors, and in practice, had never known a single instance in which people deliberately plotted beforehand to defraud their creditors in this kind of way. At the same time, those who opposed alterations of the law of property in the case of husband and wife, always insisted on the possibility of frauds being facilitated thereby and we followed the English statute in putting on the face of our bill a warning that such things could not be done more easily than now."

I have quoted thus at length in order to show that the religion of the insured had nothing to do with the introduction of the beneficent provision contained in S. 6 of the Act. It seems to me therefore that S. 6, Married Women's Property Act does apply to a policy of insurance effected by a Hindu married man on his own life and expressed on the face of it to be for the benefit of his wife or of his wife and children or any of them and that S. 2 does not prevent the application of the provisions of S. 6 to any such policy. Having regard however to the case of the *Oriental Government Security Life Assurance Co. Ltd., v. Vantedu Ammiraju* (1). I do not wish to treat this as my final considered opinion till I have heard further arguments on this point.

Then the third branch of this question concerns the argument that under the common law of India, a person who is the near relation of the party from whom the consideration has proceeded is entitled to sue the promisor, though he may not come within the strict definition of a promisee under the Contract Act. I think this is a very tenable position having regard to *Dutton v. Poole* (9). The ratio decidendi of that case appears to me as valid, and though that case is usually treated as overruled by *Tweddle v. Atkinson* (11), that fact (namely, that the later English case has overruled the earlier English case) need not prevent Indian Courts from adopting and following the overruled case if it lays down that rule of law which appeals to the Indian Courts as the more equitable rule.

"Consideration" in the Indian law under the Contract Act need not be given the restricted meaning given by later English decisions and as Shepherd, J., points out in his notes to Ss. 2 and 25, Contract Act, the word "consideration" in Indian law comes nearer to the notion of "Causa" as understood in the Roman law. A motive based on near relationship or upon the moral obligation to provide for dependent relations must surely be treated as a very lawful consideration indirectly proceeding from the relative so as to enable such relation to bring a suit against the promisor though, if the person intended to be benefited was not such a dependent relative, the law might hesitate to allow that stranger to sue upon the promise made for his benefit. The cases of *Chinnaya Rau v. Ramaya* (8) and *Samuel Pillai v. Ananthanatha Pillai* (10), already referred to, might be treated as authorities on this basis, though the observations therein in respect of the two provisions of the Contract Act may be of doubtful validity. The Privy Council case of *Nawab Khwaja Muhammad Khan v. Nawab Husaini Begam* (7) seems to me to lend very great support to the above conclusion. Their Lordships say: "First it is contended, on the authority of *Tweddle v. Atkinson* (11), that as the plaintiff was no party to the agreement, she cannot take advantage of its provisions. With refer-

ence to this, it is enough to say that the case relied upon was an action of assumpsit, and that the rule of (English) Common law on the basis of which it was dismissed is not in their Lordships' opinion applicable to the facts and circumstances of the present case In their Lordships' judgment, although no party to the document, she is clearly entitled to proceed in equity to enforce her claim. Their Lordships desire to observe that in India and among communities circumstanced as the Mahomedans, among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the Common law doctrine was applied to agreements or arrangements entered into in connexion with such contracts." On analogous principles, it seems to me that cases decided under the English law about consideration having to flow from the promisee or about persons having insurable interests only in the lives of particular persons and all such technicalities of English law should not be applied in India so as to defeat plain equities favouring the wife and children of an insured person.

The fourth branch of the argument is based on the doctrine of trusts. I have gone through Ss. 3 to 11, Trusts Act with some care and I am unable to see any difficulty in holding that a married man, who insures his life for the benefit of his wife and children in a company which promises to pay the insurance money at his death to the said wife and children creates a "trust," that he becomes the author of the trust, that the company becomes the trustee, and that the wife and children are beneficiaries. It seems to me that the cases of *Shuppu Ammal v. Subramaniam* (12), *Arumuga Goundan v. Chinnammal* (13), *Rukmabai v. Govind* (14) and *Protap Narain Mukerjee v. Sarat Kumari Debi* (15) have been decided on analogous principles. As Sundara Aiyar, J., points out in *Kosuri Rajagopala Raju v. Datta Radhaya* (16), marriage settlements are included in trusts, and Pollock points out as follows: "Closely connected with the cases covered by the

(11) [1861] 80 L. J. Q. B. 265=1 B. & S. 393=3 Jur. (n. s.) 832=4 L. T. 468=9 W. R. 781.

(12) [1909] 4 L. C. 1083=33 Mad. 238.

(13) [1911] 12 L. C. 185.

(14) [1904] 6 Bom. L. R. 421.

(15) [1901] 5 C. W. N. 386.

(16) [1912] 13 L. C. 205.

doctrine of trusts, but extending beyond them we have the rules of equity by which special favour is extended to provisions made by parents for their children." A policy of insurance effected by the father of a family for his children should therefore be looked upon with great favour by Courts of equity and I see no reason why the children should not directly claim rights against the promisor or trustee who has undertaken to act for their benefit. For all the above four reasons, I concur in referring the question for the decision of a Full Bench.

Opinions

White, C. J. — The first question which has been referred to us is whether the Married Women's Property Act, 1874 (Act 3 of 1874) applies to Hindu males.

I feel a difficulty in answering this question in the form in which it has been framed. A general answer might possibly cover a case not contemplated in the order of reference and not argued before us. The argument before us was confined to the question whether where a Hindu male effected a policy of insurance on his own life, which expressed on the face of it that it was for the benefit of his wife or his wife and children or any of them, S. 6 of the Act applied. This is the question I propose to deal with.

Under S. 2 of the Act, nothing in the Act applies to a married woman who at the time of her marriage professed the Hindu religion or whose husband at the time of the marriage professed the Hindu religion.

I am of opinion that Ss. 4, 5, 7 and 8 do not apply where either of the spouses professed the Hindu religion at the time of the marriage. These sections contain the words "married women" and therefore S. 2 applies to them in terms. They are intended to confer rights on a married woman which under the law of England she did not possess, and to remove disabilities imposed on her by the law of England. These enactments, if not in conflict with, are entirely foreign to Hindu law. The words "married women" do not occur in S. 9, but the subject-matter of the section is foreign to Hindu law and in my opinion this section also does not apply where either of the spouses was at the time of the marriage a Hindu.

Then as to S. 6, the words "married women" do not occur in the section. The section no doubt is in the interest of the wife and children but its primary object is to enable a man to make provision for his wife and children by insuring his life for their benefit without executing a separate deed of trust. The section enables a Hindu male to do something which but for the section he would not be able to do. The result may be that Hindu woman derives a benefit but I do not feel bound to hold that she is shut out from this benefit by reason of the general enactment that the Act shall not apply to Hindu women. As Sankaran Nair, J., points out in the order of reference, S. 10, of the English Act of 1874 was split into two sections in the Indian Act, Ss. 5 and 6, which is consistent with an intention to make S. 6 applicable and S. 5 inapplicable to Hindus.

Section 2 only excludes the operation of the Act as regards the married women. There is no exclusion as regards children. If a Hindu male can take the benefit of the section for the purpose of providing for his children but is precluded from taking the benefit of the section in order to make provision for his wife, a curious anomaly arises, and a state of things is brought about which can scarcely have been intended by the legislature.

This suggested anomaly was met by the contention that a similar anomaly arose under the language of S. 6 itself, since the words "or any of them" only apply to children, and that a policy for the benefit of one or more children to the exclusion of the wife, did not come within the terms of the section. The words of the Indian Act are the same as those of S. 10 of the English Act of 1874 (except that the English Act says "be deemed to be a trust for the benefit of his wife and of his children or any of them," whilst the Indian Act says "be deemed to be a trust for the benefit of his wife, or of his wife and children, or any of them)."

These words may be ambiguous, but, in S. 11, of the English Act of 1882, we have the words "for the benefit of his wife or of his children, or of his wife and children, or any of them." This makes the matter quite clear, and, in my opinion, this is the sense in which we should construe the words in S. 6, of the Indian

Act of 1874. This seems to dispose of the argument that the section itself creates an anomalous distinction between wife and children.

There are three possible views, as it seems to me:

(1) That the section does not apply to a policy of insurance, effected by a Hindu male.

(2) That it applies to a policy effected by a Hindu male for the benefit of his children, but not to a policy effected for the benefit of his wife.

(3) That it applies to a policy effected for the benefit of his wife or of his children, or of his wife and children, or any of them.

In my opinion the third view is the right one. S. 6 dispenses with the necessity for a separate deed of trust. It does not affect the law of contract or the law of trusts as regards the persons entitled to enforce the contract under the policy. When by virtue of the section a trust is created, the person entitled to enforce the rights of the beneficiary is the trustee, if a trustee has been appointed, and if no special trustee has been appointed the Official Trustee to whom the money is payable under para. 2 of the section.

Limiting my answer to the first question, the question whether S. 6 of the Act applies, I would answer it in the affirmative.

The second question is: "Whether in cases similar to the one before us, the daughter is not entitled to enforce her claim against the insurance officer or a creditor." The first point to be considered is, assuming S. 6 (in accordance with the view I have already expressed) would apply if the facts brought the case within the section, whether this particular policy enures as a trust for the wife and children, or forms part of the estate of the assured.

In the case before us, the Insurance Company contracted to pay not the parties for whose benefit the policy purports to have been taken out, but the executors, administrators or assigns of the assured, whereas in *Oriental Government Security Life Assurance Co. Ltd., v. Vantedu Ammiraju* (1) and in the Maybrick case *Cleaver v. Mutual Reserve Fund Life Association* (17), the company

contracted to pay the parties for whose benefit the policy purported to be taken out. In the Maybrick case, the contract was to pay to the beneficiary.

In *Oriental Government Security Life Assurance Co. Ltd., v. Vantedu Ammiraju* (1) the contract was to pay to the trustees who might be appointed under the Married Women's Property Act and, failing trustees, to the beneficiaries. There is nothing on the face of the policy in the present case to indicate that it was for the benefit of his wife and children except the words "for the benefit of his wife and children," which are written in ink, in the printed form. There is no evidence as to how or when these words came to be written. For all we know they have been written in by the assured after the policy had been taken out. I will assume, however that the words "for the benefit of his wife and children" were part of the policy when the contract was made. How would the matter stand then? I do not think there would be a trust if the section did not apply. The legal interest in the policy money could not be said to vest in the executors in trust for the wife and children or in the company in trust for the wife and children, because the trust, if any, would, in my opinion, be, by reason of the operation of the section, and under the section itself, if no trustee is appointed, the legal interest vests in the Public Trustee. Further, so far as the company are concerned, they are under contractual obligation to pay the executors.

If the policy had been in the same terms as the policy in *Oriental Government Security Life Assurance Co. Ltd., v. Vantedu Ammiraju* (1), and the company had contracted to pay the parties for whose benefit the policy was taken out (and this is the assumption on which the order of reference was made), I think there would have been a trust under the section; but the person entitled to enforce the claim as against the company would have been, not the daughter, the beneficiary, but, if no trustee had been appointed, the party in whom, under the section the legal interest vests, viz. the Public Trustee.

As regards the case of *Oriental Government Security Life Assurance Co. Ltd. v. Vantedu Ammiraju* (1), the question

(17) [1892] 1 Q. B. 247=61 L. J. Q. B. 128=66 L. T. 220=40 W. R. 230=56 J. P. 180.

whether a male Hindu could take the benefit of S. 6, Married Women's Property Act, does not appear to have been argued. All that the learned Judges say upon the point is: "We may point out that the Married Women's Property Act is not applicable to Hindus." With all respect to the learned Judges, I cannot accept this proposition in its entirety. For the reasons I have stated, I think a male Hindu can take the benefit of S. 6.

If the view taken by the learned Judges as to the Married Women's Property Act was right, I should agree with their conclusion in that case, that no cause of action arose to the beneficiaries and that the policy moneys formed part of the estate of the assured, notwithstanding that under the contract the money was payable to the beneficiaries in default of trustees. In the *Maybrick* case, on the facts, the trust created by the Act ceased to exist. The policy moneys therefore formed part of the estate of the assured and were payable to his executors. In the case of *Oriental Government Security Life Assurance Co. Ltd., v. Vantadu Ammiraju* (1), in the view taken by the Judges with regard to the Married Women's Property Act, S. 6 did not apply, and no trust, in my opinion, was created apart from the Act. The moneys, therefore as it seems to me, were payable to the executors, since the wife was no party to the contract with the company. The decision of the Privy Council in *Nawab Khwaja Muhammad Khan v. Nawab Husaini Begam* (7), has been relied upon as an authority in support of the contention that the daughter in the present case can enforce the contract, but in the Privy Council case the facts were of a special character, and the agreement on which the plaintiff was held entitled to sue, though not a party thereto, gave her a charge on immovable property. I do not think the present case, on the facts, comes within the principle of the decision in *Nawab Khwaja Muhammad Khan v. Nawab Husaini Begam* (7).

There is no doubt, a special class of cases of which *Weston v. Richardson* (4) is an example. If a man insures his own life in his daughter's name, this may amount to a complete gift to the daughter so as to entitle her on her father's death to sue for the policy moneys. But the daughter can sue in

this class of cases because the fact that she is a daughter raises the presumption that there was an advancement to her by way of gift.

In the case before us it seems to me that any presumption that an advancement to a daughter is intended is rebutted by the words "for the benefit of his wife and children". I do not think we can hold that, although there is no gift to the wife under the doctrine of "advancement," there is a gift to such of the children as may be daughters.

My answer to the second question therefore is that the daughter is not entitled to enforce her claim as against the Insurance Office or against a creditor.

Sankaran Nair, J.—I agree with the Chief Justice that S. 6 of the Act applies to a policy of insurance effected by a Hindu male for the benefit of his wife or his children or of his wife and children or any them. I adopt the reasons given in his judgment.

The question whether there was an advancement by way of gift, as held by me in the order of reference, does not arise on the facts of the case. It is pointed out that the Insurance Office did not agree to pay the money to the daughter.

Tyabji, J.—I agree with the learned Chief Justice, except that on some of the points mentioned by him, I wish to express no opinion.

The first question referred to us is: "Whether Act 3 of 1874 applies to any Hindu married males or not."

Section 2 of the Act, so far as material, is as follows:

"Nothing herein contained applies to any married woman who, at the time of her marriage, professed the Hindu, Mahomedan, Buddhist, Sikh or Jaina religion, or whose husband at the time of such marriage, professed any of those religions." This clause (to which I shall hereinafter refer as the "saving clause") provides merely that nothing contained in the Act shall apply to any such married woman as is mentioned in the clause. It is not easy to determine with precision what is meant by "anything contained in the Act applying to a person," within the meaning of the saving clause. I wish to express no opinion, in any part of this judgment, on the point whether there may be provisions in the Act, altering the rights or liabilities of

a married woman, which provisions, by reason of their nature, or form, or otherwise, cannot be described as applying to a married woman within the meaning of the saving clause; in any case, provisions which do not alter the rights or liabilities of a person cannot, in my opinion be said so to apply to that person. Hence it would seem to follow that if any provisions contained in the Act affect the rights or liabilities of a person, Hindu or otherwise and whether married or not, then those provisions are not prevented from having full effect by reason of the saving clause, so long at least as those provisions do not come into operation by affecting in the first instance the rights of any such married woman

If the first question referred to us is meant to raise the point whether any provisions of Act 3 of 1874 are operative (in spite of the saving clause) in case a Hindu married male effects a policy of insurance—and the referring judgments contain indications to that effect—the main arguments before us also being based on the same interpretation of the question, then, in my opinion the answer to the question is that the Act operates at least in so far as it does not purport to affect the rights or liabilities of any such married woman as is referred to in the saving clause; as to whether or not the saving clause prevents the Act from operating in so far as it affects the rights or liabilities of any married woman under a policy of insurance effected by her husband, that question, obviously, does not arise on the facts now before us, because we have to deal with the rights of the daughter of the person effecting the policy of insurance, and not with the rights of his wife, and I express no opinion on the rights of the wife. The point that does arise is more definitely referred to us under the second question that we are asked to answer, and I will deal with it in answering that question.

The second question referred to us is as follows:

"Whether, in cases similar to the one before us, the daughter is not entitled to enforce her claim against the Insurance office or a creditor."

Section 6 of the Act lays down that "a policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the

benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed to be a trust for the benefit of his wife or of his wife and children or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband, or to his creditors, or form part of his estate."

The second question, as I understand it, is framed for the purpose of having it determined whether these provisions of S. 6 can be said to apply to defendant 1 in this case within the terms of the saving clause above referred to. That question, it seems to me, must be determined in the following manner: If, under the facts of this case, the rights or liabilities of defendant 1 would become altered on the supposition that those rights or liabilities are governed by S. 6, in that case alone and not otherwise may S. 6 be said to apply to defendant 1; and in that case we should have the further question to determine, whether defendant 1 is a married woman within the terms of the saving clause; for if she is such then her rights or liabilities are not to be altered by reason of the said section, but must continue to be the same as they would have been had the said section not been enacted.

The fact of the case now before us, in so far as this Court is concerned, are as follows: One Venkataratnam (to whom I shall hereafter refer as the "assured") insured his life for Rs. 1,000 under each of two policies of insurance Exs. 1 and 1 (a) which are in identical terms, and are dated 5th June 1888. The policies commence with a recital that the assured "hath proposed to effect an insurance for the benefit of his wife and children" with the Insurance Company. The latter portion of the insurance policy is not printed, but the arguments addressed to us were on the basis that each of the policies of insurance in question was "expressed on the face of it to be for the benefit of his (the assured's) wife, or of his wife and children, or any of them" within the terms of S. 6, and my judgment is on the same basis. It seems to me to be beyond our province to deal with the question whether defendant 1 acquires any interest and, if so, what interest, under the insurance policy. I confine myself to the question whether, assuming that the policy is

such as is referred to in S. 6, Married Women's Property Act, defendant 1's rights and liabilities, if any, are affected by S. 6, notwithstanding the saving clause leaving it to the Bench who have referred the case to determine the rights of defendant 1 on a construction of the policy. The assured died leaving one daughter and two sons (being respectively defendants 1, 2 and 3). The question arose whether, if it be a fact that some portion of the insurance money was payable to defendant 1 on the death of the assured, the portion formed part of the estate of the deceased and was thus payable to the creditors of the deceased, or whether it belonged absolutely to defendant 1, and, as such, was not liable to be attached in execution of the debts of the deceased. If S. 6 governs the rights of the parties, then (if the provisions of the policies be, as is above mentioned), the legal result will be that the policies "shall enure and be deemed to be a trust for the benefit of his wife, or of his wife and children, or any of them, according to the interest expressed (in the policies of insurance) and shall not, so long as any object of the trust remains, be subject to the control of the husband (the assured), or to his creditors, or form part of his estate." Speaking with reference to the facts of this particular case, if S. 6 governs them, then, assuming that the policies in question are of the nature referred to in S. 6, the interest of defendant 1 under the policies or the moneys payable to defendant 1 by reason of them, will not be capable of being attached in execution of the plaintiff's decree; otherwise the interest of defendant 1 under the policies will form part of the estate of the assured, and be subject to attachment by his creditors.

Therefore it seems to me, that we must hold that the operation of S. 6 would affect the rights or liabilities of defendant 1 if it governs the facts of this case; or to use the expression contained in the saving clause it would, in that case, *prima facie*, apply to defendant 1.

Is then the operation of S. 6 on the rights of defendant 1 prevented by the saving clause? I think not. The said clause says that "nothing in the Act shall apply to a married woman." In order that the saving clause should have any

bearing upon the operation of a provision contained in the Act and affecting any person's rights or liabilities, it is necessary, not only that that person's rights or liabilities should be affected by that provision of the Act, but it is also necessary that that person should be such a married woman as is referred to in the clause. It seems to me that defendant 1 cannot be taken to be included within the description of a "married woman" within that clause. It is true that defendant 1 may, as a matter of fact, be married, but I think that, for the purposes of the question before us, the expression "married woman" cannot refer to any woman other than one who is married to the assured. I express no opinion on the point whether it would refer even to the women married to the assured. All I hold is that it does not refer to the daughter of the assured, even if she is married: it is obvious that the rights of defendant 1 do not arise in any way out of the application of any part to the Act to a married woman, unless defendant 1 is herself a married woman within the Act.

Hence, in answer to the second question referred to us, I would say that the daughter's rights under the insurance policies are affected by S. 6, Married Women's Property Act, and that the operation of that section on her rights is not prevented by the saving clause.

The second question referred to us apparently involves not only the point with which I have dealt, viz. whether or not S. 6 of the Act operates on the incidents of policy of insurance effected by a Hindu married man and expressed on the face of it to be for the benefit of his wife or of his wife and children or any of them, but it also involves the further point whether, in either alternative, on the construction of the particular policies before us, defendant 1 is or is not entitled to enforce her claim against the Insurance Office or a creditor. The latter point does not seem to me to have been alluded to in the referring judgments nor in the arguments before us as I understood them. The operative portion of the policies has not as I have already said, even been printed. For these reasons, I desire, with deference, to express no opinion on the construction to be placed upon them, except in so far as appears from my judgment.

What I have stated above is enough in my opinion, for furnishing answers to the questions referred to us so far as those questions are really contemplated by the order of reference. If the mode of dealing with the matter which I have adopted is correct, then the allusions to the policy underlying the Act, which were made by the learned Judges who referred the case to us, need not be considered. According to the opinion expressed in those judgments, it would appear that, if defendant 1, instead of being the daughter of the assured, had been his wife, her rights would equally have been governed by S. 6, Married Women's Property Act, as the operation of that section on the wife's rights would equally have been unaffected by the saving clause. I am conscious that if the reasoning on which I have proceeded in this judgment is correct and the results arrived at on the basis of that reasoning are not to be modified by any other considerations, then the rights of the widow of the assured might have to be held to be different from the rights of his daughter inasmuch as the rights of the daughter have been determined by me on the basis that S. 6 of the Act governs them, whereas the rights of the widow might have to be determined on the basis that the effect on them of S. 6 of the Act is excluded by the saving clause, because the reasons, which I have referred to as being sufficient to prevent the applicability of the saving clause to the rights of the daughter, may have no bearing in a case where the rights of a widow are in question. This result would, no doubt be anomalous, but it would be so only if I had expressed the opinion that the Act should be construed solely on the principles adopted in this judgment, even where the rights in question are those of the widow under S. 6 and that there is nothing in the policy of the legislature or otherwise to show that the saving clause was not intended to interfere with the operation of S. 6 upon the rights of even the widow. If a construction can be put upon the Act which would bring about the result of giving to the widow the same rights, as according to my view the daughter has under the Act, it would not necessarily be opposed to the reasoning adopted in this judgment. But I do not feel called upon to express any opinion on that point at present; I allude to it as,

in the first place, I wish to guard myself from appearing to lay down that because I have pursued a particular mode of interpreting this Act in order to arrive at a decision on the questions now before us, that mode of interpreting the Act may not have to be modified by taking into consideration other matters when the question relates to the rights of the widow. I have construed the Act in accordance with the strict meaning of its terms because I find that it would do violence to the language of the Act to hold that the saving clause prevents the daughter's rights from being governed by S. 6 of the Act. I do not base any part of my judgment on the considerations on which my learned brothers rely, viz., the general policy of the legislature, because for the purposes of the questions now before us, it is unnecessary to rely on those considerations; and I find that on a strict consideration of the Act the result at which I arrive is the same as would be arrived at on a consideration of what my learned brothers have stated to be the underlying policy of the Act. It is unnecessary to express any opinion on the point whether those considerations would require or permit of the same result being arrived at when the person whose rights are in question is not the daughter but the widow of the assured.

S.N./R.K.

*Referenced answered.***A. I. R. 1914 Madras 609**

WALLIS, J.

K. R. V. Firm—Plaintiff.

v.

Sathyavada Sitharama Swami and others—Defendants.

Civil Suit No. 7 of 1912, Decided on 10th September 1913.

Limitation Act (9 of 1908), Ss. 19 and 20—Payment or acknowledgment by partner though usual and necessary does not bind others—Authority must be proved.

To render one of several partners liable by reason of a written payment or acknowledgment by another it is not enough to show that the payment or acknowledgment was an act necessary for or usually done in the course of the partnership business.

Authority to act on behalf of the other partners cannot be presumed. It must be proved: (*Case law referred*).

[P 612 C-1]

*C. P. Ramaswami Aiyar—*for Plaintiff.*T. S. Rajagopala Aiyar—*for Defendant.**Judgment.**—This is a suit by the plaintiff a firm of merchants carrying on busi-

ness in Madras against the three defendants who are brothers alleged to be carrying on business in partnership in the mofussil for the price of goods sold and delivered with interest according to agreement and the plaint alleges that accounts were settled on 7th January 1909 when Rs. 3,976-0-6 were found due to the plaintiffs and defendant signed for that amount in the books of the plaintiffs. Defendants 1 and 3 do not contest the suit. Defendant 2 has filed a written statement in which he denies carrying on business in partnership with defendants 1 and 3, and says that the business belonged exclusively to defendant 1. He also denies that the business was a family trade and says there was no meaning in calling the defendants members of an undivided Hindu family as there is no family property. He also pleads that the suit is barred by limitation.

The transactions with defendant 1 are proved and are not barred owing to the acknowledgment by defendant 1. There must therefore be judgment against him in any event. As regards defendant 2, I find it proved against him that he was a partner with defendant 1. His denial that he had anything to do with the business is contradicted by the letters exhibited in his own writing. It is clear that the defendants were undivided and were working together for profit in the business and this it seems to me renders them partners within the definition in S. 239, Contract Act. The business was no doubt carried on in the name of defendant 1 as appears from the plaintiff's ledger but there is nothing unusual in that. In the box, defendant said something about being divided in status but not by metes and bounds. In the written statement however he did not deny he was undivided but only that there was any joint family property and before he went into the box his vakil had expressly admitted that he was undivided and that judgment must in any event be given on that basis.

As regards limitation it is contended that the written acknowledgment by defendant 1 of January 1909 does not affect the other defendants and that the suit is barred as against them under two recent decisions of this Court in *Valasubramania Pilai v. S. V. R. M. Rama-*

nathan Chettiar (1) and *Sheih Mohideen Sahib v. The Official Assignee of Madras* (2). This is a question of very great importance because written acknowledgments such as this are a very ordinary not to say necessary incident of business at any rate in this part of India and any decision affecting their validity must have a far-reaching operation. As is well known the object of this legislation was to restrict the rule laid down by Lord Mansfield and the Court of King's Bench in *Whitcomb v. Whiting* (3) that any acknowledgment or payment by one co-debtor was sufficient to take the case out of the statute of limitation as regards the others. This was effected as to acknowledgments by Lord Tenterden's Act, 9 Geo. 4 C. 14 and as to payments by the Mercantile Law Amendment Act, 1856, 19 and 20 Vic. C. 97, S. 14. The Indian Act of 1859 dealing only with acknowledgments provided generally (S. 4) that "if more than one person be liable none of them shall become chargeable by reason only of a written acknowledgment signed by another of them."

The Act of 1871, S. 20, contained the following Explan. 2: "Nothing in this section renders one of several partners or executors chargeable by reason only of a written promise or acknowledgment signed by another of them." S. 20, Act 15, of 1877 provided that "nothing in Ss. 18 and 19 renders one of several joint contractors, executors or mortgagees chargeable by reason only of a written acknowledgment, etc." This is very near the language of Lord Tenterden's Act: "No such joint contractor, executor or administrator shall lose the benefit of the said enactments so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them." The main alteration for the present purpose is that, in the Indian Act, partners are mentioned separately and not included under joint contractors. It has never been held, so far as I know, that the specific mention of the word partners makes any difference. Construing the language of the English

(1) [1909] 2 I. C. 309=32 Mad. 421.

(2) [1911] 11 I. C. 332=35 Mad. 142.

(3) [1781] 1 Sm. L. Cas. (Edn. 10) 531=2 Dougl. 652.

sections, Starling, J., in *In re Macdonald, Dick v. Fraser* (4) said that the word "only" is emphatic and in *In re Tucker, Tucker v. Tucker* (5), Lindley, L. J., observed that "the object of the enactment was not to facilitate frauds by debtors upon creditors, but to protect debtors against stale demands," and Lord Herschell observed that "it was not intended to have any application where the payment was made by him for and on behalf of another co-debtor at his request." It had previously been held by the Court of Queen's Bench in *Goodwin v. Parton* (6) that one of two partners must be presumed in the absence of proof to the contrary, to have authority to make a payment on account of a debt due to the firm so as to take the debt out of the statutes of limitation against the other. This case was affirmed by the Court of appeal in *Goodwin v. Parton* (7), and the same presumption is treated as applicable to acknowledgments in Lindley on Partnership and other text-books though I have not found any express decision on the point. In *Khoodee Ram Dutt v. Kishen Chand* (8), a case under the Act of 1871, where a question arose as to how far an acknowledgment by one partner was binding on another, the Court seems to have been of opinion that if by the ordinary rules of partnership, such an acknowledgment would be binding on the other co-partners that would be sufficient but the language is not very clear.

In *Premji Ludha v. Dossa Doongersay* (9), Scott, J., ruled: "It must be shown that the partner signing the acknowledgment had the authority, express or implied, to do so. In a going mercantile concern such agency is, I think, to be presumed as a rule: see Lindley on Partnership; *Goodwin v. Parton* (6)," but he held, following *Watson v. Woodman* (10), that as the partnership had ceased to be a going concern when the acknowledgment was made, it was not binding, as the presumption no longer applied. In *Gadu Bibi v. Parsotam* (11), the Allahabad

High Court referred to this decision with approval and held that where an acknowledgment was effected in the ordinary course of business of the firm and was such a transaction as was contemplated in S. 251, Contract Act, it was sufficient to save limitation. In *Dulsukhram v. Kalidas* (12), Candy, J., referred to Scott, J.'s ruling with approval, and stated that it had been approved by Sargent, C. J., in an unreported case, but the Court eventually sent down an issue whether assuming the partnership to have been existing when the acknowledgment was made, such acknowledgment was or was not an act necessary for or usually done in carrying on the business of the partnership (S. 251, Contract Act), in which case they held it must be taken to have been done under the authority of the other partners. Here it may be observed that S. 251, Contract Act, 1872, which was subsequent to the Limitation Act 9 of 1871, S. 20, in which partners are expressly mentioned, is quite general in its terms and makes no exception as to payments and acknowledgments made in the necessary or ordinary course of the partnership business. Now if, as here held, it be enough to show that the acknowledgment was an act necessary for or usually done in carrying on the business of the partnership, that would seem to conclude the question so far as relates to trading partnerships in this part of India. It is the almost invariable practice of trade creditors here to insist on a written acknowledgment in their books being made by the debtors as a condition of giving credit and engaging in further transactions no doubt as a safeguard against idle and dishonest defences being set up if they should ultimately be obliged to sue. Such acknowledgments are made, as a matter of course, by the trade debtors, whether carrying on business singly or in partnership and are forthcoming in almost every suit for the price of goods sold and delivered. This is a matter within the daily experience of Courts of first instance and I think they are entitled to take judicial notice of it, if relevant, and need not require it to be proved by evidence in each case.

Coming now to the decisions of this Court, it was held by Subramania Aiyar and Boddam, JJ., in *Rajaopala Pillai*

(12) [1902] 26 Bom. 42=8 Bom. L. R. 484.

(4) [1897] 2 Ch. 181=66 L. J. Ch. 630=76 L. T. 713=45 W. R. 628.

(5) [1894] 3 Ch. 429=63 L. J. Ch. 737=12 R. 141=71 L. T. 453.

(6) [1879] 41 L. T. 91.

(7) [1880] 42 L. T. 569.

(8) [1877] 25 W. R. 145.

(9) [1886] 10 Bom. 358.

(10) [1875] 20 Eq. 721=45 L. J. Ch. 57=24 W. R. 47.

(11) [1888] 10 All. 418=(1888) A. W. N. 93.

v. *Krishnasami Chetty* (13), that where a partnership is dissolved by the death of one of the partners, the surviving partners cannot bind the representatives of the deceased partner by their acknowledgment of a debt of the firm unless they are specifically authorized to do so. Here the learned Judges would appear to have been of opinion that but for the previous death of the partner, the acknowledgment would have been binding but the point did not arise directly. The first case on which the defendant relies is a decision of the learned Chief Justice and Abdur Rahim, J., in *Valasubramania Pillai v. S. V. R. R. M. Ramanathan Chettiar* (1). In that case, the learned Judges dissented from the ruling of Scott, J., in *Premji Ludha v. Dossa Doongersey* (9), that in a going mercantile firm agency is to be presumed, which they treated as obiter, and laid down that something more must be shown, that there must be "some evidence that in the course of business the partners who made the payment had authority to do so on behalf of the firm." If I understand the learned Judges rightly, they were of opinion that it was not enough to show that the payment was an act necessary for or usually done in the course of partnership business, S. 251, but there must be evidence as to the authority of the partners who made the payment. The argument is not reported and it does not appear if the decision in *Goodwin v. Parton* (6) was not brought to the notice of the Court or was regarded as inapplicable. The next case, *Sheik Mohideen v. Official Assignee of Madras* (2), was a decision of the learned Chief Justice and Sankaran Nair, J. In that case the acknowledgment had been made by the partner in charge of a branch with reference to a debt contracted by that branch, and the learned Judges held on appeal from a decision of my own, that there was no evidence that the partner making the acknowledgment had authority to do so on behalf of the firm, and that it was not a legitimate inference for the fact of his being in management that he had such authority.

In this case, *Dalsukram v. Kalidas* (12) was referred to as well as *Premji Ludha v. Dossa Doongersey* (9), but the Court was of opinion that it did not help the respondent-plaintiff. The conclusion, to

which I have come on the examination of the authorities is that there is a conflict between the decisions of the Bombay and Allahabad High Courts and the decisions of this Court. According to the former, it is enough to show that the payment or acknowledgment was an act necessary for or usually done in the course of the partnership business to make it operative when done by one partner against the others. According to the two Madras decisions, evidence of authority from the other partners is necessary and cannot be presumed. These decisions are binding on me though I confess I should be glad either to see them reconsidered or the law altered, because there is no real doubt in these cases about the acknowledgment being made with the knowledge and consent and for the benefit of all the partners, though the creditors may have no means of proving this, so that the effect of the more stringent rule is to facilitate fraud by debtors upon their creditors.

Coming now to the evidence is the present case, all that appears in that defendant 2's letters two years before the date of the acknowledgment show that a settlement, as it is called, was contemplated of which a signature in the plaintiff's books would be a usual and necessary incident, and that they (plural) were coming to Madras to make it; that the plaintiff carried on business in Madras and the defendants in the Godavari District, and that defendant 1 came up to Madras and signed the acknowledgment in the books of the plaintiff's firm. Ex. A is as follows: "Remaining debit balance Rs. 3,976-0-6. We bind ourselves on demand to pay to the plaintiff's order to persons possessing this order at Madras Rs. 3,976-0-6 being the principal together with interest thereon at 1 per cent per mensem from this date.

Sathyavada Sitharamaswami,

(Defendant 1's signature)."

The business was carried on in the name of defendant 1; and it is argued for the plaintiff that the use of the plural verb in the original shows that he was acting on behalf of others as well as himself and this is borne out by the interpreter. It may therefore I think, be taken that the acknowledgment purports to be made by defendant 1 not merely on his own behalf but on behalf of the firm. There is also

evidence that defendant 1 was in the habit of going to Madras and making payments on account of the firm. This evidence however does not show that defendant 1 was authorized to make the acknowledgment in question on behalf of the others, and following the decisions already referred to, I hold that the suit is barred as against defendants 2 and 3. I may say I attach no importance to defendant 2's statements in the box that the business had stopped two years previously as his evidence as a whole shows he is not entitled to any credence, and the reference to stopping on account of cholera in one of his letters does not clearly refer to stopping business and in any case to more than a temporary stoppage. There will be judgment for the amount claimed with further interest at contract rate to date and costs with further interest at 6 per cent against defendant 1 and against defendants 2 and 3 to the extent of the joint family properties in their hands.

S.N./R.K.

Suit decreed.

*** A. I. R. 1914 Madras 613**
Full Bench

WHITE, C. J., AND SANKARAN NAIR
AND TYABJI, JJ.

Mare Gowd—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 604 of 1912 and Criminal Revn. Petn. No. 496 of 1912, Decided on 20th March 1913, from order of 1st Class Sub-divisional Magistrate Bellary, D/- 2nd September 1912.

*** Criminal P. C. (5 of 1898), S. 125—District Magistrate is competent at any time to cancel bond under S. 107 or S. 118, if evidence not sufficient.**

A District Magistrate is entitled to entertain a petition under S. 125 to cancel a bond to keep the peace, executed by a person in pursuance of an order of a First Class Magistrate under Ss. 107 and 118, on the sole ground that the evidence before the Magistrate did not justify him to pass the order. [P 620 C 2]

Tyabji, J.—The words "at any time" in the section mean, "however early or however late." [P 622 C 1, 2]

J. C. Adam for *S. Swaminathan*—for Petitioner.

Public Prosecutor—for the Crown.

Order of Reference.

Benson, J.—The question before us in this case is as to the powers of a District Magistrate under S. 125, Criminal P. C.

The facts briefly are as follows:

The Deputy Magistrate, acting under S. 107 and S. 118, Criminal P. C., directed the petitioner to execute a bond to keep the peace. The petitioner did so and then petitioned the District Magistrate to act under S. 125, Criminal P. C., and to set aside the order of the Deputy Magistrate and to cancel the bond. The ground alleged by the petitioner was that the Deputy Magistrate had no sufficient reasons for requiring him to execute the bond. The District Magistrate refused to entertain the petition, stating: "I hold that I have no power to entertain this petition." We are now asked to revise this order of the District Magistrate.

I am of opinion that the view taken by the District Magistrate as to his powers under S. 125 is incorrect. The section runs as follows: "The Chief Presidency or District Magistrate may, at any time, for sufficient reasons to be recorded in writing, cancel any bond for keeping the peace or for good behaviour executed under this chapter by order of any Court in his district not superior to his Court."

It will be observed that the words of the section are very wide. The District Magistrate "may, at any time, for sufficient reasons, cancel such a bond," i. e., for reasons which appear to the District Magistrate, in the exercise of a sound judicial discretion, to be sufficient. If the District Magistrate, in the exercise of a sound judicial discretion, is of opinion that the bond ought never to have been required, is not that a sufficient reason for cancelling the bond? I can find nothing in the section to qualify or restrict the ordinary and natural meaning of the language used, or to indicate that "sufficient reasons" means reasons in connexion with something which occurred after the execution of the bond.

The words of the section: "at any time" (which are not found in the corresponding S. 500 of the Code of 1872, but were introduced when the sections were recast in the Code of 1882) seem to point to the same conclusion. If the District Magistrate may, within a few minutes of a Subordinate Magistrate exacting the execution of a bond, cancel it, it could hardly be in consequence of anything that occurred after the execution of the bond. The view that I take was unanimously taken by a Full Bench

of five Judges of the Calcutta High Court in the recent case of *Nabu Sardar v. Emperor* (1), overruling a contrary decision of a Bench of the same Court in the case of *Barka Chandra Dey v. Janmejy Dutti* (2). It is also the view taken by Knox, J., in two cases reported as *Emperor v. Abdul Rahim* (3).

There has been much discussion as to the nature of the jurisdiction vested in the District Magistrate under S. 125, that is, whether it is an original, or an appellate or a revisional jurisdiction. I do not however think that the existence of the jurisdiction should be doubted or that its extent, according to the plain language of the section, should be curtailed, because of apparent difficulties in classifying the nature of the jurisdiction with reference to other sections of the Code. I say apparent difficulties, because I think that on examination they will not be found to be insuperable. It is, I think, clear from Ss. 404 and 406, Criminal P. C., that no appeal is allowed in regard to an order to execute a bond to keep the peace, and, consequently, the jurisdiction, given under S. 125 cannot be regarded as an appellate jurisdiction. This is what was expressly held in the case of *In re. Chet Ram* (4) and by Tudball, J., in the case reported as *Banarsi Das v. Partab Singh* (5), but the decisions did not go beyond that point, or state that the District Magistrate had not any revisional powers under S. 125. The distinction is of importance, for if there is a right of appeal, the appeal cannot be dismissed without giving the appellant an opportunity of being heard (S. 421, Criminal P. C.), whereas there is no similar provision in regard to petitions for revision.

Whether the jurisdiction given by S. 125 is to be regarded as original or revisional, depends on the circumstances which evoke the exercise of the jurisdiction. If the petitioner alleges that in the events that have happened since the execution of the bond, its continuance is no longer necessary and that it should

therefore, be cancelled, the jurisdiction invoked is clearly of an original, not a revisional character. But if the petitioner alleges that the order was made for insufficient reasons, and asks for the cancellation of the bond on this ground, the jurisdiction invoked is revisional in character. No doubt S. 125 does not, in terms, provide for setting aside the order to execute the bond. It only provides for the cancellation of the bond, but I take it that if the bond is cancelled by the superior Court on the ground that it ought never to have been required, the petitioner would be content with having obtained the substance, and would not be too curious in seeking for the express cancellation of the order. The omission to provide expressly for the setting aside of the order was, perhaps, due to a desire for simplicity of language, and to the fact that the section covers both the classes of cases to which I have referred, in one of which the original order was rightly passed, though the continuance of the bond is no longer necessary: and in the other of which the cancellation of the bond may be regarded as, in effect, depriving of any further importance, the original order which was wrongly passed.

It may also be observed that under S. 124 the District Magistrate may order a person imprisoned for failure to give security to be discharged, but the section says nothing about cancelling the order of the Subordinate Magistrate requiring the bond to be given. It can hardly be contended that the absence of a provision in the section for cancelling the order limits the power of the District Magistrate to discharge the prisoner to cases other than those in which the order of the Subordinate Magistrate was illegal or unnecessary at the time when it was made. The interpretation which I have given to S. 125 seems to me to be in accordance not only with its plain language, but the obvious convenience. The District Magistrate is the chief Magistrate responsible for the peace of the whole district; and it seems improbable that the legislature would restrict his power of control over the orders of his subordinate Magistrates when those orders are, in his more experienced judgment, unnecessary for the peace of the district. It is contended, however that he could always report

(1) [1907] 34 Cal. 1=11 C. W. N. 25=4 C.L.J. 428=4 Cr. L. J. 399 (F. B.).

(2) 32 Cal. 948=9 C. W. N. 860=2 Cr. L. J. 550.

(3) [1905] 32 Cr. L. J. 335=(1905) A.W.N 143.

(4) [1905] 27 All. 623=(1905) A. W. N. 135=2 A. L. J. 716=2 Cr. L. J. 329.

(5) 18 I. C. 351=11 A. L. J. 16=14 Cr. L. J. 63=35 All. 103.

the case to the High Court under S. 438, but that would seem to involve a lengthy and cumbrous procedure without any corresponding advantage. It may be pointed out also that the Chief Presidency Magistrate has power to act under S. 125, but it is not clear that he has any power under S. 438 or otherwise to report a case to the High Court for revision. If therefore the restricted scope of S. 125 contended for by the Public Prosecutor is correct, a wrong or illegal order made by a Subordinate Presidency Magistrate under Ss. 107 and 118, could not be interfered with by the Chief Presidency Magistrate himself, nor could he report the case to the High Court. This could hardly have been the intention of the legislature.

It is also suggested that if the legislature intended to give the District Magistrate revisional powers, they would have been given in Ch. 32, as in the case of wrongful discharges, but the answer is that there was no need to make any provision in that chapter as it had already been made in S. 125. I do not think that any argument can be drawn from the fact that the Sessions Court is a Court of reference for certain purposes under S. 123, for S. 125 is careful to exclude from its purview all such cases. In my opinion, then, the District Magistrate in the present case had power under S. 125 to entertain the petition to cancel the bond, and it was open to him, in his discretion, to consider whether there were sufficient reasons for requiring the petitioner to execute the bond and to cancel it if he found a sufficient reason for so doing. The fact that there was a prayer to set aside the order in pursuance of which the bond was executed could not deprive the District Magistrate of the jurisdiction given by the section to cancel the bond.

I would set aside his order and direct him to restore the petition to his file, and to deal with it in accordance with law as above stated.

I do not think that this Court should go into the merits in a case of this kind where the District Magistrate has jurisdiction, but has dismissed the petition on the ground that he has no jurisdiction. In Criminal Revision Case No. 17 of 1907, I refused to entertain a petition similar to the present petition on the ground that the matter was one within

the cognizance of the District Magistrate and no application had been made to him. It seems to me that he is in a better position than this Court to deal with this matter which relates to the peace of his district.

The same view was taken, and the same rule followed, in two cases by Knox, J., in *Emperor v. Abdur Rahim* (3), already referred to.

As however my learned brother does not agree with me as to the interpretation of S. 125, and as the question of law involved is one of importance and likely often to arise in practice, I think it desirable to refer to the decision of the Full Bench the question whether, in the facts of this case as stated by me, the District Magistrate was right in holding that "he had no power to entertain the petition."

Sundara Aiyar, J.—In this case, an order was passed by the Subdivisional First Class Magistrate of Bellary directing the petitioner in this Court, Mare Gowd, under S. 107, Criminal P. C., to execute a bond for keeping the peace. The petitioner moved the District Magistrate of Bellary under S. 125, Criminal P. C., to set aside the order and to cancel the bond. It is admitted that the application was based entirely on the ground that it was passed by the Subdivisional Magistrate on insufficient grounds. The District Magistrate held that he had no power to revise the order of the Subdivisional Magistrate under S. 125 as he was asked to do. This Court is asked to hold, in the exercise of its powers of revision, that the District Magistrate was wrong in declining jurisdiction.

The question for decision is whether the District Magistrate was right in the view he took of his powers under S. 125. The contention of Mr. J. C. Adam, the learned counsel for the petitioner, is that S. 125 confers plenary powers on the District Magistrate to cancel the bond executed for keeping the peace or for good behaviour on any good ground, whether because the order was wrongly passed, or because there was no further necessity for keeping the bond alive in consequence of a change in the circumstances of the case, or because, on fresh facts not presented to the Magistrate who passed the order but brought to the notice of the District Magistrate, th

order directing security to be given appears to be unnecessary. It is admitted that before a bond has been actually executed, the District Magistrate has no power under the section to set aside the order directing a person to execute a bond.

Mr. Adam relies on a decision of the Full Bench of the Calcutta High Court, *Nabu Sardar v. Emperor* (1), in support of his contention. The learned Public Prosecutor contends on the other hand, that the jurisdiction conferred by S. 125, on the District Magistrate cannot include the power to set aside the order of any inferior Magistrate as a Court of appeal or revision; and therefore also the power to cancel the bond executed in pursuance of the order on the ground that it was wrongly passed. This contention must, I think, be sustained. The different kinds of jurisdiction possessed by a superior Court over the proceedings of an inferior Court are described in the Criminal Procedure Code as those of a Court of "Appeal," "Confirmation," "Reference or Revision:" see S. 520. "Appeals" are dealt with in Ch. 31. "Reference and Revision" are dealt with in Ch. 32. "Confirmation" is dealt with in special sections relating to proceedings of an inferior Court requiring confirmation. S. 404 enacts that: "No appeal shall lie from any judgment or order of a criminal Court except as provided for by the Code or by any other law for the time being in force." No appeal is provided for either in Ch. 31 or in terms anywhere else in the Code against an order either under S. 106 or S. 107 directing security to be given to keep the peace, while an appeal is provided by S. 406 against an order passed by a Magistrate other than a District Magistrate, or a Presidency Magistrate, for security for good behaviour under S. 118 of the Code.

With respect to a District Magistrate's powers of revision, S. 435 entitles him to call for and examine the record of any proceeding before any inferior criminal Court. S. 436 empowers him to pass final order in revision in one class of cases; and S. 438 authorizes him to report to the High Court the result of his examination of the record in other cases for the orders of the High Court. There can be no doubt that both the Sessions Judge and the District Magistrate are empowered to report to the High Court an

order directing security for keeping the peace under S. 438 after examining the record under S. 435. It is unlikely that, if the District Magistrate was intended to be a Court of appeal or revision with respect to orders for security to keep the peace, provision would not have been made for it in Ch. 31 or Ch. 32. There is no apparent reason for not doing so and for providing an appeal or revision in another portion of the Code. Besides, it is unlikely that the words: "Appeal or Revision" would not have been employed in S. 125, if it was intended that the District Magistrate should be a Court of appeal or revision with respect to the order of an inferior Court for security to keep the peace. Again S. 125 refers to an order for security for good behaviour as well as to one for security to keep the peace. It is not likely that S. 125 also was intended to confer the powers of an appellate Court in the former class of cases when S. 406 expressly provides an appeal in such cases. An examination of some other sections in Ch. 8 (C), dealing with "proceedings in all cases subsequent to order to furnish security" leads to the same conclusion. S. 123, Cl. (2), makes the Sessions Judge a Court of reference with respect to all orders for security passed by Magistrates for a period exceeding one year, and the High Court a Court of reference for similar orders passed by a Presidency Magistrate. Is it likely that the District Magistrate would be made a Court of appeal or revision in a case where the Sessions Judge is made a Court of reference?

Section 124 gives the District Magistrate the power to release a person imprisoned for failing to give security ordered by any Magistrate of the District, including his own predecessor, where he is of opinion, that the release may be made without hazard to the community or to any other person. He may, on the same ground, reduce the amount of security or curtail the time for which security has been required. This is a power of the nature of original jurisdiction not questioning the legality or validity of an order passed for giving security. Where the order for security has been passed by the Court of Session or the High Court, the District Magistrate or the Chief Presidency Magistrate, as the case may be, may make a reference to the Sessions

Court and the High Court respectively, if he thinks that a person imprisoned for failing to give security may be discharged without any hazard. Such a reference also does not question the validity of the original order for security. It is unlikely that S. 125 immediately following the above sections and not expressly providing that the District Magistrate is to be a Court of appeal or revision intended to confer on him, powers of an appellate or revisional character. Moreover, if this were the intention, there is no reason for not enabling the District Magistrate to set aside the order for security and for providing only that he may cancel the bond after it has been executed. It does not seem to be permissible to interpret the power to cancel the bond as including the power to set aside the order for security.

A stronger reason for holding that the District Magistrate has no appellate powers under S. 125 is that he is empowered to exercise the power conferred by the section at any time. It is extremely improbable that appellate jurisdiction would be given to a Court without limiting the time within which such power might be exercised. The Calcutta High Court, in *Barka Chandra Dey v. Janmejy Dutt* (2), held that "the jurisdiction conferred by S. 125 is not an appellate or revisional but an original jurisdiction." This appears to be the only view consistent with the provisions of the Code already referred to. It is true that no bond had been actually executed in that case and the District Magistrate's order was therefore entirely wrong, and the opinion expressed by the learned Judges who decided the case may be regarded as only an obiter dictum. In *Nabu Sardar v. Emperor* (1), a bond for keeping the peace had been executed by the person ordered to do so. He applied to the District Magistrate for the cancellation of the bond. It does not appear on what ground he requested him to do so. Maclean, C. J., held that the District Magistrate may, under S. 125, cancel a bond for any reason which he thinks sufficient. He observed: "If he thinks that the bond ought never to have been required, is not that a sufficient reason? I should say so. There is nothing in the section to qualify or restrict the natural meaning of the language used, or to indicate that sufficient reasons mean reasons

in connexion with something which has occurred after the execution of the bond." Ghose, J., concurred in the observation. The questions referred to the Full Bench were: (1) "Has a District Magistrate power, under S. 125, Criminal P. C., to direct the cancellation of a bond to keep the peace executed on an order by a Subordinate Magistrate, on any other ground except that the bond is no longer necessary?" (2) Has the case of *Barka Chandra v. Janmejy Dutt* (2) been correctly decided?" It must be observed that in *Barka Chandra v. Janmejy Dutt* (2) it was observed that a bond could be cancelled under S. 125, only "if after a bond has been executed it is made to appear that by reason of the circumstances as they exist at the date of the application, that is circumstances subsequent to the date of the execution of the bond, the continuance of the latter is no longer necessary, the District Magistrate may cancel it."

The other learned Judges, who took part in *Nabu Sardar v. Emperor* (1) agreed in answering the first question in the affirmative and the second in the negative. That is, they held that the District Magistrate's power to cancel a bond was not confined to the case where the bond was no longer necessary and that *Barka Chandra v. Janmejy Dutt* (2), which held the contrary view, was not correctly decided. It is not quite clear whether they intended to concur in the Chief Justice's observation that the cancellation might be based merely on the ground that the order for security was wrongly passed. S. 125 merely states that the District Magistrate may cancel the bond "for sufficient reason." What would constitute a "sufficient reason" is not explained. S. 124 confines the power to discharge a person imprisoned for failing to give security to cases where there would be no hazard in releasing the accused. It is reasonable to infer that the "sufficient reason" referred to in S. 125 was intended to be wider than the reason mentioned in S. 124. At the same time, it would not be right to hold, for the reasons already mentioned, that the bond could be cancelled merely on the ground that the Magistrate who passed the order did so wrongly; for that would be to make the District Magistrate a Court of appeal or revision. The conclusion which this reasoning leads to is that

the District Magistrate must have power to cancel the bond not merely on the ground of something occurring after the execution of the bond which makes it right that it should be cancelled but on other grounds also which would not impeach the correctness of the order passed by the inferior Magistrate. For instance, it may appear from facts not known at the time when the order was passed, or not put before the Magistrate who passed it, that it would not be desirable or expedient to keep the bond alive. The jurisdiction conferred by the section must be held to be of an original character and not one intended to enable the District Magistrate to exercise the powers of a Court of appeal or revision. Having regard to the object of the section, namely to confer on the District Magistrate large powers in the matter of preserving the peace of the district, the section confers on him the power to hold a fresh investigation after a bond has been executed and to cancel it if he considers it proper to do so.

The District Magistrate's power of interference is therefore wider than it was held to be in *Barka Chandra Dey v. Janmejy Dutt* (2). Aikman, J., in *In the case of Chet Ram* (4) and Tudball, J., in *Banarsi Das v. Partab Singh* (5), took the same view as the Calcutta High Court did in *Barkat Chandra Dey v. Janmejy Dutt* (2). Knox, J. on the other hand, held the view adopted in *Nabu Sardar v. Emperor* (1), in two cases: see *Emperor v. Abdur Rahim* (3). The only case in this Court that has been cited is the judgment of Benson, J., in Criminal Revision Case No. 17 of 1907, but it does not appear that the learned Judge intended to lay down any rule as to the scope of the District Magistrate's powers under S. 125. He merely held that the High Court would not ordinarily exercise its power of revision to cancel a bond for keeping the peace when no application had been made to the District Magistrate under S. 125. Though the District Magistrate has a wide power under S. 125, an order for security to keep the peace, being the result of a conviction for an offence in cases where it is passed under S. 106, and of a comparatively simple and at the same time urgent character in cases where it is passed under S. 107, it was not considered neces-

sary to provide an appeal against it. It was deemed to be sufficient, if either the District Magistrate or the Sessions Judge should consider it necessary to do so, to report such cases for the orders of the High Court in revision. In the present case the District Magistrate was asked to cancel the bond merely on the ground that the Subdivisional Magistrate's order was wrongly passed. This he had no power to do. As he could do so only by exercising the powers of a Court of appeal or revision, the prayer that the order of the Subdivisional Magistrate should also be set aside was inadmissible. There is therefore in my opinion, no ground for interfering with the order of the District Magistrate in revision.

As my learned brother is of a different opinion, I agree to the order that the question whether the District Magistrate was right in holding that he had no jurisdiction to entertain the petition be referred to a Full Bench.

(This case coming on for hearing on Wednesday, 12th March 1913, upon perusing the order of reference to a Full Bench, and upon hearing the arguments of Mr. J. C. Adam, counsel for the petitioner, and of the Public Prosecutor, on behalf of Government, and the case having stood over for consideration till this day, the Court expressed the following:)

Opinion:

White. C. J.—I have had the advantage of reading the judgment which had been written by Sankaran Nair, J., and I agree with the conclusion at which he has arrived.

I think the view taken by the Full Bench of the Calcutta High Court in *Nabu Sardar v. Emperor* (1) was right.

I am of opinion that the Magistrate was wrong in holding that "he had no power to entertain the petition," and I would answer the question which has been referred to us in the negative.

Sankaran Nair, J.—The question for consideration is whether a bond to keep the peace executed by a person in pursuance of an order of a First Class Magistrate under Ss. 107 and 118, Criminal P. C., can be cancelled by the District Magistrate under S. 125, Criminal P. C., on the sole ground that the evidence before the Magistrate did not justify him in passing such an order.

An order under Ss. 107 and 118 is passed to prevent any person from committing a breach of the peace or from disturbing public tranquility. It is based upon evidence recorded as in summons cases. The amount of the bond must be fixed with due regard to the circumstances of the case and should not be excessive. The period for which security is required is to commence on the date of such order unless the Magistrate fixes a later date. Sureties also may be required by the Magistrate if he thinks it necessary and in default of such security the person against whom the order is passed may be committed to prison until he gives it or till the period of one year expires. Under S. 124, the District Magistrate may release any person who has not given such security if he is of opinion that it may be done "without hazard to the community or to any other person." Then comes the important section, S. 125, which runs in these words: "The Chief Presidency or District Magistrate may at any time for sufficient reasons to be recorded in writing cancel any bond for keeping the peace or for good behaviour executed under this chapter by order of any Court in his district not superior to his Court." Benson, J., held that if the District Magistrate is of opinion that the order is not supported by the evidence on the record it is open to him to cancel the bond. Sundara Aiyar, J., on the other hand, held that such bond can be cancelled only on the ground of something occurring after the execution of the bond which makes it right that it should be cancelled or on some other grounds which would not impeach the correctness of the order passed by the inferior Magistrate but that a District Magistrate has no power to cancel the bond on the ground that the order of its execution was made on insufficient grounds.

If we give the words "for sufficient reasons" in the above section their natural meaning then it would seem that the District Magistrate may set aside the order if he thinks that the evidence did not support the conclusion arrived at by the Subordinate Magistrate. That the evidence adduced does not warrant the conclusion is surely a sufficient reason for interference. If anything had happened after the date of

the passing of the order which made the continuance of the bond unnecessary that also would be a sufficient reason. If again the District Magistrate considered from any other information which was not placed before the Deputy Magistrate that any bond was unnecessary then also the section gives him the power to cancel the bond. Is there any reason then to restrict or qualify the ordinary meaning of the words used? It was argued that S. 125 refers to orders for security to keep the peace as well as to orders for security for good behaviour; that S. 496 gives a right of appeal against the latter class of orders; no such right of appeal is given in the former class of cases by any section of the Code, nor is any right of the District Magistrate to revise in terms recognized; it is therefore unlikely that S. 125 was intended to confer such powers. Now the power of interference with orders for security for good behaviour was given by the Criminal Procedure Code, S. 125, only recently. No inference can therefore be drawn from that provision and the right of appeal given by S. 406.

The fact that no right of appeal is given does not show that the District Magistrate may not exercise the powers usually vested in an appellate Court. In revision, for instance such powers are often exercised though the party has no right to be heard. Ss. 435 to 438 which refer to the revisional powers of the District Magistrate do not refer to the security cases as they have been already dealt with under S. 125. Moreover it has to be noticed that S. 125 admittedly enables the District Magistrate to interfere on grounds other than those disclosed by the evidence before the Magistrate who passed the order. A Court in the exercise of its appellate or revisional powers is confined to the evidence recorded. The section therefore conferred far larger powers than those of an appellate or revisional Court. The object of S. 107 indicates probably why it was considered inexpedient to give a right of appeal to the party while as the chief Magistrate responsible for the peace of the district, it may have been considered advisable to give him ample powers of interference. The order under Ss. 107 and 118 may result in simple imprisonment for one year. It

is hardly likely that such an order would be intended to be final. High Court's power of revision when the evidence is recorded only as in summons cases will seldom be invoked with success, and as no right of appeal is given, it is probable that S. 125 was intended to give the District Magistrate the right to review the evidence. An argument was based on the fact that S. 125 enables the District Magistrate only to cancel the bond, not to set aside the order. The bond may be cancelled not only for the reason that the order is wrong, but, though the order is right on the evidence before the Subordinate Magistrate, for other reasons the District Magistrate considers its continuance unnecessary. The order in such cases cannot be set aside. Again the order under Ss. 107 and 118 is not to keep the peace, but to execute a bond to keep the peace. With the execution of the bond, the order may be said to have spent itself. It is the bond then that remains to be cancelled.

Section 124 also supports this conclusion. It enables the District Magistrate to release any person imprisoned for failing to give security when he is satisfied that he might do so "without hazard to the community or to any other person," or, in other words, when there is no apprehension of any breach of peace or disturbance of public tranquillity as stated in S. 107. It is obvious that the District Magistrate may arrive at this conclusion on the evidence taken by his Subordinate Magistrate. If this power can be exercised only in the nature of original jurisdiction, it is probable it would have been conferred also, if not solely, on the Magistrate who originally passed the order. If he could do so under S. 124, he surely could do the same under S. 125.

It is also argued that the District Magistrate can interfere only after the bond has been executed or the party has been committed to prison. This is true. But it has to be pointed out that the period for which the security is required commences at the date of the order unless the Magistrate for sufficient reasons fixes a later date: S. 120. Therefore the party must execute his bond with or without surety at once, in which case the District Magistrate can deal with the matter under S. 125, or he is

committed to prison in default, when the jurisdiction of the District Magistrate conferred on him by S. 124 may be invoked. The power to fix a later date was only given recently. I see no reason therefore to depart from the natural meaning of the words, and agreeing with Benson, J., and the Full Bench of the Calcutta High Court, answer the question in the negative, i. e., that the District Magistrate is entitled to entertain a petition to set aside the order of the Deputy Magistrate as having been passed on insufficient grounds.

Tyabji, J.—The question we have to determine is whether the District Magistrate was right in declining to assume jurisdiction under S. 125, Criminal P. C. The section is as follows: "The Chief Presidency or District Magistrate may, at any time, for sufficient reasons to be recorded in writing, cancel any bond for keeping the peace or for good behaviour executed under this chapter by order of any Court in his district not superior to his Court."

According to the view of the section taken by the District Magistrate, in cases where it is contended that the bond should be cancelled and such contention is based on the same materials as those on which the order was originally made, there cannot be sufficient reasons" within the meaning of the section for cancelling the bond.

It is not suggested that there is anything in the section itself, or in any other part of the Code, to give a restricted meaning to the words "sufficient reasons." But my learned brother, Sundara Aiyar J., was of opinion that, when S. 125 is read with the rest of the Code, and due consideration given to its context, it appears that the nature of the powers conferred by the section is different from that which would result, if the section were read in its more liberal, and what seems to me to be its natural, sense. I shall refer to the construction of the section which would permit the Magistrate to cancel the bond without fresh material on the ground that the bond should never have been ordered to be executed, as the more liberal construction; and by the more restricted construction I mean the construction which has been put upon it by the District Magistrate and accepted by my brother, Sundara

Aiyar, J., and supported before us by the learned Government Pleader.

The first head of argument before us was that, if the section is read in its more liberal sense, it will have the effect of providing for an appeal from an order requiring a bond to be executed, and it is argued that it is indicated sufficiently by the Code that there is an intention on the part of the legislature not to permit of an appeal from such an order. This argument seems to me to assume, without sufficient grounds, that the jurisdiction that would arise, if S. 125 were read in its more liberal sense was considered by the legislature to be exactly in the nature of a power to entertain an appeal. It seems to me that it could not have been so considered. It is admitted that, whatever construction is placed on the section, the Chief Presidency or the District Magistrate may, if he chooses, cancel the bond on a consideration of fresh materials which were not before the Court ordering the execution of the bond. This is not generally associated with appellate powers. It is true that Courts with appellate jurisdiction have, in exceptional cases, the power to take fresh evidence, but they are, as a rule, required to give their decisions on the same materials as were present before the Court of first instance. Hence if the powers conferred by the section are liberally construed, they would not assume the form of appellate powers.

The argument above referred to seems to me equally to be incapable of withstanding a careful examination from another point of view: for, assuming that the section should be read in its more restricted sense and if therefore it is taken as providing for a review on fresh materials, then it would be more in conformity with the usual and recognized principles of the law of procedure to empower the Court that has made the order in the first instance to review that order, whereas in S. 125 it is contemplated that the Court which is asked to cancel the bond is, in most cases, different from the Court initially making the order. In other words, even if the section is read in its more restricted sense as contended for by the Government Pleader, the powers created by it do not coincide with powers of review. The fact that, in the great majority of cases, the power under S. 125 would be exer-

cised by the District Magistrate, coupled with the nature of the functions annexed to the office he holds, seems also to furnish an indication that whatever interpretation is given to S. 125, it cannot have reference to a jurisdiction exactly similar to that of a Court of appeal or of revision. Neither construction makes the powers created by the section conform exactly to the powers of a Court of appeal or of revision in either case, they are powers of a special and rather of an exceptional nature.

But assuming that the more liberal construction of S. 125 converts the jurisdiction conferred by it into that of an appellate Court, I fail to see that there is anything in the Code which would constrain us to hold that S. 125 ought necessarily to be so construed as to prevent its giving rise to powers of entertaining appeals. S. 404, Criminal P. C., which has been referred to in this connexion, lays down that "No appeal shall lie . . . except as provided for by this Code or by any other law . . ." It is not stated that "no appeal shall lie except as provided by Ch. 31 of the Code which deals with appeals," or even by Part 7 which deals generally with appeals, reference and revision." Hence, it would seem that the legislature did not contemplate the rest of the Code to be so interpreted that no appellate or revisional powers should arise under any portion of the Code except under Part 7 thereof.

The learned Government Pleader also argued that if S. 125 is read together with Ss. 124 and 126, it will appear that the power under each of these sections does not arise unless the original order to give security has been given effect to either by the obedience of the person against whom the order is made, or by imprisonment as a punishment for disobedience. Hence it is argued that it follows that the Court acting under S. 125 must proceed on the basis that the order requiring the bond to be executed was rightly made, and the section markedly omits to say that the Chief Presidency or the District Magistrate may set aside the order; and yet, if the said Magistrate cancels the bond on the same material that was before the first Court, it is evident that he, in effect, sets aside the order. This argument fails to convince me for two

reasons. In the first place, it seems to me that, for the reasons I have already indicated, the legislature in S. 125 contemplates a kind of jurisdiction which is different from that of an appellate Court or a Court of review. In the second place it seems to me that if I am right in the conclusion that the powers are different, and perhaps, in some respects, more extensive, and if I am right in assuming that the general nature of the functions exercised by the District Magistrate throws light on the nature of the powers conferred by S. 125, then it would be more in accordance with the scope of the section, as I interpret it, that the legislature should save the Magistrate from the necessity of expressing any opinion as to the correctness or the incorrectness of the original order where he is of opinion that the bond which had already been executed should be cancelled. In other words, in the view I take of the true construction of the section, the legislature intended the Magistrate to exercise the powers quite independently of the necessity to pronounce on the correctness or the incorrectness of the original order. This view, it seems to me, is supported by the nature of the jurisdiction created by S. 107, Criminal P. C., (under which the bond is originally ordered to be executed) and by the mode in which the legislature deals with orders passed under the section. It will be observed that these orders are not subject to appeal in the ordinary way: see S. 406 of the Code. The legislature apparently desired that no person should complain of an order to execute a bond for the purpose of preventing a breach of the peace or disturbance of public tranquillity: but what it does provide is that, if the exigencies of public peace and tranquillity have been sufficiently safeguarded, the authorities responsible for seeing that there is no breach of the peace, or disturbance of public tranquillity may have the power of bringing about a cessation of the operation of the measures, which they find to be no more necessary.

Both the learned counsel who argued the case before us sought to found an argument on the words "at any time" which form part of the section. I accept the interpretation put on those words by each of the counsel and think

that the words in question mean "how-
ever early or however late." Mr. Adam may make the application, as he suggested, half an hour after the order is passed, and the Government Pleader may make it when there is only one day left for the expiration of the period for which the bond had been executed; but neither can prevent the application of the other. If I am right that this is the effect of the words "at any time," it is plain that no argument can be founded on the basis that the meaning to be annexed to them can only be one of the two mentioned by the learned counsel to the exclusion of the other, and that, if they mean "however early," they imply that there is no time for fresh material being brought; if, on the other hand, they mean "however late," then they imply, in the first place, that the delay in obtaining fresh material is not to prejudice the applicant, and secondly, that the section cannot have reference to an appeal, time for which would ordinarily be limited.

For these reasons, I am of opinion that under S. 125, Criminal P. C., the Chief Presidency or District Magistrate may cancel the bond therein referred to, if the said Magistrate is of opinion that the Court ordering the execution of the said bond ought never to have so ordered.

S.N./R.K.

Reference answered.

A. I. R. 1914 Madras 622

SADASIVA AIYAR, J.

Sessions Judge of Cuddapah — Petitioner.

v.

Kondeti Obalesu and another—Respondents.

Criminal Misc. Petn. No. 36 of 1914, Decided on 6th February 1914, from order of Sess. Judge, Cuddapah, D/- 12th January 1914, in S. C. No. 2 of 1914.

Criminal P. C. (1898), S. 195—No sanction under S. 195 is required respecting forged documents when person producing it is no party to proceedings.

No sanction under S. 195 is required in respect of a forged document when the person producing it as evidence is not a party to the proceedings: 25 *Mad.* 671 and 9 *I.C.* 557, *Foll.*: 6 *I. C.* 529, *Diss. from.* [P 623 C 1]

Public Prosecutor—for the Crown.

S. Ranganadha Aiyar — for Respondents.

Order.—The learned Sessions Judge ought to have followed the law clearly

laid down by this Court in *John Martin Sequeira v. Laju Bai* (1), that where a person "was not a party to the proceedings in the Court in the case in which the alleged forged will was produced, no sanction for his prosecution was required." Assuming that the Bombay High Court took a different view in *In re Narayan Dhonddev Risbud* (2) (a report which is not available to me) the Sessions Judge was bound by the decision of this Court in *John Martin Sequeira v. Laju Bai* (1).

As regards the difference in language between S. 469 of the old Criminal P. C., of 1872 and S. 195 of the present Code, I see no essential difference in meaning and intent. The old section is worded thus: "A complaint of an offence relating to documents described in S. 463, S. 471, S. 475 or S. 476, I. P. C., when the document has been given in evidence in any proceedings in any civil or criminal Court shall not be entertained against a party to such proceedings, except with the sanction etc." The new S. 195 (c) is: "No Court shall take cognizance of any offence described in S. 463 or punishable under Ss. 471, 475 or 476 of the same Code, when such offence has been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except with the previous sanction, etc."

I think that both sections contemplate the necessity of sanction, only in case the offence which the Criminal Court is asked to entertain has been committed by a party to the proceeding in the other Court.

This is also the view taken in *Debilal v. Dhajadhari Goshami* (3), which refers with approval to *John Martin Sequeira v. Laju Bai* (1). I therefore do not accept the reference and direct the Sessions Judge to proceed with the trial of the prisoners committed to his Court.

S.N./R.K. *Reference not accepted.*

A. I. R. 1914 Madras 623

SADASIVA AIYAR AND SPENCER, JJ.

Palla Kanakamma — Plaintiff — Appellant.

v.

Challa Ramasami and others—Defendants—Respondents.

Second Appeal No. 935 of 1911, Decided on 3rd February 1914, from decree of Sub-Judge, Kistna, in Appeal Suit No. 280 of 1910.

Hindu Law—Widow—Agreement between widow and reversionary heirs settling reversion on latter is not legal.

A Hindu widow and the expectant reversionary heirs cannot legally enter into an agreement whereby the latter's expectant reversionary rights become converted into vested reversionary rights. [P 623 C 2]

P. Narayanamurthi—for Appellant.

P. Nagabushanam—for Respondents.

Judgment.—The only question in this case is whether a Hindu widow and the expectant reversionary heirs could legally settle the reversion on the said expectant reversionary heirs so as to give them a vested reversionary right in the properties inherited by the widow, that is, so as to convert the expectant reversionary right into a vested reversionary right.

Persons who have got only a spes successionis in certain properties, and a lady who has got no power of alienating or dealing with the reversion, cannot, it seems to us, so deal in advance with the rights in the reversion as to affect the reversion when it actually falls in.

The agreement under Ex. B between the said contingent reversioners, to divide after the widow's death the properties in which they had only a spes successionis, could not again legally give any vested right in half the property to either of the parties to the agreement. Whether, if the agreement was supported by consideration, a suit for specific performance of that agreement will lie at the instance of the legal representative of one of the two parties to the agreement against the other party, that is, whether the latter party could, when the reversion falls in to himself alone, be compelled to execute a registered conveyance of half the property to the said legal representative, that is a question on which it is unnecessary to express an opinion in this case as the plaintiff (appellant in this second appeal) brought his suit for partition on the basis that

(1) [1902] 25 Mad. 671=2 Weir 173.

(2) [1910] 6 I. C. 529=11 Cr. L. J. 368.

(3) [1911] 9 I. C. 557=12 Cr. L. J. 101.

Exs. A and B had already given him a vested right in half the lands, which right (according to the plaintiff in his plaint) had only to be enforced by this suit which was brought for partition and possession. The suit was not brought for the execution of a conveyance of half-share in the properties by defendant 1 to plaintiff, but it was only brought for partition and possession of the half-share already alleged to have been conveyed.

The point is also not taken in the second appeal memorandum, that the suit could be treated as one for specific performance. The second appeal fails and is dismissed with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 624

SADASIVA AIYAR AND TYABJI JJ.

Venkatasubbaiyar—Plaintiff—Appellant.

v.

Subbarathinam Aiyar and others—Defendants—Respondents.

Second Appeal No. 1370 of 1911, Decided on 20th February 1914, from decree of Dist. Judge, Trichinopoly, in Appeal Suit No. 179 of 1910.

(a) Assignment—Assignment of mortgage rights—Notice given to mortgagor—Mortgagor may pay to assignee if assignment is not cancelled.

Where a mortgagee assigns his rights under a mortgage bond to another, and gives notice of assignment to the mortgagor, the latter is entitled to treat the assignee as the person to whom the payment should be made, provided that before such payment the assignment has not been cancelled: 12 *I. C.* 532 and 19 *I. C.* 596, *Foll.*

A notice cancelling such an assignment, in order to be effective, should at least signify an intention to bring a suit to cancel it.

[P 627 C 1, 2]

(b) Assignment—Subsequent decree setting aside assignment does not affect payments previously made.

A decree, subsequently obtained setting aside the assignment, speaks only from its date, and does not effect payments previously made; 19 *I. C.* 656 *Ref.*

[P 627 C 2]

(c) Assignment—Assignment not denied but treated as void by mortgagee—Mortgagor is not bound to bring interpleader suit between mortgagee and assignee.

Where the mortgagee does not deny the assignment, but only treats it as one entirely void and of no effect, the mortgagor is not bound to bring an inter-pleader suit to make the mortgagee and the assignee interplead between themselves as to their respective rights under the assignment: 4 *I. C.* 420, *Dist.*

[P 628 C 1]

S. Sreenivasa Aiyangar and S. Varadachariar—for Appellant.

C. V. Ananthakrishna Aiyar and N. S. Rangasami Aiyangar—for Respondents.

Judgment.—Before disposing of this second appeal, we consider it desirable to have findings on the following questions:

(1) Whether before the receipt of Ex. 7 by defendant 1, Doraisawmy Iyengar had agreed to receive payment of the amount due on the hypothecation bond from the usufructuary mortgagees under Ex. 6, whether he had agreed to release defendant 1 and whether he had received any payment from the usufructuary mortgagees or from defendant 1.

(2) Whether before the receipt of Ex. 7 defendant 1 had entered into any and what contract, agreement or undertaking with Doraisawmy Iyengar with reference to the hypothecation debt?

(3) Whether any and what payments were made to Doraisawmy Iyengar before the decree in O. S. No. 235 of 1900, on the file of the Court of the District Munsif of Kulitalai?

The findings will be on the evidence on record.

The finding is to be returned within one month from the date of receipt of this order. Time for objections, seven days.

(In compliance with the order contained in the above judgment the District Judge of Trichinopoly submitted the following:)

Finding.—Before dealing with the matters on which I am asked to return findings I will briefly call attention to the pleadings in the plaint, and in the written statement, which appear to have been overlooked by the Subordinate Judge.

The plaintiff's averments are briefly as follows:

On 3rd July 1894, defendant 1 executed a hypothecation bond, Ex. 1 in favour of the plaintiff. On 3rd March 1897 the plaintiff executed a deed of assignment, Ex. 2 in respect of Ex. 1 in favour of Doraisawmy Iyengar and one Ranga Rao, and on 24th March 1897 sent a notice Ex. 3 to defendant 1 directing him to pay the amount of the bond to the said persons. On 29th September 1897, defendant 1 executed a usufructuary mortgage Ex. 6, in favour of Vembadi Moopan and Muthukaruppa Goundan

directing them to discharge Ex. 1. On 5th August 1897, the plaintiff sent a second notice to defendant 1 informing him that the assignment of 3rd March 1897 was void, and directing him not to pay any of the money due under the hypothecation bond to Doraisawmy Iyengar or Ranga Rao. No portion of the money has been paid by defendant 1 or by his mortgagees to the assignees under Ex. 2.

The defendants state that the date of the second notice is wrongly given in the plaint, that the notice is dated 15th October 1897, but seems to have been posted on 15th November 1897 and was received by defendant 1 some days later. They aver that defendant 1 executed the usufructuary mortgage deed Ex. 6, on 29th September 1897 for Rs. 2,600 and directed the mortgagees to pay Rs. 1,800 out of the consideration to Doraisawmy Iyengar for the suit bond in accordance with the plaintiff's notice Ex. 3. Doraisawmy Iyengar agreed to receive the Rs. 1,800 from the usufructuary mortgagees, and a balance of Rs. 230-1-6 remained due on 3rd October 1897, and he received the same on that date from defendant 1.

Issue 3 framed by the Subordinate Judge is:

"Whether the suit bond was not discharged by the execution of the mortgage of 29th September 1897 referred to in para. 9 of the plaint and by the payment of Rs. 230-1-6 alleged by the defendants.

Is the payment of Rs. 230-1-6 true?"

And issue 5 is: "Have the mortgagees under the deed of 29th September 1897 paid the suit debt?"

2. It would thus appear that at the time of the framing of issues there was no dispute between the parties as to the date on which Ex. 6 was executed; and indeed in view of the express statement in para. 9 of the plaint that the deed was executed on 29th September 1897, it was not, I think, open to the plaintiff to deny that Ex. 6 was executed on that date. The Subordinate Judge has entirely overlooked this, and has built up an argument on a theory, which he appears to have set up himself, that Ex. 6 was executed after the receipt of the second notice, Ex. 7. But this premise is not allowable in view of the plaintiff's pleading that Ex. 6 was executed on 29th

August 1897 and the Subordinate Judge's argument appears to me to be vitiated throughout by the error into which he has fallen in respect of this matter. In discussing the question sent down to me I shall accept the date given by the plaintiff as the date of the execution of Ex. 6, viz. 29th August 1897.

3. The first two issues on which I am asked to return findings are: (1) (a) Whether before the receipt of Ex. 7 by defendant 1, Doraisawmy Iyengar had agreed to receive payment of the amount due on the hypothecation bond from the usufructuary mortgagees under Ex. 6, (b) whether he had agreed to release defendant, (c) whether he had received any payment from the usufructuary mortgagees or (d) from defendant 1. (2) Whether before the receipt of Ex. 7 defendant 1 had entered into any and what contract, agreement or undertaking with Doraisawmy Iyengar with reference to the hypothecation debt.

In regard to issue 1 (a), (b) and issue 2, attention of the parties, no doubt, was not directed to these matters, but as the evidence stands I am of opinion that the defendants, on whom the burden lies, have not proved that before the receipt of Ex. 7 there was any agreement between the mortgagees or defendant 1 and Doraisawmy Iyengar that Doraisawmy Iyengar should receive payment of Rs. 1,800 from the mortgagees, or that Doraisawmy Iyengar agreed to release defendant 1. Defendant 1, examined as D.W.2, says that two or three days after the execution of Ex. 6, i. e., about 3rd October 1897, he got the payment of Rs. 1,800 undertaken by the mortgagees and himself paid Doraisawmy the balance which came to Rs. 230 odd. Doraisawmy himself, examined as D. W. 1, says that when defendant paid him Rs. 230-1-6, which is endorsed on Ex. 1 as having been paid on 3rd October 1897 he took him to the mortgagees and made them undertake payment to him which he agreed to receive from them. Vembadi one of the mortgagees under Ex. 6, examined as D. W. 3 states however that defendant 1 told him some time after the execution of Ex. 6 (say one month or so) that the money should be paid to Doraisawmy and that after registration (17th November 1897) defendant 1 brought Doraisawmy to him and pointed him out as the person that he should pay

while D. W. 5 the man who negotiated Ex. 6, says that defendant 1 brought Doraisawmy to his house and told him that he was the man that had to be paid before the registration of the document. The evidence as to the time when the various undertakings were entered into between Doraisawmy and defendant 1 and the mortgagees is thus both meagre and contradictory. My finding on issue 1 (a) and (b) and issue 2 is against the defendants.

4. The defendants' case is that the payments they plead were made by mortgagees to Doraisawmy were in March 1898 which was after the receipt of Ex. 7 by defendant 1. I see no reason however to doubt the evidence of defendant 1 that the payment of Rs. 230-1-6 was made by him to Doraisawmy on 3rd October 1897 the date on which payment is endorsed on Ex. 1. My finding therefore on issue 1 (c) and (d) is that Doraisawmy received payment of this sum from defendant before the receipt of Ex. 7, but that he received no payment from the usufructuary mortgagees before the receipt of the second notice.

5. Issue 3 on which I am asked to return finding is: "Whether any and what payments were made to Doraisawmy Iyengar before the decree in original Suit 235 of 1900 on the file of the Court of the District Munsif of Kulitalai?" The date of this decree is 22nd December 1900. I have already found that defendant paid Rs. 230-1-6 to Doraisawmy on 3rd October 1897. Payments by the mortgagees are endorsed on the document as having been made on 3rd, 4th and 10th March 1898. Doraisawmy (D. W. 1) speaks to the payment and says the last payment was made on 10th March 1898. D. W. 3 says D. W. 4 acted for him and that he paid D. W. 5, ten or fifteen days after the registration of Ex. 6 and the latter paid Doraisawmy and got possession of Ex. 1 which was handed to his co-mortgagee before the witness gave evidence in Original Suit 235. D. W. 5 says he paid Doraisawmy Rs. 1,800 with interest and wrote the endorsements on Ex. 1. If the payments were made I see no reason to doubt that they were made on the date on which payment is endorsed but it is urged for the plaintiff that there is reason to doubt that any payment was made at all and the plain-

tiff's vakil practically adopts the arguments set out by the Subordinate Judge in paras. 17 and 18 of his judgment. These briefly are (1) that the hypothecation bond (Ex. 1) was not produced at the hearing of Original Suit No. 235 of 1900 on the file of the Kulitalai District Munsif in which the present plaintiff sued for declaration that the assignment, Ex. 2, executed by him to Doraisawmy Iyengar and Ranga Rao was invalid as against him and for recovery of hypothecation bond Ex. 1, and (2) that it is improbable that defendant 1 after receiving Ex. 7, should not have informed his mortgagees of the risk involved in making any payments to Doraisawmy or that if he had so informed them they would have made any payment. Neither argument appears to me conclusive. Vembandi (D. W. 3) states that when he was summoned to produce Ex. 1 by the Kulitalai Court in Original Suit No. 235 he told the Court the document was not with him but with his co-mortgagee, Muthukarupa Goundan, who was in Salem.

The plaintiff's prayer in Original Suit No. 235 for the recovery of Ex. 1 was obviously unsustainable as the mortgagees under Ex. 6 were not parties and though it is true an issue was framed in that suit as to whether Ex. 1 had been discharged, it was no concern of the mortgagees to prove discharge, nor, so far as I can see, had the issue anything to do with the question for decision. As to the improbability of any payment being made by the mortgagees after the receipt of Ex. 7 by defendant 1, the latter states that on receipt of Ex. 7 he asked plaintiff if he would give him an indemnity against loss, offering in that case to tell his mortgagees not to pay Doraisawmy but that the plaintiff declined, and if this is true it seems to me more probable that defendant 1 would not have told the mortgagees anything about the second notice, for it was to his interest that they should pay Doraisawmy. Moreover defendant 1 sold the property usufructuarily mortgaged under Ex. 6 to the mortgagees in 1903 under Ex. 8, and part of the consideration for the sale is shown in the sale deed as Rs. 2,600 received as per Ex. 6. My finding on issue 3 is that defendant 1 paid Doraisawmy Iyengar Rs. 230-1-6 and that the mortgagees paid him Rs. 1,800 before the de-

cree in O. S. No. 235 of 1900, on the file of the Court of the District Munsif of Kulitalai.

(This second appeal coming on for final hearing after the return of the finding of the lower appellate Court upon the issues referred by this Court for trial, the Court delivered the following judgment :)

Sadasiva Aiyar, J.—I accept the facts as found by the lower appellate Court. Those facts are :

(a) That defendant 1 as mortgagor paid Rs. 230 odd in October 1897 to Doraisawmy Iyengar who had obtained the assignment from the plaintiff of plaintiff's rights as first mortgagee ; (b) that the person who obtained the second usufructuary mortgage from defendant 1 paid at defendant 1's request the balance of Rs. 1,800 and interest, due under the plaintiff's mortgage-bond, to the plaintiff's assignee in March 1898, after defendant 1 had got notice in November 1897 from the plaintiff that the assignment was obtained by coercion and undue influence ; (c) that defendant 1 has redeemed his second (usufructuary) mortgage by payment of money, including the money which the said mortgagee had paid to the plaintiff's assignee at defendant 1's request ; (d) that the plaintiff has by the decree Ex. D (passed in a suit of 1900) succeeded in having it declared as against the plaintiff's assignee Doraisawmy Iyengar that the assignment is not binding on the plaintiff.

On these facts it is admitted by the plaintiff (who is the appellant in the second appeal before us) that he ought to give credit (in his claim in this suit for money due under his mortgage-bond) to the 230 odd rupees paid by defendant 1 after the date of plaintiff's assignment to Doraisawmy Iyengar and before the date of the notice (Ex. 7) of November 1897 given by the plaintiff to defendant 1. The plaintiff however contends that defendant 1's second mortgagee's payment of Rs. 1,800 and interest in March 1898 was made at defendant 1's risk as it was made after the notice of November 1897. In the first place this notice (Ex. 7) is worded as if the assignment by the plaintiff to Doraisawmy Iyengar by registered deed was altogether a void transaction and not a

merely voidable transaction. There is no trace of an intimation by the plaintiff in Ex. 7 that he intended to bring a suit against Doraisawmy Iyengar to have the assignment set aside. On the other hand (as I said before) it treats the assignment deed as of no legal effect at all. Now defendant 1 would have had no defence to a suit by Doraisawmy Iyengar on the plaintiff's mortgage-deed if that suit had been brought before the plaintiff had the assignment set aside by a decree obtained in a suit brought by him (plaintiff) : see *Trimbak Bhikaji v. Shankar Shamrao* (1), *Raja Rajeswara Dorai (Rajah of Ramnad) v. Arunachellam Chettiar* (2) and 4 American Cyclopaedia, p. 62. Defendant 1 therefore was entitled and, in fact, bound to treat Doraisawmy Iyengar, as the owner of the mortgage right under the plaintiff's mortgage bond till the assignment was so set aside by the plaintiff (and the plaintiff may or may not choose to do so). Defendant 1 was not bound to wait to pay up the money due on the mortgage charge binding on his property to the person owning the legal right in the mortgage till the plaintiff so chose to bring a suit and to obtain a decree, divesting the plaintiff's assignee of the latter's rights under the assignment. A decree so obtained by the plaintiff against his assignee might have the effect of cancelling the assignment from the date of the assignment itself as between those two, but it cannot be given that effect as against those who were bound to treat the assignment as valid till it was set aside and who made payments accordingly to the assignee in order to protect and conserve their own rights and interests.

The case of *Sayam Ramamoorthi Dhora v. Secy. of State* (3) merely decided that a decree establishing A's title to a land as against B was binding on B if A's title was set up by C as against B even in a suit by B against C. I do not think that that case is relevant to the decision of the question now in dispute, namely whether payments made by a third person who is the owner of a land and who treated the assignee of a mortgagee over the land as the mortgagee entitled to receive the mortgage amount,

(1) [1911] 12 I. C. 532=36 Bom. 37.

(2) [1913] 19 I. C. 596.

(3) [1913] 19 I. C. 656=36 Mad. 141.

the payments having been made before the assignment was set aside by the assignor through the instrumentality of the decision of a Court of Justice, whether such payments could be questioned by the assignor as payments made to a person who had no right to receive such payments. In other words, can the assignor ignore such payments and compel the owner of the land to make the payments again to him? I think that he cannot do so. It may be that the third person after he got notice that the assignor was disputing the validity of the assignment might have brought an interpleader suit; but in the circumstances of the present case I think defendant 1 was not bound to bring an interpleader suit as the assignment, on the assignor's own case, was merely voidable and not void. An observation in *Gopalakrishna Iyer v. Gopalakrishna Iyer* (4) is relied on by the appellant's learned vakil. That observation is that "when the fact of the assignment" by the creditor "or its validity and operation is in dispute," the safest course for the debtor is to ask the assignor and the assignee to interplead and if he pays either of them, "he does so at his risk." I do not think that this observation applies to cases where the creditor does not deny the fact of the assignment and only pleads that it is voidable by him and where the third person acts as an ordinary and reasonably prudent man would do to protect his own interests. The plaintiff was asked by defendant 1 to give security against the plaintiff's assignee's claims and the plaintiff refused to do so. The plaintiff might have brought a suit at once against his assignee and obtained an injunction against defendant 1 and defendant 1's second mortgagee, preventing them from making payment to the plaintiffs' assignee, but he did not choose to do so. I therefore hold that the payments made to the plaintiff's assignee before the plaintiff brought his suit to cancel the assignment deed are binding on the plaintiff and I would dismiss the second appeal with costs.

Tyabji, J.—I agree generally.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 628

MILLER AND SPENCER JJ.

In re *Sinnu Gounden* and another—Accused.

Criminal Revn. No. 673 of 1913 and Criminal Ref. No. 95 of 1913, Decided on 22nd January 1914, from the orders of Dist. Magistrate, South Arcot, D/- 12th October 1913.

(a) Criminal P. C. (1898), S. 439—A complained against B under S. 426, I. P. C.—B arrested A on false charge of nuisance on trial date—Complainant A not appearing, B acquitted under S. 247—On A's application District Magistrate recommended new trial, but High Court declined to interfere—Acquittal order was held legal and that there was no legal error invoking revision.

A brought a complaint against B under S. 426, I. P. C. On the date fixed for the trial, B improperly procured A's arrest on a false charge of committing nuisance, and the Magistrate acting under S. 247, acquitted B because A, the complainant, did not appear. Upon A's application the District Magistrate referred the case to the High Court recommending that the order of acquittal may be set aside and a new trial directed but the High Court declined to interfere, inasmuch as :

(1) the order of acquittal was strictly in accordance with law; [P 630 C 1]

(2) it is a sound rule of practice not to interfere in revision when there is no error in law on the face of the record: 22 Cal. 998; 17 I. C. 403, *Foll.*; [P 631 C 2]

(3) there was an appeal from an acquittal: 2 Mad. 38; 14 Mad. 363; 25 All. 128 and 3 Bom. 150. *Foll.*; 2 Weir 457; 2 Weir 308; 7 Mad. 213 and (1891) A. W. N. 120, *Dist.* [P 632 C 1]

(b) Criminal P. C. (1898), S. 417—Appeals against acquittals cannot be limited to cases in which Court owing to error of law comes to wrong decision on evidence before them.

There is nothing in the language of S. 417, to limit appeals against acquittals to cases in which Courts have, owing to some error of law or misappreciation of evidence, come to a wrong decision on the evidence before them: 2 Cal. 273, *Foll.* [P 631 C 2]

(c) Criminal P. C. (1898), S. 417—Code does not distinguish right of appeal against acquittal from that against conviction.

There is no distinction under the Code between the right of appeal against an acquittal and the right of appeal against a conviction: 17 Cal. 485; 20 All. 459 and 7 P. R. 1904 *Cr.*, *Foll.* [P 631 C 2]

(d) Criminal P. C. (1898), S. 428—Additional evidence may be admitted in appeal against acquittal as well as against convictions.

Section 428 allows additional evidence to be admitted in appeals against acquittals as well as in appeals against convictions. [P 631 C 2]

(e) Criminal P. C. (1898), S. 403—Acquittal under S. 247 is bar to trial for same offence and District Magistrate cannot order re-trial.

Under S. 403 an acquittal under S. 247, Criminal P. C., operates as a bar to a trial for the same offence and a District Magistrate can-

(4) [1909] 4 I. C. 420=33 Mad. 123.

not order a re-trial of the acquitted person; 2 *Weir* 457; 2 *Weir* 308; 7 *Mad.* 213 and (1891) *A. W. N.* 120, *Foll.* [P 630 C 1, 2]

J. C. Adam—for the Crown.

Miller, J.—As the Criminal Procedure Code does not permit a Magistrate to review his judgment in the light of evidence subsequently obtained or to re-admit to his file a case in which the accused has been acquitted under S. 247 owing to the absence of the complainant, even if good reasons were shown for his non-appearance, I should hesitate without further consideration to hold that the legislature intended to permit this Court in appeal or revision to set aside an acquittal merely on the ground that fresh evidence is available which could not be produced at the trial, or on the ground that a complainant has shown sufficient reason for his failure to appear and prosecute his complaint before the Magistrate in a summons case. But in the present case we must take it that the acquittal of the accused under S. 247 was procured by his own trick: he himself is responsible for the complainant's failure to appear. The order was, we may say, obtained by a fraud on the Court, and though, even in these circumstances the Code does not permit the Court which made the order to vacate it on proof of the fraud, interference by this Court may be a proper exercise of our powers in revision, or possibly in appeal, to avoid a miscarriage of justice.

We have not been referred to any case in England in which certiorari has been had to quash an order of acquittal made by an inferior Court for fraud in the person procuring the order. There is a case, *R. v. Unwin* (1) (referred to in Archbold's Criminal Pleadings, Edn. 23, p. 132; 10 Halsbury's Laws of England, p. 197 foot-note) which seems to have been something like the present case and in which certiorari was refused, but I have not been able to see the report of that decision. But we have the authority of Archbold's Criminal Pleadings (Edn. 23, p. 292) for saying that a new trial after acquittal in a case of misdemeanour would be granted if the verdict had been obtained by irregularities committed by the defendant himself and though no case is there cited in which a new trial has actually been allowed on these grounds, the authority

of Archbold's Treatise is so high that it is not unsafe to accept it as correctly stating the principle on which the Courts would have acted in England in former days.

In India we have power to revise an order which is improper (S. 435, Criminal P. C.), and an order, though strictly in accordance with the law as in the present case, may, I think, be said to be improper if it was procured by the fraud or trick of the party asking for it, and would not have been made but for that fraud or trick. The order before us is one which but for the accused's deceit would not have been made in the circumstances, and so may be said to be an improper order though the Magistrate's action was strictly correct.

Our powers in appeal are not defined by the Code further than this, that an appeal may lie on a matter of fact as well as on a matter of law except in a case tried by a jury (S. 418). The Code does not expressly state whether these matters are matters appearing upon the record, matters, that is, which the inferior Court has or might have determined, or whether we are at liberty to admit an appeal on some extraneous matter which ought to have affected the decision, had it been known at the time of the trial, but which was not before the inferior Court.

I have not found a case in any of the High Courts which decides this point. In *Empress v. Prag Dat* (2), the learned Judges state as one of the requirements of an appeal that the ground for interference should be apparent on the record, but it cannot be said that they were deciding the present point.

But there is nothing in the Criminal Procedure Code to suggest that, so far as the right of appeal is concerned, there is any difference between the case of an appeal from a conviction and from an acquittal, and I should not like to hold that an appeal from a conviction could not be entertained, if based on the concealment of a material fact from the Court which conducted the trial. I agree therefore that in this case, the Local Government might have directed the filing of an appeal against the acquittal, and that being so, I agree also that we ought

(1) 7 Dowl. P. C. 578.

(2) [1898] 20 All. 459=(1898) *A. W. N.* 117.

to refuse to interfere on the District Magistrate's report of the case.

The District Magistrate is, no doubt, not the party entitled to appeal from an acquittal, but his report to the High Court is intended to move the Court to act under S. 439, Criminal P. C., that is, to act as a Court of revision and though it is made at the instance of the complainant it contains the District Magistrate's presentation of the case; and it seems to me that to entertain proceedings by way of revision on a District Magistrate's report in a case where an appeal would lie from an acquittal is contrary to the spirit, if not to the letter, of sub-S. 5, S. 439, Criminal P. C.

Spencer, J.—In this case, the complainant preferred a complaint of mischief under S. 426, I. P. C., on 14th June against two individuals; process was issued against them and the complainant was informed of the date of hearing in person. On 23rd June, the date fixed for the trial, the Magistrate acquitted the accused under S. 247, Criminal P. C., owing to the complainant not being present in Court when the case was called on. It subsequently transpired that the complainant had been kept out of the way by the action of the accused in getting a constable to arrest him on a false charge of committing nuisance, after he had come to Gingee where the Magistrate's Court was situated: see the judgment in C. C. No. 638 of 1913 on the file of the 2nd Class Magistrate of Gingee. Under these circumstances the District Magistrate has under S. 438 referred the case to the High Court for setting aside the order of acquittal and for directing a new trial.

The question for our decision is whether, assuming that the Second Class Magistrate would have exercised his discretion differently by adjourning the hearing to another day, had he been aware of the cause of the complainant's failure to appear, this Court acting as a Court of revision will set aside the acquittal and order a fresh trial.

Upon the materials before him when the order under S. 247 was passed, the Magistrate's procedure was strictly proper and in accordance with law. This section declares that the Magistrate shall acquit the accused unless for some reason, he thinks proper to adjourn the hearing of the case to some other day.

Such an acquittal, after the accused has appeared and answered to the charge, will operate as a bar to his being again tried for the same offence as he is a 'person "tried" by a Court within the meaning and for the purposes of S. 403, Criminal P. C.: *Suraiya Sastri v. Venkata Rao* (3). The Magistrate has no power to revive the proceedings, as there is no provision in the Code of Criminal Procedure resembling O. 9, R. 4, Civil P. C., by which a case can be restored to file by the Court which dismissed it; nor can the District Magistrate order a re-hearing: *Narayanasami Aiyar v. Janaki Ammal* (4), *Rangasami v. Narasimhulu* (5) and *Queen-Empress v Hardeo Singh* (6).

Coming next to a consideration of what are the powers of the High Court in such a matter, I think there can be hardly any doubt that if this matter came up for determination in a Court governed entirely by English law, the answer to the question whether the acquittal could be interfered with would be in the negative.

In English Courts the maxim of *nemo debet bis vexari* is given full scope. It has been repeatedly held in England that if an accused person has been once tried and acquitted upon the merits by a Court of competent jurisdiction so as to have been put in peril of conviction, he cannot again be tried upon the same charge, but if charged, he can successfully plead *autrefois acquit*. It is true that in *Reg. v. Scaife* (7) a new trial was ordered in a case where one of the accused indicted for felony procured the absence of a witness whose evidence taken before a Magistrate was read against himself and others jointly tried with him.

But *Reg. v. Scaife* (7) was dissented from in later cases, *Reg. v. Bertrand* (8) and *Reg. v. Murphy* (9).

In England the Courts have resolutely set their face against granting new trials

(3) 2 Weir 457.

(4) 2 Weir 308.

(5) [1884] 7 Mad. 213=2 Weir 477.

(6) [1891] A.W.N. 120.

(7) [1886] 17 Q.B. 238=2 Den. C.C. 281=20 L.J. M.C. 229=15 Jur. 607=5 Cox. C.C. 243=117 E. R. 1271.

(8) [1866] L.R. 1 P.C. 520=4 Moore P.C. (n.s.) 460=36 L.J. P.C. 51=16 L.T. 752=16 W. R. 9=10 Cox. C.C. 618=16 E. R. 391.

(9) [1869] L.R. 2 P.C. 535=6 Moore P.C. (n.s.) 177=38 L.J. P.C. 53=21 L.T. 598=17 W.R. 1047=16 E. R. 693.

after acquittals for murder and felony on the ground of misreception of evidence, misdirection, or that the verdict was against the evidence and the same principle has been extended to misdemeanours also : see *Reg. v. Duncan* (10).

It has been further held that acquittals and dismissals cannot be quashed by certiorari even though the justices who tried the cases were disqualified by interest or bias : *Reg. v. Galway Justices* (11) and *Reg. v. Antrim Justices* (12). The latest case on the point is that of *Reg. v. Simpson ; Ex parte Smithson* (13) in which the doctrine has been stretched to the length of holding that a dismissal of information could not be disturbed even though one of the five justices who acquitted the accused was disqualified and though the Court might be said, to that extent, not to be a competent tribunal.

In India however matters stand upon a different footing. Here appeals against orders of acquittal are allowed by S. 417, Criminal P. C., a provision of law which is quite alien to the principles upon which English Courts administer the law against criminals. We have also S. 403 which prohibits a second trial for the same offence, provided that the conviction or acquittal at the first trial remains in force. If the conviction or acquittal is set aside by a Court of competent jurisdiction, it follows that the accused cannot successfully plead the original decision in bar of further proceedings.

The safeguard of the subject consists in the fact that no appeal against an acquittal will lie except at the instance of Government and that Government only exercise this power in cases in which there has been in their opinion a substantial failure of justice.

It appears *prima facie* that there was a failure of justice in the present case if the complainant was prevented from presenting his complaint and obtaining the redress that the criminal law allows, owing to a circumstance beyond his control namely, his wrongful arrest and detention on a false charge, a fact which the Court which tried the case of nuisance found to be true. But this was a circumstance which was not in evidence at the

time when the Court passed the order of acquittal under S. 247, Criminal P. C., on the complaint of mischief. Of course, he may have his remedy in an action in tort of malicious arrest against the constable, or against the accused if he instigated the constable or he may proceed criminally against them, if so advised, for offences under Ss. 211 and 341, I. P. C., but he will still have a grievance that his complaint of mischief has not been heard.

Now there is nothing in the language of S. 417, Criminal P. C., to limit appeals against acquittals to cases in which Courts have, owing to some error of law or misappreciation of evidence, come to a wrong decision on the evidence before them.

It has been held that the legislature has allowed by this section an appeal by the Local Government in the widest terms and without any limitation whatever: see *Empress v. Judoonath Gangooly* (14), and that there is no distinction in the Code between the right of appeal against an acquittal and the right of appeal against a conviction, both being governed by the same rules and being subject to the same limitations: see *Queen-Empress v. Bibhuti Bhusan Bit* (15) and *Queen-Empress v. Prag Dat* (2) and *Emperor v. Chattr Singh* (16).

Section 428, Criminal P. C., allows additional evidence to be admitted in appeals against acquittals as well as in appeals against convictions, although cases in which this power is exercised will naturally be rare.

I would therefore be prepared to set aside the order of acquittal in this case and order a re trial, if the matter had come before the Court by way of appeal presented by the Local Government under S. 417.

But in revision it has always been regarded as a sound rule of practice not to interfere when there is no error in law on the face of the record: *Emperor v. Sakharam* (17); *Keshab Chunder Roy v. Akhil Metey* (18) also *Emperor v. Tirth Das Kewalram* (19); and not to interfere

(14) [1876-77] 2 Cal. 273 - 1 Ind. Jur. 629.

(15) [1890] 17 Cal. 485.

(16) [1904] 7 P. R. 1904 Cr.=97 P. L. R. 1904 =1 Cr. L. J. 781.

(17) [1902] 4 Bom. L. R. 686.

(18) [1895] 22 Cal. 998.

(19) [1912] 17 I. C. 403=6 S. L. R. 120=13 Cr. L. J. 771.

(10) [1881] 7 Q.B.D. 198=50 L.J.M.C. 95=44 L.T. 521=30 W.R. 61=14 Cox. C.C. 571=45 J.P. 456.

(11) [1906] 2 Ir. R. 449.

(12) [1895] 2 Ir. R. 608.

(13) [1914] 58 S.J. 99=30 T.L.R. 81.

in cases of acquittal in which Government might have appealed under S. 417, Criminal P. C., but has not done so: see *In the matter of Aurokiam* (20), also *Thandavan v. Perianna* (21); *Emperor v. Madar Bakhsh* (22) and *Queen-Empress v. Miyai Ahmed* (23). In the former respect the Courts in India conform to the practice of the English Courts when dealing with writs of certiorari and the now obsolete writs of error; for the latter practice there is now the authority of Cl. 5 of S. 439, Criminal P. C.

In *Queen-Empress v. Hardeo Singh* (5) Straight, J., acting in revision, ordered a new trial upon a reference by the Sessions Judge when the accused had been acquitted under S. 247 on a complaint of mischief and assault owing to the complainant's absence through fever, but this is the only reported instance that I have been able to discover of a High Court in exercise of their revisional powers setting aside an order of acquittal upon facts not before the Court that tried the case. Even that instance was prior to the introduction of Cl. 5 of S. 439 by Act 5 of 1898. I therefore consider that our proper course is to refuse to interfere with the acquittal on the District Magistrate's reference.

S.N./R.K. *Reference not allowed.*

(20) [1878-80] 2 Mad. 38=2 Weir 566.

(21) [1891] 14 Mad. 363=2 Weir 571.

(22) [1902] 25 All. 128=(1902) A. W. N. 200.

(23) [1878-79] 3 Bom. 150.

A. I. R. 1914 Madras 632 (1)

SADASIVA AIYAR AND SPENCER, JJ.

Manian Nambudripad and another—Appellants.

v.

Agniharman Nambudripad and others—Respondents.

Second Appeal No. 681 of 1911, Decided on 2nd February 1914, from decree of Sub-Judge, North Malabar, in Appeal Suit No. 59 of 1910.

Malabar Law—Duties of office of Urulan cannot be alienated to stranger or delegated to agent in absence of strict proof of custom.

Ordinarily the powers and duties of the office of Urulan are incapable of alienation to a stranger or delegation to an agent. But if such a custom is set up and strictly proved, it may be recognized provided that the alienation or delegation is strictly confined to its narrowest limits. [P 632 C 2]

C. V. Ananthakrishna Aiyar—for Appellants.

J. L. Rosario—for Respondents.

Judgment.—The ordinary rule is that the duties of the office of Urulan with its powers are incapable of being alienated to a stranger or even delegated to an agent: see Moore's Malabar Law, p. 379.

If there is a custom to so delegate some or all of the powers, such a custom, if not wholly unreasonable or opposed to public policy, might be recognized, but the custom must be strictly proved and the delegation permitted by the custom must be strictly confined to the narrowest limits.

In this case there is no proof of any custom by which each of the three Uralars could delegate his power separately to an agent or by which two of them together could delegate their united power to an agent.

It may be that there is a custom that all three of them together might appoint such an agent by a resolution passed unanimously or by a majority at a meeting properly convened after due notice (such appointment to last for a definite period), but it is unnecessary to decide whether there has been such a custom and if that is a valid custom.

What the majority of the Uralars (two out of three) have attempted to do in this case was to appoint an agent to exercise the powers of all three Uralars without consulting the third or giving notice to him. This, of course, could not be allowed under the ordinary law and no custom was set up or proved allowing this *Kunhan v. Moorthi* (1).

The lower Court's decisions are right and the second appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1910] 7 I.C. 422=34 Mad. 406.

A. I. R. 1914 Madras 632 (2)

SESHAGIRI AIYAR, J.

K. R. Srinivasa Aiyangar—Petitioner.

v.

Tirumalai Chetty and others—Respondents.

Civil Revn. Petn. No. 338 of 1913, Decided on 18th February 1914, from order of Sub-Judge, Kumbakonam, D/- 12th December 1912, in Ex. Appln. No. 2329 of 1912, in Small Cause Suit No. 668 of 1908.

Agent — Power-of-attorney authorizing agent to collect outstandings includes power to collect decretal debts—Application by

agent to carry on execution proceedings is step-in-aid—Limitation Act, Art. 182 (5).

A power-of-attorney authorising an agent to collect "outstandings" includes also a power to collect debts which have ripened into decrees obtained even before the date of the power-of-attorney. An informal application though infructuous, to carry on the proceedings in execution may still operate to keep the decree alive: 28 *Mad.* 557, *Foll.* [P 633 C 1]

S. W. Padmanabha Aiyangar — for Petitioner.

V. Purushothama Aiyer for T. R. Venkatarama Sastri—for Respondents.

Judgment.—Mr. Purushothama Aiyer argues that the right to take out execution mentioned in the power-of-attorney relates only to decrees obtained since 3rd July 1909 when the two ladies gave the power-of-attorney to their agent. The preamble says that the two ladies are unable to appear in Court and to conduct the proceeding; this is followed up by the statement, that for the purpose of recovering outstandings due to the estate, the agent is given power to file suits and to recover the outstandings due to the estate. I take it that the word "outstandings" refers not only to debts which have not ripened into decrees but also to decrees obtained against persons owing money to the estate; the clause relating to execution stands by itself; I am therefore of opinion that this power-of-attorney did give authority to the agent to present an application for execution of the decree already passed. That being my view the previous application presented on 4th August 1911 was an application in accordance with law. It is hardly necessary to refer to the authorities which hold that non-compliance with certain formalities, although they may disable the petitioner from successfully carrying on execution through the agency of such a petition, would none-the-less make the application presented by him an application in accordance with law. It is only necessary to refer to *Pachiappa Achari v. Poojali Seenan* (1) where this point has been expressly referred to. I hold therefore that the Subordinate Judge was wrong in holding that the application was barred by limitation. I reverse his order and direct him to restore this application to his file and to dispose of it according to law. The costs will abide the result.

S.N./R.K.

Order reversed.

A. I. R. 1914 Madras 633

SADASIVA AIYAR AND SPENCER, JJ.

C. W. Simson and others—Plaintiffs—Appellants.

v.

Koka Jagannadha Row Naidu and others—Defendants—Respondents.

Second Appeal No. 1 of 1911, Decided on 28th January 1914, from decree of Dist. Judge, Godavari, in Appeal Suit No. 62 of 1907.

Contract Act (1872), S. 73, Illus. (m)—A's contract with B respecting unascertained goods—A contracted with C who had no knowledge of previous contract—A sued C for damages, sustained on account of breach of warranty—Basis for calculation is difference between value of goods supplied and market value of goods guaranteed on date of breach and Illus. (m) was held inapplicable.

Where A entered into a contract with B in respect of unascertained goods and afterwards entered into another contract with C, C not having been informed of the previous contract with B:

Held: (1) that in a suit brought by A against C for damages sustained by A on account of the breach of warranty of quality, the proper basis for their calculation is the difference between the value of the goods as supplied and the market value of the goods of the guaranteed quality on the date of breach, and not the special damages which A might have incurred through the breach committed by him of his own previous contract with B of which C had no knowledge;

(2) that Illus. (m) of S. 73 did not apply as in the illustration the sale is of ascertained goods and not of unascertained goods as in this case, and also the contract between A and B was made on the same occasion as that between B and C and the basis of damages in both was to be the same. [P 633 C 2, P 634 C 1]

P. Narayanamurthi—for Appellants.

K. Sreenivasa Iyengar and Purushothama Naidu—for Respondents.

Judgment.—We agree with the learned District Judge that the basis for the calculation of the damages sustained by the plaintiffs on account of the breach of warranty of quality committed by the defendants is the difference between the value of the goods as supplied and the market value of the goods of the guaranteed quality on the date of breach and not the special damages which the plaintiffs might have incurred through the breach committed by them of their own contract made with a third person in respect of unascertained goods before the date of the contract with the defendants and of which contract no notice had been given to the defendants. Illus. (m), S. 73 Contract Act, is not applicable as on the facts mentioned in

that illustration the sale was of ascertained goods and not of unascertained goods as in this case. The contract between A and B in that illustration was made on the same occasion as that between B and C and the damages were to be apparently calculated on the very same basis as between A and B as they were to be as between B and C. illus.(a), S. 73 is what exactly applies to this case.

The second appeal fails and is dismissed with costs.

The memorandum of objections is not pressed and is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Madras 634

SADASIVA AIYAR AND TYABJI, JJ.

S. Tiruvenkatachariar — Plaintiff — Appellant.

v.

Venkatachariar and *others*—Defendants—Respondents.

Second Appeal No. 826 of 1911, Decided on 25th July 1913, from decree of Dist. Judge, Chingleput in Appeal Suit No. 202 of 1909.

(a) **Specific Performance—Prior agreement to sell established—Subsequent purchaser must prove (a) payment of valuable consideration (b) bona fide transaction and (c) want of notice of prior agreement.**

After a plaintiff has established a prior agreement to sell immovable property it is for the subsequent purchaser to prove: (a) that he paid valuable consideration; (b) that he acted bona fide; and (c) that he had no notice of the prior agreement. [P 634 C 2]

(b) **Hindu Law—Alienation—Agreement to sell property by Hindu—Suit for specific performance—Court can decide question of son's right to contest liability under father's agreement.**

If a party to an agreement to sell is a Hindu and in a suit for the specific performance of the agreement the son of such party raises any question as to his liability to fulfil the obligations of his father the Court will go into and decide such questions. [P 634 C 2]

T. R. Ramachandra Aiyar—for Appellant.

M. Krishnaswami Aiyar—for Respondents.

Judgment.—The learned District Judge, in considering the evidence in the case, has proceeded upon the ground that the burden of proving that defendant 3's purchase from defendant 2 was made with notice of the prior contract to sell alleged to have been made with the plaintiff by defendants 1 and 2, lay on the plaintiff. The

case of *Himatlal Motilal v. Vasudec Genesh* (1) decides that the burden of proving: (a) that the subsequent purchaser paid valuable consideration, (b) that he acted bona fide; and (c) that he had no notice lies on that purchaser, assuming, of course, that the plaintiff has established the prior agreement to sell alleged in his plaint. Further the District Judge has not at all considered several circumstances mentioned by the Munsif as pointing to mala fides on the defendant's part: see paras. 31 to 33 of the Munsif's judgment.

Lastly, the District Judge is clearly wrong in saying that, even after his findings in favour of the defendant, he need not go into the questions involved in issues 8 and 9 and that the plaintiff should be relegated to another suit to obtain the reliefs he would be entitled to as against defendant 2 when the plaintiff failed as against defendant 3. It is also unsatisfactory that the District Judge has not given a finding on the question whether there was really a contract to sell made between the plaintiff and defendants 1 and 2, and whether a sale deed was executed by defendants 1 and 2 in 1905: "see para. 2 of the District Judge's judgment where he says "assuming the sale alleged by the plaintiff in his favour to have been really executed").

We reverse the judgment of the District Judge as unsatisfactory on all points and remand the case to the District Court to decide the appeal de novo. The District Court is requested to give definite findings on all the issues in the case when deciding the appeal and also on the question as to the approximate value of the plaint property at the time of the plaintiff's sale deed and defendant 3's sale-deeds, the payments alleged by defendant 3 to have been made towards the purchase money of Rs. 1,250, whether Rs. 1,250 was a real or a fictitious price, and so on. Costs of this second appeal will be costs in the cause. Defendants 1 and 2 having both died, if defendant 2's son raises any question as to his liability to fulfil the obligations of the father the District Court will go into and decide such questions also.

S.N./R.K.

Case remanded.

A. I. R. 1914 Madras 635

Full Bench

WHITE, C. J., AND SANKARAN NAIR AND
OLDFIELD, JJ.

*President. Vakils' Association, High
Court, Madras—Petitioner.*

v.

*A Vakil of the High Court—Respon-
dent.*

Civil Misc. Petn. No. 585 of 1914, De-
cided on 20th March 1914.

**Letters Patent (Madras), Cl. 10—Vakil
suggesting that he can influence Judge by
improper means is guilty of serious profes-
sional misconduct.**

A vakil is guilty of professional misconduct
meriting more than a mere warning for sug-
gesting that he is in a position to influence a
Judge by indirect and improper means.

[P 636 C 2]

*M. O. Parthasarathy Aiyangar and
G. S. Ramachandra Aiyar—for Vakil.
Advocate-General—Amicus Curiae.*

White, C. J.—This matter comes be-
fore us on a resolution of the council of
the 'Vakils' Association with reference
to a letter written on 23rd July 1912 by
a vakil of this Court. By direction of
this Court the matter was inquired into
by the council of the Vakils' Association
and the vakil was asked by the council
to submit any explanation that he might
have in connexion with the writing of
this letter. At a meeting of the council
of the Association held on 22nd Febru-
ary 1913, the following resolution was
passed: "Resolved that taking all the
facts in the explanation to be true this
council is of opinion that the vakil is
guilty of grave professional misconduct
in writing the letter dated 23rd July
1912 to S. Madhuvayyar, private vakil
Kumbakonam. It is therefore requested
that this Honourable Court may be
graciously pleased to take action against
the said vakil under S. 10, Letters
Patent."

In dealing with this case we proceed
on the same assumption as that adopted
by the Vakils' Association, namely that
"the facts in the explanation are true."
The letter as translated is in these
terms:

"Please destroy this after perusal.
Many crores of prostrations. Your letter
to hand I am glad I have got it." (This
sentence "your letter to hand I am glad
I have got it" does not appear in the
translation of the letter which is before

us but we may take it that this is an
accurate translation of the sentence. It
is the translation suggested by the vakil's
counsel Mr. Parthasarathy Aiyangar).
Then the letter goes on: "The Tiruk-
kovaloor incendiarism case is to come on
for trial before Singaravelu Mudaliar
Avergal, the Sub-Magistrate. The said
Mudaliar was a Sub-Magistrate here at
Tanjore. He was previously the Sub-
Magistrate of Kumbakonam Town. He
was a particular friend of mine when he
was here. I need not write to you more
You will know it if you go over here to
the town and make enquiries. I shall
by all means positively secure advantage
to our side. However great be the
vakil that may appear what I shall be
able to achieve before the said Sub-
Magistrate will be different. I shall tell
you that if you come in person. I intend
going to Mannargudi on the 30th instant.
You may see me positively if you come
here on Friday the 26th instant. Or if
you intimate the time of your arrival I
shall remain in town. I may perhaps
go to Kumbakonam on the 25th instant.
I shall then see you. I intend going to
Mannargudi on the 27th instant. We
shall surely succeed in the aforesaid case
and there need be no anxiety. Please get
me engaged as vakil. Ask the Sub Magis-
trate too if you please. I solicit a reply
in any case." The explanation of the
vakil which we take to be true as regards
all statements of fact is this:

"In regard to the letter dated 23rd
July 1912 I beg to state as follows:
About June end or July beginning, 1912
Mr. Madhuvier, a private vakil approa-
ched me on behalf of Tirukkavaloor party
in what is called the Tirukhavaloor arson
case and proposed certain terms which
I accepted. As he had not brought the
records with him he said he would go to
me subsequently with the party and the
records. A few days later, Mr. Madhu-
vier wrote to me a letter which unfortu-
nately I have not preserved to the fol-
lowing effect as I am able to recollect
its contents: "The clients agreed to
engage you on the terms settled but are
now hesitating on the ground of some
information that the old Magistrate has
been transferred and the new Magistrate
is said to have had a difference and con-
sequent misunderstanding with you.
The informant seems to have said that
the Magistrate himself gave him the in-

formation. The clients are afraid that they might lose a good case by engaging one who was not on good terms with the Magistrate. I assured the clients that it could not be so but they were still hesitating and considering if it would not be better to go to a vakil of longer standing. Please write to me if the information is untrue and also what you think of the case. I shall speak to the clients and then go to you with them." It was in reply to this letter that I wrote the letter in question. I had a difference with one Mr. E. Singaravelu Mudaliar, Sub-Magistrate of Valangiman but not with the Singaravelu Mudaliar who was to be the new Sub-Magistrate of the Court. My relations with the latter were good and were known to be such at Tanjore where he was previously Magistrate. Far from the case being lost to the clients by engaging me I thought I would be more advantageous to the party as I had appeared before him on previous occasions and known his ways and as I had accidentally come to know of certain facts regarding that case which would be useful to the party and which would not be available to others. This was what I conveyed in the letter in question and asked him to go and see me with a view to tell him what information I had about the case. I also told him that he might verify from the Magistrate himself that I had no difference and no misunderstanding with him. As the letter was a reply to Mr. Madhuvier's to remove a misapprehension I advised him to tear it off."

The vakil has been represented before us by a very experienced advocate of this Court. The Advocate-General was requested to appear in support of the notice to show cause. He has however as *amicus curiae* urged before us that this is a case in which we ought not to take action under the Letters Patent. We have considered the letter with great care by the light of the explanation. If I could read the letter as nothing more than a statement that the report referred to in the letter to which the letter of the vakil purports to be a reply was untrue and if the rest of the vakil's letter could be regarded as nothing more than a glorifying of himself and of his own professional powers I may be of opinion that the letter, though not in good taste, did not constitute an act of

professional misconduct. To my mind however the letter is something a great deal more than a statement that it was not true that the relations between the vakil and the Magistrate who was about to try the case in which the vakil hoped to appear were strained with boastful observations thrown in. As I read the letter it appears to me that the writer of the letter intended to convey to the mind of the private vakil to whom the letter was written that the writer was in a position to influence the Magistrate by indirect and improper means. If that is the right view of the letter no one can contend for one moment that it does not constitute an act of professional misconduct on the part of the vakil. Having arrived at the conclusion that the vakil was guilty of an act of professional misconduct we have considered whether we can accede to the request put forward by Mr. Parthasarathi Aiyangar that a caution to the vakil would meet the requirements of the case. We find ourselves unable to accede to the request. We have come to the conclusion that the imposing of a period of suspension is necessary and the order of the Court is that Mr. . . . a vakil of this Court be suspended from practice for three months from this date.

Sankaran Nair, J.—I agree.

Oldfield, J.—I agree.

S.N./R.K. *Vakil suspended.*

A. I. R. 1914 Madras 636

WALLIS AND AYLING, JJ.

Narayana Sastrigal—Defendant—Appellant.

v.

Mangalathammal — Plaintiff — Respondent.

Appeal No. 236 of 1913, Decided on 4th March 1914, from order of Sub-Judge, Kumbakonam, in Appeal Suit No. 958 of 1912.

(a) Civil P. C. (1908), O. 6, R. 17—Wrong person's name entered in suit—Amendment after limitation does not bar suit.

Where a plaintiff intending to sue one person by mistake enters the name of another, an amendment of the name, even made after the period of limitation, does not bar the suit: *Challinar v. Roder*, (1895) 1 T. L. R. 323, *Foll.*

[P 670 1]

(b) Civil P. C. (1908), O. 6, R. 17—Where there is intention to sue wrong person, amendment of plaint will not bring within time suit already barred.

Where under some mistake or error the plaintiff intends to sue the wrong person, an amend.

ment will not make the suit within time against the right person if it is already barred against him. [P 637 C 1]

T. Natesa Aiyar—for Appellant.

T. R. Venkatarama Sastri—for Respondent.

Judgment.—If the plaintiff intended to sue Narayana Sastri but mistook his name and entered the name Vaithianada instead, amendment was rightly allowed and the suit is not barred: *Challinar v. Roder* (1). If however the plaintiff intended to sue the individual Vaithianada under the mistake that he (Vaithianada) had obtained the order or under any other error, then the suit cannot be considered to have been instituted against Narayana within the period of limitation and must be considered barred.

No issue was raised about this by the District Munsif; and the Subordinate Judge, whilst framing a correct issue, decided it without hearing evidence. Without interfering with the order of remand we set aside the finding of the Subordinate Judge on issue 2 and remand that issue also to the District Munsif for disposal according to law.

Costs will abide the result.

S.N./R.K.

Suit remanded.

(1) [1885] 1 T. L. R. 527.

A. I. R. 1914 Madras 637 (1)

SADASIVA AIYAR, J.

In re Govindarajulu Mudali—Accused—Petitioner.

Criminal Revn. No. 738 of 1913, and Criminal Revn. No. 596 of 1913, Decided on 23rd January 1914. from order of Second Presy. Magistrate, George town, D/- 14th October 1913.

Criminal P. C. (1898), S. 239—Joint trial of thief and receiver of stolen property is illegal.

A joint trial of two accused, one for theft and the other for receiving stolen property, is illegal: 3 P. R. 1905 Ref. [P 637 C 1, 2]

S. Krishnamachariar—for Petitioner.

Facts.—Two accused were charged and tried at one trial, one, for committing theft with regard to electric bulbs and the other for receiving stolen property in purchasing them. The Magistrate acquitted the accused who was charged with theft, and convicted the other for receiving stolen property. Hence the revision petition to the High Court by the accused who was convicted.

Order.—The trial of the two accused, one for theft and the other for receiving

stolen property was clearly illegal: *King-Emperor v. Sunder Singh* (1).

The conviction of the petitioner is set aside and the fine, if paid, will be refunded without prejudice to the police (if they consider it desirable) taking fresh action against the petitioner.

S.N./R.K.

Revision accepted.

(1) [1905] 3 P. R. 1905 Cr.=2 Cr. L. J. 37=21 P. L. R. 1905.

A. I. R. 1914 Madras 637 (2)

SANKARAN NAIR AND AYLING, JJ.

Srinivasachariar—Petitioner—Appellant.

v.

Gopalan and another—Respondents.

Appeal No. 13 of 1913, Decided on 13th February 1914, against order of Dist. Judge, Chingleput, D/- 2nd November 1912, in Succession Certificate Petn. No. 25 of 1912.

Succession Certificate Act (1889)—Application for succession certificate—Whether debts belonged to deceased or not is irrelevant.

In an application for a succession certificate the question whether the debts in respect of which the certificate is applied for belong to the deceased or not, is irrelevant and cannot be gone into: 28 Bom. 119, Foll.; 25 Cal. 320, Diss. from. [P 637 C 2]

J. S. Jayarama Iyer for *G. S. Ramachandra Iyer*—for Appellant.

M. O. Parthasarathy Iyengar—for Respondents.

Judgment.—The Judge has dismissed the petition on the ground that the debts in respect of which the certificate is prayed for did not form the property of the deceased but very probably they belong to one of the persons who oppose the grant of the succession certificate to the appellant. We are of opinion that the question whether the debts belonged to the deceased is not a matter to be decided on this application. We agree with the decision of *Bai Kashi v. Parbu Keval* (1) which has been followed in appeal against O. 42 of 1906 by Benson and Wallis, JJ. We are unable to agree with the opinion of the Chief Justice to the contrary in *Radha Rani Dassi v. Brindaban Chundra Basak* (2). The order of the lower Court is therefore reversed and the District Judge is directed to restore the application to his file and dispose of it according to law. Costs hitherto in-

(1) [1904] 28 Bom. 119=5 Bom. L. R. 721.

(2) [1898] 25 Cal. 320=2 C. W. N. 59.

curred will be provided for in the final order.

S.N./R.K.

Order reversed.

A. I. R. 1914 Madras 638 (1)

SANKARAN NAIR AND BAKEWELL, JJ.

Yuruva Venkata Reddy and another—
Defendants—Appellants.

v.

Maddi Veeranna—Plaintiff—Respondent.

Second Appeal No. 1668 of 1912, Decided on 13th November 1913, from decree of Sub-Judge, Kurnool, in Appeal No. 118 of 1911.

Registration Act, S. 49 — Compulsorily registrable lease is inadmissible without registration to prove lessee's possession.

A compulsorily registrable lease is inadmissible without registration to prove the nature of lessee's possession: 17 *M. L. J.* 469, *Foll.*

[P 638 C 1]

S. Swaminathan—for Appellants.

P. Venkataramana Rao—for Respondent.

Facts.—This is a suit for the recovery of a house site from the defendants and for a perpetual injunction restraining them from interfering with his building a kottam on the same, alleging that the site belonged to him and was in his enjoyment but the defendants forcibly took possession of the same. The defendants pleaded that it belonged to them and that the plaintiff was in possession of the site under an unregistered rental agreement alleged to have been executed by the plaintiff in 1905. The Subordinate Judge held that the rental agreement required registration and under S. 107, T. P. Act, was inadmissible in evidence following *Vairananda Nadar v. Uriyakan Rowter* (1) and decreed the plaintiff's claim.

Judgment.—The lease relied upon requires registration and is not admissible to prove the nature of the plaintiff's possession: see *Kanuparti Subbayya v. Kurunani Maddulethiah* (2).

The second appeal is dismissed with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 638 (2)

SADASIVA AIYAR AND SPENCER, JJ.

Alla Pichai Tharaganar and others—
Appellants.

v.

Mahomad Moideen Tharaganar and others—Respondents.

Second Appeal No. 831 of 1911, Decided on 27th January 1914, from decree of Sub-Judge, Tinnevely, in Appeal Suit No. 619 of 1909.

(a) Mahomedan Law—Gift—Donor's residence in house after gift does not invalidate gift of house.

A gift of a house is not invalidated by the mere residence of the donor therein after the gift: 30 *Mad.* 305, *Foll.*; 19 *Mad.* 343, *Diss. from.* [P 638 C 2]

(b) Mahomedan Law—Gift — Contingent gifts are invalid—Conditional gifts can be enforced as absolute gifts though condition is bad.

Contingent gifts are generally considered invalid while conditional gifts can be enforced as absolute gifts, although the condition may be bad: 13 *Bom.* 264, *Ref.* [P 638 C 2]

C. V. Ananthakrishna Aiyar—for Appellants.

L. A. Govindaraghava Aiyar—for Respondents.

Judgment.—The first contention is that a gift of the house under Ex. 4 is invalid by reason of the possession of the property not having completely passed at the time.

In this matter we see no reason why we should not follow the decision of *Kandath Veetil Bava v. Musaliyam Veetil Pakru Kutti* (1) in preference to the earlier decision in *Bava Saheb v. Mahomad* (2). It was held in *Kandath Veetil Bava v. Musaliyam Veetil Pakru Kutti* (1) that in certain circumstances such as those connected with the present case, the residence of the donor in the house which is the subject of gift would not be a ground for invalidating the gift.

The next contention is that the condition that defendants 1 and 2 should enjoy the properties absolutely only after the donor's death made the gift itself not an absolute gift and that conditional gifts are not recognized in the Mahomedan law. On this question it is necessary to distinguish between contingent gifts and gifts with a condition attached. Though the former are generally considered invalid, the latter can be enforced as absolute gifts, although the condition may be bad: see *Nizamuddin Gulam*

(1) [1898] 21 *Mad.* 109.

(2) [1907] 17 *M.L.J.* 469.

(1) [1907] 30 *Mad.* 305=2 *M. L. T.* 180.

(2) [1896] 19 *Mad.* 343.

v. *Abdul Gafur* (3) and the observations at p. 134, Vol. 1, of Ameer Ali's *Mahomedan Law* (4th Edition). This second appeal fails and is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(3) [1889] 13 Bom. 264.

A. I. R. 1914 Madras 639 (1)

Full Bench

WHITE, C. J., AND SANKARAN NAIR AND
OLDFIELD, JJ.

Rao Sahib Pydah Venkatachalapathi Garu and others — Defendants — Appellants.

v.

Muthu Venkatachalapathi and another — Plaintiffs — Respondents.

Letters Patent Appeal No. 228 of 1912, Decided on 7th January 1914, from decree of Madras High Court, D/- 23rd September 1912, in Appeal No. 46 of 1909.

Registration Act (1908), Ss 17 and 47—Out and out sale—Unregistered letter written next day to convert sale into mortgage is inadmissible without registration under S. 17.

An unregistered letter is inadmissible in evidence to show either that the sale executed the previous day is in effect a mortgage or that it conveys no title. In either view the unregistered letter "affects immovable property" within the meaning of S. 17 and is not admissible in evidence without registration.

[P 639 C 1]

T. Rangachariar — for Appellants.

P. Narayanamurthi — for Respondents.

Judgment.—If the claim of the plaintiff in the present suit is to be treated as based on the footing of a mortgage transaction we think it is clear that, as was held in *Mutha Venkatachalapati v. Pyanda Venkatachalapati* (1) that the unregistered letter cannot be received as evidence of such a transaction.

Assuming the plaintiff is entitled to sue for possession on the ground that no title passed to the defendants under the sale-deed (Ex. A), in order to succeed he must show that by virtue of the unregistered letter the sale deed does not affect the immovable property, which is comprised both in the sale-deed and in the unregistered letter, in the way in which the sale-deed purports to affect the property, and would affect the property if the unregistered letter had never been written. This being so, it seems to us the unregistered letter is relied on as evidence of a transaction affecting im-

(1) [1904] 27 Mad. 848.

movable property and, being unregistered, is inadmissible in evidence.

We think the principle of the decision in *Achutaramaraju v. Subbraju* (2) applies to this case.

The appeal must be allowed with costs in this Court and the suit dismissed. There will be no order as to costs in the Court of first instance.

S.N./R.K. *Appeal allowed.*

(2) [1902] 25 Mad. 7=1 M. L. J. 370.

A. I. R. 1914 Madras 639 (2)

SANKARAN NAIR AND AYLING, JJ.

Tungala Mallanna — Defendant — Petitioner.

v.

Gottumukkala Ramaraju and others — Plaintiffs — Respondents.

Civil Misc. Petn. No. 1223 of 1911, Decided on 28th January 1914, from judgment of Govt. Agent, Godavari, in Appeal Suit No. 4 of 1911.

(a) **Madras Estates Land Act (1908), S. 3, Cl. 5** — Inferior proprietor holding under "missal" is landholder.

An inferior proprietor holding an estate under a "missal" is a landholder under S. 3, Cl. 5, Estate Lands Act. [P 639 C 2]

(b) **Madras Estates Land Act (1908), S. 3, Cl. 5 (2)—Scope.**

Cowledar under inferior proprietor is not tenant, but one merely dealing with land on behalf of the inferior proprietor. [P 640 C 1]

(c) **Madras Estates Land Act (1908), S. 3, Cl. 7 (2)—S. 3, Cl. 7 (2) applies to letting after passing of Act**

The provisions of S. 3, Cl. 7, sub-Cl. (2), apply only to a letting after the passing of the Act. [P 640 C 1]

P. Narayanamurthi — for Petitioner.

T. Prakasam — for Respondents.

Judgment.—The question for decision is whether the appellant-defendant, is an occupancy tenant.

The plaintiff is the cowledar of the Nandigama Estate which is held under a "missal" by a person who is styled the inferior proprietor. The inferior proprietor is clearly a landholder under the Estates Land Act, S. 3, Cl. 5. Under that clause every person entitled to collect the rents of the whole or any portion of the estate also is a landholder. The appellant contends that the respondent-plaintiff falls within this definition. The cowle under which the plaintiff claims to recover possession provides that he is to be placed in possession of the lands, that he is to pay the kist due to Government, that he is to bear the charges of establishment, etc., that he

is to act subject to "missal" conditions and pay the inferior proprietor "a profit" of Rs. 800 per annum. These are clearly not the terms of a tenancy. The possession which was given to the cowledar is such possession as the proprietor had. We have no hesitation in holding that the plaintiff is not a tenant but a person entitled to deal with the land on behalf of the inferior proprietor including the right to collect the rent. If the plaintiff is a landholder then it is not denied that the defendant is a tenant. S. 6 of the Act confers on him a permanent right of occupancy unless, as is contended before us by the plaintiff's counsel, the land is "old waste" under S. (3), Cl. (7), sub-Cl. (2). It is clear that this provision applies only to any letting after the passing of the Act. If by surrender or otherwise the plaintiff gets possession of this land and lets it after the passing of the Act, and the land was not held with any permanent right of occupancy for 10 years prior to such letting, the land is old waste.

We are of opinion that the defendant is a tenant with permanent right of occupancy in his holding. We direct the agent to review his judgment in accordance with the above observations. Costs will abide the result.

S.N./R.K. *Appeal accepted.*

A. I. R. 1914 Madras 640 (1)

SESHAGIRI IYER, JJ.

Raghava Iyengar — Defendant — Appellant.

v.

Athanambalam — Plaintiff — Respondent.

Second Appeal No. 924 of 1913, Decided on 17th February 1914, from decree of Sub-Judge, Ramnad, in Appeal Suit No. 351 of 1912, D/- 23rd December 1912.

(a) Civil P. C. (1908), S. 47 — Suit for damages for fraudulent execution is not barred.

A suit for damages for fraudulent execution is not barred by S. 47. [P 640 C 2]

(b) Damages — Measure of—Fraudulent execution—Amount recovered in execution is the measure.

The measure of damages for fraudulent execution is the amount recovered in fraudulent execution. [P 640 C 2]

S. T. Sreenivasa Gopalachariar — for Appellant.

Judgment.—In this case defendant 1 obtained a decree against plaintiff. He

assigned the decree to defendant 3 who recovered out of Court Rs. 170 from the plaintiff and gave him a receipt to the effect that the decree was satisfied. This payment was not certified. Taking advantage of this defendant 1 levied execution against plaintiff and recovered about Rs. 400 odd. This suit is to recover that amount. Such a suit for damages for fraudulent execution is not barred by S. 47. The measure of damages has been rightly held to be the amount which defendant 1 recovered.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Madras 640 (2)

MILLER, J.

Nallaboltu Bodi Naidu — Plaintiff — Petitioner.

v.

Chengama Naidu and others — Counter-Petitioners.

Civil Revn. Petn. No. 900 of 1912, Decided on 26th November 1913, from order of Dist. Munsif, Tirupati, in Misc. Petn. No. 283 of 1912.

Civil P. C. (1908), O. 18, R. 18 — R. 18 empowers Court to inspect property without superior Court's sanction.

Order 18, R. 18 gives absolute discretion to every Court to inspect any property or thing without the sanction of the superior Court.

[P 640 C 2]

N. Chandrasekhara Iyer — for Petitioner.

C. K. Mahadeva Iyer — for Counter-Petitioners.

Judgment.—So far as the rule at p. 53, Civil Courts Guide made under S. 392, Civil P. C., requires the sanction of the District Judge for an inspection it is clearly opposed to O. 18, R. 18 of the present Code which makes inspection purely a matter of discretion of the Court. The rule seems to apply to cases where both parties agree to the inspection and seems to make no provision for payment of expenses in other cases or either to prohibit the payment of expenses in other cases. But it is open to the District Munsif, if he so desires to make the inspection without charges and the District Judge's sanction is not required for that purpose. It is perhaps not necessary that I should set aside his order refusing to inspect because that order will not prevent him from acceding to another application if one is made. But it is necessary to point out that as the law now stands, the District Judge's sanction to make

an inspection is not required and the District Judge's refusal will not affect the District Munsif's discretion to make an inspection should he be asked to do so and see fit to comply without charges. The order does not therefore prejudice the petitioner. I need not interfere with it. I make no order as to costs.

S.N./R.K. : *Petition dismissed.*

A. I. R. 1914 Madras 641 (1)

SADASIVA AIYAR AND SEPNER, JJ.

Uthami Chettiar and another—Appellants.

v.

Juttu Nagaswami Iyer—Respondent.

Appeal No. 12 of 1913, Decided on 13th November 1913, against appellate order of Dist. Judge, Madura, in Appeal Suit No. 4 of 1912.

Madras Civil Rules of Practice, R. 279 (6)—Payment of decree amount by debtor without process issued on execution application is money realised by application within Cl. (6), though it does not come under Civil P. C. (1882), S. 295.

Payment into Court by a judgment-debtor of the decree money, without any process having been issued on the execution application is money "realized by the application" within the meaning of R. 279, Cl. 6, though it may not come within the terms of S. 295, Civil P. C. 1882: 28 *Mad.* 380, *Dist.* and 20 *I.C.* 919, *Foll.* [P 641 C 1]

R. Rangaswami Aiyangar—for Appellants.

Judgment.—The decision in the case of *Vibudhapriya Thirthaswami v. Yusuf Sahib* (1) quoted by the learned District Judge turned upon the wording of S. 298 of the old Civil P. C. The words of that section were: "Whenever assets are realized by sale or otherwise in execution of a decree"; whereas the wording of R. 279, Cl. (6), of the Civil Rules of Practice, 1905, is "realized by the application." Money may be realized "by the application," that is by the judgment-debtor paying the amount in Court in consequence of an application having been made without any process having been issued; though such payment may not come within the terms of S. 295 of the old Civil P. C., because it was not realized "by sale or otherwise in execution;" that is by a process issued and effectually carried out in execution. Further, the money was realized in the case of *Vibudhapriya Thirthaswami v. Yusuf Sahib* (1) from a person who was

under no obligation at all to pay it into Court.

We think that it is not equitable that the decree-holder after incurring the expenses of engaging a vakil to put in an execution application through the default of the judgment-debtor in not having obeyed the decree at once should be put to loss through any narrow interpretation of R. 279, Cl. (6), of the Civil Rules of Practice, 1905. Following the ruling of *Kanappa Chetty v. Annamalai Chetty* (2) on the file of this Court we set aside the order of the learned District Judge and restore that of the District Munsif with costs in all Courts.

S.N./R.K. : *Order set aside.*

(2) [1913] 20 *I. C.* 919.

A. I. R. 1914 Madras 641 (2)

WALLIS AND SADASIVA AIYAR, JJ.

Vaikuntarama Pillai—Defendant—Appellant.

v.

Athimoolam Chettiar—Plaintiff—Respondent.

Second Appeal No. 1631 of 1911, Decided on 2nd April 1914, from decree of Dist. Judge, Tinnevely, in Appeal Suit No. 418 of 1910.

(a) **Contract Act (1872), S. 11**—Contract by minor void—Equitable restitution can be granted only on ground of fraud.

Contracts by minors are void; the only ground on which equity interferes to make a person of full age return money or property which he obtained during minority is fraud. [P 642 C 1,2]

(b) **Contract Act (1872), S. 11**—Money obtained by minor by misrepresentation of age must be refunded—Minor representing himself to be major mortgaged property—He can plead minority.

Where a minor obtains money by misrepresenting his age, that amounts to fraud, and he may be made to refund it. A minor who mortgaged his property representing himself to be a major is not estopped from subsequently pleading his minority; *Levene v. Brougham*, (1909) 25 *T. L. R.* 265; *Johnes In re*, (1881) 18 *Ch. D.* 109, *Stock v. Wilson*, (1913) 2 *K. B.* 235; *The Unity Joint Stock Mutual Banking Association In re*, (1866) 3 *De. G. & J.* 63; 35 *Cal.* 539, (*P. C.*); *Thurston v. Nottingham Permanent Benefit and Building Society*, (1902) 1 *Ch.* 1; 12 *I. C.* 568 and 8 *I. C.* 388; *Foll.*; *Holmes v. Penny*, (1857) 3 *K. & J.* 90, *Dist.* [P 642 C 1,2]

(c) **T. P. Act (4 of 1882), S. 53**—Scope—*Quaere*.

Quaere—Whether a future creditor can get rid of a voidable but real transfer under S. 53. [P 643 C 2]

C. V. Ananthakrishna Aiyar—for Appellant.

T. R. Ramachandra Aiyar and M. B. Doraisami Aiyangar—for Respondent.

(1) [1905] 28 *Mad.* 390=15 *M. L. J.* 222.

Wallis, J. — This is a suit by the plaintiff on a mortgage executed by defendant 1 during minority in favour of defendant 3 who transferred it to defendant 4 who again transferred it to the plaintiff. The transfer by defendant 3 to 4 was attested by defendant 1 after he had attained majority. Before the date of the attestation but after he attained majority, defendant 1 executed a settlement transferring all his property to his mother and wife on behalf of his minor son, stipulating only for maintenance for himself. The District Judge has found that the settlement was intended to be operative, but that it was executed by defendant 1 with intent to defeat and delay his creditors; and there is no ground for questioning these findings. But he has also found that the plaintiff was a person defrauded, defeated or delayed by the settlement so as to be entitled to set it aside under S. 53, T. P. Act. From the decision an appeal has been preferred by the son, defendant 2. It has been contended before us that defendant 1 at the date of the settlement was a debtor of defendant 3 for the money advanced to him on mortgage during minority, as he was bound to refund it.

Where a minor has obtained money by misrepresenting his age, that amounts to fraud and he may be made to refund it, but I think it is now settled that in the absence of fraud a refund cannot be ordered. This would appear to have been the rule in England even before the Infants Relief Act of 1874 which makes contracts entered into by minors void by statute as the Contract Act does in India. In England there is an express decision on the point by the Court of appeal in *Levene v. Broughan* (1) and the earlier decision of the Court of appeal, *In re Jones, Ex parte Jones* (2) to which Sir George Jessel was a party is to the same effect. All the cases have been reviewed recently by Lush, J., in *Stocks v. Wilson* (3), where it is shown on an examination of all the authorities that the ground, on which equity interferes to make a person of full age return money or property which he obtained during minority, is

fraud. In that case as in the earlier case of *Ex parte, The Unity Joint Stock Mutual Banking Association, In re King* (4), fraud was found and return ordered. As regards Indian cases it seems sufficient to refer to the well known decision in *Mohori Bibee v. Dharmodas Ghose* (5) in which their Lordships held that minors' contracts are void and not voidable, and that S. 65, Contract Act, has no application to them and in which they cited with approval the observations of Romer, L. J., in *Thurston v. Nottingham Permanent Benefit Building Society* (6): "A Court of equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the legislature has declared to be void." That is to say in the absence of fraud, an infant is not estopped from pleading minority in answer to a suit for the return of the money advanced to him during minority.

This has also been expressly decided by the Allahabad High Court in *Kanhai Lal v. Babu Ram* (7). The finding in the present case is that there was no fraud or misrepresentation by the minor as to his age when he borrowed on a mortgage from defendant 3. Consequently he could not then have been ordered to refund, and therefore defendant 3 was not one of his creditors at the date of settlement. Both the lower Courts however have held that this does not debar the plaintiff from setting aside the settlement. The District Munsif relies on the fact that defendant 1 always treated defendant 3 as a creditor, endorsed payments on the mortgage after he attained majority, attested its transfer to defendant 4, and lastly admitted the plaintiff's claim in this suit. The District Judge apparently takes the same view. Now as regards the present question, the admission of defendant 1 during the suit cannot give the plaintiff the right to set aside the settlement as against defendant 2. It has not been found, or contended before us, that the settlement was void on the ground that it was intended to

(1) [1909] 25 T. L. R. 265=53 S. J. 243.

(2) [1881] 18 Ch. D. 109=29 W. R. 747=50 L. J. Ch. 673=45 L. T. 193.

(3) [1913] 2 K. B. 235=82 L. J. K. B. 598=108 T. L. R. 834=20 Manson 129=29 T. L. R. 252.

(4) [1866] 3 De G. & J. 63=27 L. J. Bk. 33=4 Jur. (n. s.) 1257=6 W. R. 640=44 E. R. 1192.

(5) [1903] 30 Cal. 539=5 Bom. L. R. 421=7 C. W. N. 441=30 I. A. 114 (P. C.).

(6) [1902] 1 Ch. 1=71 L. J. Ch. 83=50 W. R. 179=86 L. T. 35=18 T. L. R. 135.

(7) [1910] 8 I. C. 888.

defraud subsequent creditors as distinct from creditors existing at the date of the settlement, and in these circumstances it appears unnecessary to consider whether the plaintiff would be entitled as a subsequent creditor by estoppel of defendant 3 to avoid it. The plaintiff was not creditor of defendant 1 at the date of the settlement. There is no doubt a dictum in *Holmes v. Penney* (8) that where debtor makes a settlement in fraud of his creditors and pays them off and a new set of creditors stand in their places the settlement would be void against them also, but this proceeds upon the language of the Statute of Elizabeth, which is for the protection of "creditors or others," not "creditors" only which words are not reproduced in the Transfer of Property Act, and besides the plaintiff in this case cannot be said to stand in the place of the creditors at the date of the settlement. In these circumstances I think the plaintiff is not entitled to set aside the settlement and that the appeal must be allowed and the suit as against defendant 2 and the plaint Sch. 2 property is dismissed with costs throughout. The memo. of objection is dismissed with costs.

Sadasiva Aiyar, J.—I entirely agree. Even if defendant 1 were estopped by some conduct of his from denying as against defendant 4, that he (defendant 1) owed money to defendant 3 on the mortgage-deed, this would not create a real debt on the date when the estoppel arose. Estoppel only prevents a man from pleading the real state of facts, but does not make the false state of facts which the Court has got to assume as true (as between the estopped man and the man in whose favour the estoppel works) to become for all purposes a true state of facts. So far as defendant 2 was concerned, no such debt as he was bound to discharge by the obligation imposed under the Hindu law on a Hindu son really arose at any time even after the date of the settlement, by reason merely of his father's becoming estopped by the said father's conduct from denying that he owed a debt to defendant 3 or to defendant 3's assignee (defendant 4). An estoppel cannot overrule a plain provision of law: see *A. R. Krishna Chetty v.*

Wellaichami Thevan (9). In this case the plain statutory provision that a minor is incompetent to incur a contractual debt cannot be overruled by an estoppel. Defendant 4 does not actually become a subsequent creditor or a prior creditor by reason of the estoppel, but defendant 1 is estopped from denying that there was a prior debt due by him to defendant 3, and that estoppel works in favour of defendant 4 and against the defendant 1. In this view, it is unnecessary to go into the question whether a future creditor can get rid of a voidable real transfer under S. 53 of Act 4 of 1882: that is the question on which I feel grave doubts whether the current of authorities is really consistent and whether the observations in some of the decisions are sound and in consonance with justice and convenience.

S.N./R.K. *Appeal allowed.*

(9) [1911] 12 L. C. 568=37 Mad. 38.

A. I. R. 1914 Madras 643

WALLIS AND AYLING, JJ

In re *Chinnavan*—Petitioner.

Criminal Misc. Petn. No. 82 of 1914, Decided on 10th March 1914, from order of Second Class Magistrate, Atur, in Revn. Petn. No. 6 of 1914.

Criminal P. C. (1898), S. 347—Special power to commit to Sessions under S. 347 does not deprive accused benefit of Ch. 18—Accused tried under S. 354, Penal Code, denying charge, enjoying benefit of cross-examination cannot be said to be prejudiced by the fact that Magistrate altered charge into one under Ss. 376 and 511, Penal Code, and committed him to Sessions—Committal order was held not illegal.

The special power to commit to a Sessions Court, conferred on a Magistrate by S. 347 cannot be interpreted as depriving the accused of the benefit of the procedure prescribed in Ch. 18 of the Code, but where the accused, when tried on a charge under S. 354, I. P. C., denies the charge in toto and enjoys the benefit of cross-examining the prosecution witnesses and of examining the witnesses for the defence, it cannot be said that he has been prejudiced merely because the Magistrate, at the time of delivering his judgment, altered the charge into one under Ss. 376 and 511 and committed him to the Sessions, because he was not himself competent to try the accused on the altered charge. [P 644 C 1]

A committal order passed under such circumstances is not illegal, and should not be set aside: 17 I. C. 813 (F. B.), *Foll.* [P 644 C 2]

C. Madhavan Nair—for Petitioner.

Public Prosecutor—for the Crown.

Order.—This is an application to quash the commitment of the accused

(8) [1857] 3 K. & J. 90=26 L. J. Ch. 179=3 Jur. (n. s.) 80=5 W. R. 132=69 E. R. 1035=112 R. R. 49.

for trial by the Sessions Court on a charge of attempted rape under Ss. 376 and 511, I. P. C. The case for the petitioner is that the Second Class Stationary Magistrate took cognizance of the case and after hearing the evidence for the prosecution, framed a charge of indecent assault under S. 354, I. P. C., took the accused's plea, allowed the prosecution witnesses to be cross-examined and heard the evidence for the defence according to the procedure prescribed in Ch. 21, Criminal P. C., for the trial of warrant cases and reserved judgment; but that instead of delivering judgment on the charge under S. 354, the Magistrate framed a charge against the accused under Ss. 376 and 511 and committed the accused for trial by the Sessions Court. It is not disputed that under S. 227, Criminal P. C., the Magistrate, even at the late stage, was empowered to alter the charge into one under Ss. 376 and 511, I. P. C., or that, as this charge was not cognizable by the Magistrate, it became his duty under S. 347 to commit the case to the Sessions as one that "ought to be tried by the Court of Session." It is said, however that S. 347 only authorizes the Magistrate to commit the accused for trial by the Sessions Court "under the provisions hereinbefore contained" and that this means after observing the procedure prescribed in Ch. 18 before commitment to the Court of Session. We agree entirely with the decision of the Full Bench of the Burma Chief Court, *Emperor v. Chanuing Arnold* (1), that it was not intended by S. 347 to enable the Magistrate to deprive the accused of any of the rights conferred on him by Ch. 18, though as observed by one of the learned Judges, when an order has been made under S. 347, proceedings under Ch. 18 need not necessarily be commenced de novo.

In the present case we do not think that the accused has in fact been deprived of any such rights. Under Ch. 18 the accused had the right to cross-examine the witnesses for the prosecution and to adduce evidence for the defence before the framing of the charge on which he was to be committed to the Court of Session. The accused has enjoyed these rights in the present case

subject only to this that the Magistrate, treating the case as a warrant case under Ch. 21, framed a charge under S. 354, I. P. C., against the accused before calling on him to cross examine the prosecution witnesses and call evidence for the defence. It may therefore be said that the accused was led to confine his cross-examination and the defence evidence exclusively to the charge under S. 354. In some cases this might be a very real prejudice, but in the present case the defence is that the prosecution story is an entire concoction and the defence witnesses who speak to this before the Magistrate are the witnesses whom the accused has caused to be summoned for the trial to meet the charge of attempted rape. In these circumstances we do not think the accused has been in any way prejudiced and we decline to quash the committal.

S.N./R.K.

Petition dismissed.

A. I. R. 1914 Madras 644

SANKARAN NAIR AND BAKEWELL, JJ.

V. R. Ry. Sethuram Madigai Row Sahib—Plaintiff—Appellant.

v.

Gopal Row Peishwa and others—Respondents.

Second Appeals Nos. 705, 987 and 1479 of 1912, Decided on 20th November 1913, from decrees of Sub-Judge, Tanjore, in Appeal Suits Nos. 157, 156 and 174 of 1910.

Specific Relief Act (1 of 1877), Ss. 55 and 56—Where damages are adequate remedy, mandatory injunction should not be granted.

Where upon a balance of convenience, damages will be an adequate remedy, relief by way of mandatory injunction should not be granted. [P 642 C 2].

T. Ethiraja Mudaliar—for Appellants.

T. V. Gopalaswami Mudaliar and G.S. Ramachandra Aiyar—for Respondent.

Judgment.—In these connected appeals the lower appellate Court has found that there is a lane between the houses of plaintiff 2 and the defendant, which leads to the house of plaintiff 1; and that this lane and a strip of land 3 feet broad parallel thereto are the common property of plaintiff 1 and the defendant. The defendant has erected a building which encroaches upon a small portion of this common property, 2 feet by 2 feet, and has also built some steps to a door-way in his wall which project 3 feet into the common property;

(1) [1912] 17 I. C. 813 = 13 Cr. L. J. 877 (F. B.).

and this has been done in spite of objections taken by the appellant.

In the plaints in both suits, the plaintiffs (appellants) exaggerated their claims; in Original Suit No. 405 of 1908 they claimed the exclusive property in land found to belong to the defendant, and in Original Suit No. 461 of 1908 they claimed that a door-way made by the defendant in his house should be removed. In both suits the plaintiffs prayed for a mandatory injunction for the removal of the building and of the steps which encroached upon the common property,

The Subordinate Judge has found that the piece of land, including the lane, between the houses of the parties can be partitioned in such a way as to give to each party a strip of land 5 feet 10 inches in width from north to south, and 39 feet from east to west, and that, if this division be effected the portions of the land upon which the defendant has encroached can be allotted to the defendant as part of his share of the common property. Upon these facts he has held that the plaintiffs have failed to show that the acts of the defendant have caused such material and substantial injury as could not be remedied in a suit for partition of the common property, and has confirmed the decrees of the Court of first instance which dismissed both the suits. The lane gives access to plaintiff 1's house, and it is obvious that to reduce its width by about one-half will be extremely inconvenient to him, and will deprive him of the right which he has heretofore exercised of freely passing over the common property.

In fact, each party has not only a right of ownership in common in the soil of the lane, but a right of way over the whole of the surface, and the effect of forcing the plaintiffs to ask for partition is to deprive them of this right. Without expressing any opinion upon the decisions relied upon by the Subordinate Judge, we think that the present case does not fall within them.

The small piece of land upon which the defendant has encroached forms part of plaintiff 1's verandah, and is only 2 feet square, so that the inconvenience is not great, but it cannot be compensated by giving the plaintiffs the sole ownership of another piece of land of the same area, and as we have pointed out a divi-

sion of the whole of the common property would be injurious to the plaintiffs. The question therefore is whether the remedy granted to the plaintiffs should be by way of injunction or in damages. Plaintiff 1 was originally in fault, in claiming the land as his exclusive property, and upon the balance of convenience, we think that damages would be an adequate remedy and we assess them at Rs. 20.

The result is that there will be a decree in Second Appeal No. 705 of 1912 setting aside the decrees of both the lower Courts and declaring that the peice of land 2 feet square upon which the defendant has erected his building is the joint property of plaintiff 1 and the defendant, and awarding to the plaintiff the sum of Rs. 20 as damages; and there will be no order in Second Appeal No. 987 of 1912 except that the respondent do pay the appellant's costs.

There will be a decree in Second Appeal No. 1479 of 1912, reversing the decree of the lower appellate Court and restoring that of the District Munsif. The parties will bear their own costs in the District Munsif's Court in both cases, and the defendant will pay the plaintiff's costs of all proceedings in this and the lower appellate Court. The memorandum of objections in Second Appeal No. 705 of 1912 will be dismissed. Order for costs will be against the defendant (respondent 1) only.

S.N./R.K.

Decree modified.

* A. I. R. 1914 Madras 645

MILLER AND TYABJI, JJ.

Kalgara Ramanna and others—Appellants.

v.

Kalgara Gangayya and others—Respondents.

Second Appeal No. 1429 of 1912, Decided on 1st October 1913.

*** Hindu Law—Alienation—Bona fide sale by widow—Part consideration not binding on reversioners—Alienee may retain property and pay amount so found to reversioners.**

Where in a bona fide sale by a Hindu widow a portion of the consideration money is found not to be binding on the reversioners, it is at the option of the alienee to retain the property and pay the amount so found to the reversioners: 6 I. C. 207, *Foll.* [P 646 C 1]

T. V. Seshagiri Aiyar for T. R. Ramchandra Aiyar—for Appellants.

K. Narain Rao—for Respondents.

Judgment.—The District Judge finds that out of the sum of Rs. 1,300, the price paid for the property, Rs. 1,022 was to pay off a debt or debts which the widow was legally justified in paying out of the corpus of her son's estate and that as regards the balance Rs. 278, there was no justification for obtaining that money by sale of the land. The District Judge also finds that both sales were bona fide transactions, and that the prices paid were not unreasonably low. These findings we accept, but we do not think they justify the decree which the District Judge has made.

The sale, Ex. 4, for Rs. 700 is clearly wholly good as found by the District Judge, and the reversioners have no claim to recover the property. The only ground suggested in support of the decree is inadequacy of price, but the District Judge's finding is that the price was not unreasonable.

As regards the sale for Rs. 600, the sum of Rs. 322 is binding, so to phrase it, on the reversioners, and Rs. 278 is not binding, but the sale was bona fide and the purchaser is, we think entitled to retain the land.

We accept the view taken of this question in *Felaram Roy v. Bagalanand Banerjee* (1) and think that the right decree as regards the second sale will be one which permits the purchaser to retain the land; we need not consider the question whether the reversioners have a right to recover the sum of Rs. 278, because that question was not argued, and it was stated by Mr. Seshagiri Aiyer that, if we accept the District Judge's finding his clients were willing to pay that amount to retain the land.

We leave that question open for further consideration should it arise. The decree will therefore be that the suit be dismissed with costs throughout, as against defendants 1 to 14 and 17 and 18 and that, if defendant 15 do not within three months pay the amount of Rs. 218 with interest at 6 per cent. per annum from the date of the death of the widow, i. e., 24th January 1900, the plaintiff be at liberty to sell the property covered by Ex. 3 for the amount, but if the payment is made within three months, the plaintiff's suit will stand dismissed as against defendants 15 and 16 also. Defendant 15 will pay his own

costs but not the plaintiff's. The memorandum of objections is dismissed with costs.

S.N./R.K.

Suit dismissed.

A. I. R. 1914 Madras 646

WHITE, C. J. AND OLDFIELD, J.
Athalur Malakondiah—Appellant.

v.

Thatha Lakshminarasimhulu Chetty—Respondent.

Appeal No. 18 of 1913, Decided on 9th February 1914, from original decree of Bakewell, J., D/- 19th December 1912.

Executor—Court may in discretion dismiss administration suit by annuitant legatee if legacy is paid into Court by executor.

A suit by an annuitant legatee against the executor for a general administration of the testator's estate may, at the discretion of the Court, be dismissed, if the executor pays into Court the amount of the legacy and a sum sufficient to secure the payment of the annuity: *Wollaston v. Wollaston*, (1878) 7 Ch. D. 58, *Foll.*; and *Campbell v. Gillespie*, (1900) 1 Ch. 225, *Dist.* [P 646 C 2]

V. V. Srinivasa Aiyangar—for Appellant.

C. P. Ramaswami Iyer—for Respondent.

White, C. J.—This is an appeal from a decree dismissing a suit brought by a party who was a legatee and annuitant under the will of a deceased person of which the defendant was the executor. It is contended on behalf of the appellant that it was obligatory on the learned Judge to proceed with the case and to hear the evidence and that the plaintiff, if the allegations in the plaint were established, was entitled to claim, as of right, a general administration decree. A written statement was put in and, after the written statement, the defendant paid into Court the amount of the legacy and a sum sufficient to secure the payment of the annuity. I think the learned Judge had a discretion to adopt the course which he took: see Halsbury's Laws of England, Vol. XIV, para. 798, and the cases which are there cited. No doubt, the cases cited are instances where the Court has acted under O. 55, R. 10 of the Rules of the Supreme Court of England. But with the exception of one case, we have not been referred to any authorities which show that any alteration of the substantive rights of parties either in law or in equity was affected by the rule in question, a rule which enabled a party to apply for the administration of the

(1) [1910] 6 I. C. 207=14 C. W. N. 895.

estate of a deceased person by originating summons instead of by suit. It seems to me if the rule purported to affect the substantive rights of parties, it would be beyond the power of the rule-making authority. In view of the pleadings in this case and having regard to the payment into Court to which I have referred, I am not prepared to say that the learned Judge exercised a discretion, which, I think, he had, wrongly when he dismissed the suit. We have been referred by the learned vakil for the appellant to the case of *Wollaston v. Wollaston* (1). There the question before the Court was whether the annuitant under the will in question was entitled to have a judgment for administration of the estate and it was held that he was. The argument turned on whether the annuitant qua annuitant was entitled to a judgment for administration.

If seems clear that under the English practice where one creditor sues on behalf of others for the administration of the estate of a deceased person, the defendant may at any time before judgment have the action dismissed on payment of the plaintiff's debt and all the costs of the action: see Daniell's Chancery Practice, Edition 7, Vol. 1, p. 195 and the cases there cited. It has been pointed out that that was a case of a creditor's suit and the case now before us is a suit by a legatee and annuitant: But for the purposes of the question, whether there is a discretion in the learned Judge, I do not think any distinction can be drawn between suits by creditors and suits by legatees. As has been pointed out in the course of argument, in view of the payment into Court which has been made, the only question that would remain, if we follow the English practice, would be the question of costs. Our attention has been called to a case which, Mr. Srinivasa Aiyangar contended, showed that there was no discretion in the Court. He contended that the discretion, in England at any rate, was given by O. 55, R. 10 and that, prior to the introduction of that rule, there was no discretion. The case to which he referred is *Campbell v. Gillespie* (2). That was a case in which a creditor sued the trustee under a deed

for the benefit of creditors charging him with fraud and misconduct and claiming an account of all his dealings under the trust-deed. No doubt, the learned Judge in that case observed that under the old law the plaintiff would have been entitled, as a matter of right, to a common account against the defendant but that under O. 55, R. 10 the Court had a discretion. I do not think the observations of the learned Judge, with reference to the particular facts of this case, require us to hold that in a case like the present there is no discretion in the Court. In regard to costs, the order dismissing the suit with pleadings was an order made by the learned Judge in the exercise of a discretion which, I think, he was entitled to exercise. This being so, I do not think his order as to costs should be disturbed.

The appeal fails and is dismissed with costs.

Oldfield, J.—I agree.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 647

SADASIVA AIYAR, J.

Ravipati Ramayya — Plaintiff—Petitioner.

v.

Addanki Seshayya and another—Defendants—Respondents.

Civil Revn. Petn. No. 254 of 1912, Decided on 11th February 1914, from decree of Dist. Munsif, Narasaraopet, in Small Cause Suit No. 856 of 1911.

Inam — Inam held by lessees for fixed period—Lessees are not liable for increase in quit rent consequent on enfranchisement for inamdar's benefit.

Where an inam is held by lessees for a fixed period and the inamdar gets it enfranchised for his own benefit, his lessees are not liable for the consequent increase in the quit rent.

[P 647 C 2 ; P 648 C 1]

V. Ramadoss—for Petitioner.

P. Nagabushanam—for Respondents.

Judgment.—This is an unsustainable petition by the plaintiff. The petitioner got his inam enfranchised for his own benefit and hence was charged by the Government with the burden of paying an increased quit rent. He wants to recover the increase in the assessment from the defendants who are only lessees for a fixed number of years under him. The analogy of the mulgeni tenant and his landlord has absolutely no application. These tenants agreed and could have agreed to pay only the assessment.

(1) [1878] 7 Ch. D. 58=47 L. J. Ch 117=37 L. T. 631=26 W. R. 77.

(2) [1900] 1 Ch. 225=69 L. J. Ch. 223=81 L. T. 514=48 W. R. 150.

as it stood at the time of their lease for the period of their lease, and not the increased assessment which was imposed at their landlord's request for their landlord's benefit. The plaintiff's claim is wholly inequitable and I dismiss this revision petition with costs.

S.N./R.K. *Revision dismissed.*

A. I. R. 1914 Madras 648

WHITE, C. J., AND SPENCER, J.

A. R. Krishnan Chetty and others—
Plaintiffs—Appellants.

v.

Vellaichami Thevan and others—
Defendants—Respondents.

Civil Appeal No. 227 of 1905, Decided on 21st September 1911, from decree of Sub-Judge, Madura East, in Civil Suit No. 41 of 1904, D/- 21st August 1905.

(a) **Guardians and Wards Act (8 of 1890), S. 7 (2)—After order under S. 7 transaction by other person does not bind minor's estate—Suit against minor must fail.**

When a guardian of a minor's property is appointed under the Guardians and Wards Act, no person other than such guardian can legally bind the minor's estate even if he be a de facto guardian of the minor. [P 649 C 1]

The want of authority of a de facto guardian is a good defence to a suit brought by a mortgagee against a minor to enforce a mortgage executed in his favour by such guardian. [P 649 C 2]

(b) **Evidence Act (1 of 1872), S. 115—Knowledge or representation of intention does not estop—Estoppel does not help void transaction.**

There can be no estoppel if the person concerned knows the truth about the facts asserted, nor can the doctrine be invoked to defeat a plain provision of law. A cause of action cannot be founded on an estoppel, nor does an estoppel arise from the representation of a mere intention. [P 650 C 1, 2]

(c) **Contract Act (9 of 1872), S. 11—Void contracts cannot be ratified—Advance for necessities—Burden on creditor to show that estate was made liable—Contract Act (1872), S. 68.**

There can be no ratification of a void transaction, owing to the promisor possessing no contractual capacity at the time. Nor can a void deed form a good consideration for a fresh contract made by a minor on attaining majority. [P 650 C 2]

Where a money-lender advances money to a minor and alleges that the articles purchased with such money were necessities, the responsibility would rest on him when a bond is taken for a debt, to take care that the bond is so drawn as to render the estate of the minor in law liable for debt. [P 651 C 1]

(d) **Civil P. C. (5 of 1908), O. 12, R. 6—Admission not acted upon under O. 12, R. 6, is piece of evidence.**

An admission may be made by a party at any time, but if the Court of first instance did not treat it as a confession of judgment and pass a decree against him on the strength of it, it can be treated only as a piece of evidence. [P 651 C 2]

S. Srinivasa Aiyangar—for Appellants.
T. Rangachariar, T. Rangaramanujachariar; S. Sundararajah Aiyangar; C. S. Govindaraja Mudaliar, C. S. Venkatachariar and M. Narayanaswami Aiyar—for Respondents.

Judgment.—The plaintiff in the lower Court, a money-lender by profession, based his claim upon two hypothecation bonds, Ex. L for Rs. 1,000 executed on 27th July 1898, and Ex. A for Rs. 3,000 executed on 28th June 1899, and as his suit was dismissed he now appeals. On account of the defendant 1's minority, a guardian named Krishnaswamy Iyer was appointed on 18th January 1897, under the order of the District Court of Madura, marked Ex. CC. On 20th November 1899, by force of orders marked Exs. EE and FF, defendant 1's mother who had by Ex. CC been made guardian of the persons of defendant 1 and his minor sister jointly with the guardian of their property was appointed guardian of their property also and Krishnaswami Iyer was discharged from his office. On 31st October 1900, defendant 1 was declared by the Court to have attained majority and the guardian's powers ceased.

Exhibit L was executed by defendant 1's mother Rukku Nachiar alone purporting to act as guardian of defendant 1 and his sister. Ex. A was executed both by defendant 1 and his mother, but she does not describe herself therein as his guardian. A comparison of dates easily shows that both documents were executed during the continuance of the guardianship of the guardian of the property appointed by Court. The Subordinate Judge has found that defendant 1 was below 18 years, when the guardian was appointed. Mr. Srinivasa Iyengar has asked us to come to a different conclusion on the evidence, but on this point we may briefly remark that no evidence, sufficient to rebut the legal presumption that defendant 1 was a minor when guardians of his person and property were appointed by the Court having jurisdiction under Act 8 of 1890, has been laid before us.

As regards Ex. L, it has been contended that it is valid on the ground that it was executed by defendant 1's mother who was guardian of his person and de facto guardian of his property, if the debt was incurred for necessary purposes. But, in

the first place, there is no proof that she was de facto guardian beyond the vague statement of the plaintiff's 8th and 9th witnesses that her men managed defendant 1's villages and there was no suggestion of the kind in Ex. DD, when a motion was made to the Court to remove Krishnaswamy Iyer and appoint Rakku Nachiar. In the second place, the authorities cited on the appellant's behalf fall far short of establishing the proposition that, when a guardian of a minor's property is appointed under the Guardians and Wards Act, persons other than such guardians can legally bind the minor's estate.

It would be exceedingly inconvenient for the minor's interests, if there was such conflict of authority between guardians. The legislature has in fact provided for such an eventuality so far as guardians appointed by Court are concerned. S. 7 (2), Guardians and Wards Act, takes away the power of any guardian not so appointed, by declaring that the Court's order appointing a guardian under the Act will have the effect of removing any other guardian. Ss. 29 and 30 provide against the lawfully appointed guardian encumbering or alienating portions of the minor's estate without the Court's permission. In *Nathu v. Balvant Rao* (1) it was held that an adverse act of a mother, while acting de facto guardian of her son, in disposing of the minor's property as if it was her own and purporting to pay her own debts although the purchase money was in fact applied in payment of debts for which the minor was liable, would not bind the minor for whom a guardian had been appointed by Court. The effect of appointments under the Act of extinguishing the powers of a natural guardian is discussed in *Ramchunder v. Channa Lal* (2). No doubt, these cases are not on all fours with the present, but they show how other Courts have treated the powers of certificated guardians as exclusive; and the language of the Act is clear enough. In *Abdul Khader v. Chidambaram Chettiar* (3), here the parties were Mahomedans, this Court held that persons purporting to act as de facto guardians and to incur debts in good faith for the benefit of a minor, could not bind the minor's

property by their acts, if in fact they had no legal status as guardians. The position of a mother after the appointment of a guardian by Court appears to be no better, even though she may be guardian of the minor's person as in this case. The want of authority of a de facto guardian is a good defence to a suit brought by a mortgagee to enforce his mortgage against a minor, though if the positions were reversed and the minor was suing to set aside the mortgage, as was held in *Nizamuddin Shah v. Anandiprasad* (4), a Court might equitably decline to grant relief until the plaintiff compensated the mortgagee to the extent to which he had benefited by the money advanced on the mortgage.

Turning to the decisions cited on the other side, they do not help us much. *Honappa v. Mhalpai* (5) and *Manishankar Pranjivan v. Bai Muli* (6) deal with the powers of natural guardians when no certificated guardian has been appointed. So also the case of *Arunachalla Reddi v. Chidambara Reddi* (7). There was a testamentary guardian in that case and he acquiesced in the alienation made by the natural guardian for necessity. In *Ananthayya Kameti v. Lakshmi Narayanappayya* (8) there was a caretaker in possession of a minor's estate as a guardian, but no conflict of authority arose between guardians certificated or natural. In *Madan Mohan v. Ranji Lal* (9) the certificated guardian joined with the minor in executing the mortgage in dispute but failed to obtain the Court's permission, and the Court treated the transaction as voidable and good if not followed by notice of an intention to avoid it, whereas in *Mahori Bibi v. Dharmodas Ghose* (10) the Privy Council has treated mortgages entered into by minors as void for want of contractual capacity. In *Gharibulla v. Khalak Singh* (11) certain mortgages were contracted by the manager of an undivided Hindu family, and the mother who obtained a certificate of guardianship did not get the Court's sanction under S. 29. It is thus not a case in point.

(1) [1908] 27 Bom. 390.

(2) [1905] 2 A. L. J. 460=(1905) A.W.N. 122.

(3) [1909] 3 L. C. 876=32 Mad. 276.

(4) [1896] 18 All. 373.

(5) [1891] 15 Bom. 259.

(6) [1888] 12 Bom. 686.

(7) [1903] 13 M.L.J. 223.

(8) [1908] 18 M.L.J. 233.

(9) [1901] 23 All. 288.

(10) [1912] 39 Cal. 539=30 I.A. 114 (P.C.).

(11) [1903] 25 All. 407.

Next, it is contended that, apart from Rakku Nachiar's act being valid, defendant 1 and those who claim under him are precluded from disputing the validity of Ex. L, because, in 1903 after attaining majority, defendant 1 undertook in a letter filed as Ex. L (1) to see that this debt and that secured by Ex. A were paid at an early date if the plaintiff arranged to take an assignment of Ex. L from the original mortgagee Mahomed Ibrahim.

It is sought to make Ex. L (1) do duty as an estoppel, as a ratification of the suit bonds Exs. A and L, or as a foundation for a new contract between defendant 1 and the plaintiff after the attainment of majority. The plaintiff's position is said to have been made worse by his acting on defendant 1's offer to pay promptly on condition of his taking the assignment (Ex. M), but the plaintiff's statements at p. 167 of the printed documents that defendant's mother represented her son to be 17 or 18 in 1896 or 1897 (the year when a guardian was appointed) that he got no record to show his age, and that he was aware of the guardianship petition being presented, show that he was not wilfully kept in ignorance of defendant 1's minority and there can be no estoppel, if the person concerned knows the truth about the facts asserted. Moreover, estoppel cannot be invoked to defeat a plain provision of law : vide *Madras Hindu Mutual Benefit Permanent Fund v. Raghava Chetty* (12). A mortgage can only be effected by a registered document and there is no registered document validly executed by defendant 1 in existence. There is only an alienation made by his mother without authority. The case of *Sarat Chunder v. Gopal Chunder Laha* (13) can be distinguished by the circumstances that the District Judge found that Ahmad, whose acquiescence in his mother's conduct was held to amount to estoppel, had reached majority at the date of the mortgage. The case of *Parameshur Ojha v. Mt. Goollee* (14), relied on by Mr. Srinivasa Iyengar, was another case of a major permitting his mother to represent him as a minor, and to mortgage ancestral property. If in that case he had been in fact a minor his

permission would have gone for nothing. Then too, there can be no ratification of a void transaction, void owing to the promisor possessing no contractual capacity at the time : vide *Ramasami Pandia Thalavar v. Anthappa Chettiar* (15) and Pollock and Mulla's Contract Act, p. 56 :

Nor can a void deed form a good consideration for a fresh contract made on attaining majority. In this case, we are told that defendant 1 was benefited by not being put into Court at once and by a change of creditors and the promisee was benefited by the promise of defendant 1 to pay the debt of Rs. 3,000. These advantages may serve as consideration for the assignment, but this suit was brought on the mortgages ; the cause of action is described in the plaint as starting from them and no case of a new contract appears to have been put forward till now. Even in the prayer for additional issues at p. 185 of the printed documents this case is not clearly set out. A cause of action cannot be founded on an estoppel, nor does an estoppel arise from a representation of a mere intention such as defendant 1's intention to pay promptly : vide Halasbury's Laws of England, Vol. 13, p. 377, S. 534.

As regards Ex. A, it was executed both by defendant 1 and his mother. Decisions have been cited to show that it is not necessary for a guardian to describe himself as a guardian if he actually is one, but when a minor purports to act and execute for himself as in this case, it would be a violent presumption to treat his mother as acting for him.

Assuming however that her act was the act of a guardian, it is bad for the same reason as her execution of Ex. L viz. because there was a guardian appointed by the Court at the time. Defendant 1's execution of Ex. A was bad as being the act of a minor.

Again, it is argued that the plaintiff is entitled to be reimbursed for necessities supplied to the minor and to get a charge on his estate independently of the suit bonds. S. 68, Contract Act, and the decision in *Bhawal Sahu v. Baijnath Pertap Narain Singh* (16) are quoted in support of this position and some of the items and oral evidence have been referred to in order to show what the cost of the minor's maintenance was and how

(12) [1896] 19 Mad. 200.

(13) [1893] 20 Cal. 296=19 I. A. 203 (P.C.).

(14) [1869] 11 W. R. 446.

(15) [1903] 16 M.L.J. 422.

(16) [1908] 35 Cal. 320=12 C.W.N. 256.

the money borrowed from the plaintiff was expended. On this point it will be sufficient to note that the Subordinate Judge in para. 19 of his judgment found no evidence that the debts which Ex. A discharged and those which the account Ex. K, evidence were all borrowed for the real necessity of defendant 1 or Rakku Nachiar. In our opinion also the plaintiff failed to establish satisfactorily that the debts were incurred for defendant 1's benefit, several of the debts mentioned in Ex. A being incurred by his mother. The plaintiff evidently knew that he was dealing with a limited owner as he states at p. 170 of the printed documents, in his evidence that he knew when Ex. B was taken, that Krishnasami was appointed guardian and that defendant 1 and his mother told him that he, the guardian appointed by the Court, was giving Rs. 20 for their maintenance every month. Ex. B in date is after Ex. L and therefore Ex. A. From Ex. DD it appears that Rakku Nachiar was given monthly Rs. 30 and four and half kalams of paddy, and although the cash payments were delayed, for a time there is no such allegation as to the grain. Thus defendant 1 and his mother were not without necessities for their support, and we are not satisfied that they could not have lived within their income if they have tried. Even if some of the articles purchased with the money advanced by the money-lender were necessities, the responsibility would rest on him when a bond is taken for the debt to take care that the bond is so drawn as to render the estate of the minor in law liable for the debt.

This was the opinion of the learned Judges who decided the case in *Bhawal Sahu v. Baijnath Pertab Narain Singh* (16) and we agree with them. If the present suit had been based on accounts and the plaint framed for the recovery of necessities supplied to a minor, questions of limitation would have arisen.

Lastly, a question has been raised whether the lower Court should have given the plaintiff a decree on the admission of liability under both Exs. A and L contained in defendant 1's statement presented on 27th February 1905, and printed at pp. 8 and 9 of the printed pleadings. The plaint contains a prayer for a personal decree against defendant 1. Defendant 1 is now dead and respondent 12 is his legal representative. In

defendant 1's first written statement dated 6th September 1904, upon which issues were framed on 30th November 1904, he completely denied his liability. In his deposition on 18th 1905 he stated that his first written statement was put in at the instance of defendant 5 and his second written statement at the instance of the plaintiff. He added that the facts mentioned in the written statement put in through Mr. Naganathier (i.e., the first) were true. Ex. 4 is a notice given by defendant 1 to the plaintiff in August 1904, in which he alleged that the plaintiff had held out false hopes to him before suit and had practised fraud in respect of the documents for Rs. 1,000 and Rs. 3,000 by which Exs. L and A are evidently intended, and that they were unsupported by consideration and invalid. S. 152, Civil P. C., in force when the suit was tried, declares that if at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment. S. 153 contains a similar provision for suits in which there are, as here, several defendants. No doubt, admissions may be made by parties at any time, but seeing that the Court of first instance did not treat defendant 1's second statement as a confession of judgment and pass a decree against him on the strength of it, we are of opinion that it can only be treated as a piece of evidence, and that not conclusive, looking to the circumstances under which it was made. These are that its maker contradicted it before and retracted it afterwards alleging that he had been induced to make it, that it was put into Court on a day when there was no hearing of the suit and after the framing of issues, and that at the time it was made defendant 1 appears to have parted with most, if not all, of his rights over his property.

We think that the appellant is not entitled to any relief in this suit and we would dismiss his appeal with costs of respondents 5 and 6 (one set) 4 and 12 (one separate set).

S.N./R.K.

Appeal dismissed.

*** A. I. R. 1914 Madras 652**
Full Bench

WHITE, C. J., AND MUNRO AND
 SANKARAN NAIR, JJ.

In re *Reference under Stamp Act* 1899.

Civil Reference No. 14 of 1910, Decided on 20th March 1911, made by Dist. Munsif, Tiruvallur, D/- 27th October 1910.

(a) Civil P. C. (14 of 1882), S. 269—Rules under S. 269 are enforceable until new rules are framed by High Court under S. 128 (2) (b), Act 5 of 1908 — Old rules consistent with sections of new Code — “Consistent with Code” mean consistent with sections.

The rules made by the Local Government under S. 269 of the old Civil P. C., for the maintenance of attached livestock are in force until rules are made by the High Court under the power given by S. 128 (2) (b) of the new Civil P. C. [P 653 C 2]

The old rules, although inconsistent with O. 21, R. 43 of the new Code, are consistent with the sections of the new Code. They are consequently kept alive under S. 157 of the new Code. [P 653 C 2]

The words “consistent with the Code” mean only consistent with the sections of the Code and not with the rules in Sch. 1 which can be altered by the High Court. [P 654 C 1]

* (b) Court-fees Act (7 of 1870), Sch. 2, Art. 6—Security bond under rules under S. 269 of the Code of 1882 is leviable with eight anna stamp and not ad valorem.

A security bond for the production of attached livestock, given in accordance with the requirements of the rules under S. 269 of the old Code is a bond given in pursuance of an order made by a Court under a section of the Code of Civil Procedure within the meaning of Arts. 6, Sch. 2 of the Court-fees Act. [P 653 C 2]

Consequently, the proper stamp leviable on such a bond is an eight anna stamp under Arts. 15 and 57, Sch. 1, Stamp Act. [P 654 C 1]

Order of Reference. — The document was executed by defendant 2 in Original Suit No. 38 of 1909 on the file of the District Court of Chingleput and two sureties under R. 7, p. 31, Civil Courts Guide, for the production when called for of the attached moveables left in their custody by an amin of this Court. The warrant was sent to this Court for execution and was entrusted by my Deputy Nazir to the Amin. After attachment he obtained this bond as usual in this Court on a one-rupee stamp paper (general), being the ad valorem stamp on the value of the attached cattle. When the same was forwarded to the District Court it was returned to this Court with an order that a fresh bond should be taken on a paper with 8 annas court-fee label attached to it

as required by Art. 5, Sch. 2, Court-fees Act. I submitted that the bond was correctly stamped under Art. 57, Sch. 1, Act 2 of 1899 and that the Court-fees Act was not applicable. Thereupon a further proceeding was received with the bond, requiring a fresh bond and a direction that the practice of this Court should be corrected.

As I held judicially elsewhere when such a bond was sought to be enforced that bonds of this character should bear ad valorem general stamp and not 8 annas court-fee label and as the different opinion of the District Judge has thrown doubt on the correctness of my view I beg to refer the question for the decision of the High Court.

Rule 7, Civil Courts Guide, was framed under S. 269 of the old Civil P. C., and continues in force under S. 157 of the present Civil P. C. It will be treated as framed under the present Ss. 122 and 128 (b). It will therefore be enforceable by execution process under S. 145 but it has to be determined whether the document is one excluded from the purview of the Act 2 of 1899. Art. 15 of that Act provides for: “Bond as defined by S. 2 (5) not being a debenture (No. 27) and not being otherwise provided for by this Act or by the Court-fees Act 7 of 1870.” Among the bonds for which special provision is made are: “indemnity bonds” (34) and security bonds (57). The Court-fees Act provides for bail-bond or other instrument of obligation in pursuance of an order made by a Court or Magistrate “under any section of the Code of Criminal Procedure 1882 or the Code of Civil Procedure.” An order to attach cattle implied an order to obtain security bond as per rules framed under proper authority but it may be a question whether such an instrument could be described as executed “under any section of the Civil Procedure Code.” Assuming however that it was so I am of opinion that the bond in question does not wholly fall under this article and requires to be stamped under the Stamp Act.

Under R. 7, Civil Courts Guide (p. 31), cattle may be left in the charge of a judgment-debtor if he “enters into a bond in the form given in Sch. A appended to these rules with one or more sufficient sureties for its production when called for.” Defendant 2 was

therefore the principal and his two co-executants were his sureties. S. 19, Cl. 15, Court-fees Act, exempts from court-fees: "Bail-bonds in criminal cases, recognizances to prosecute or give evidence and recognizances for personal appearance or otherwise." Even if an undertaking to produce the person of another be exempt an undertaking to produce material objects, documents and so forth would perhaps not be exempt.

Article 57, Stamp Act provides for duty on security bonds or mortgage-deeds "executed by way of security for the due execution of an office or to account for money or other property received by virtue thereof or executed by a surety to secure the due performance of a contract." The executants of the bond may in certain cases be deemed officers in custody of the attached properties (compare O. 21, R. 43) but if not there was certainly a contract and the sureties who joined in the execution of the bond were expressly required as such to join in it and in as far as their obligation is concerned they fall under that article. It will be observed that there is no proviso in this article that payment under the Court-fees Act exempted them from liability under this article. The principle in *Kulvanta v. Mahabir Prasad* (1) and *Soonjharee Koonwar v. Ramessur Pandey* (2) would therefore be applicable. In this connexion the case of the obligation being charged on immovable property may also be referred to. Such instruments are treated as mortgages even though executed under the Civil Procedure Code. The Board of Revenue has also ruled to the same effect (vide Resolution No. 2273, dated 9th September 1899, Registration Circular No. 11, dated 23rd September 1899) and instruments of that nature are not registered by the registering officers unless they are stamped as mortgages. The legislature did not amend Art. 57 or Art. 34 even when they thought fit to do so in regard to Art. 15, Stamp Act, and Art. 16, Sch. 2, Court-fees Act. I am therefore of opinion that a security bond by sureties to see to the production by the decree-holder, judgment-debtor, or claimant as the case may be of attached movables entrusted to the former are chargeable under Art. 57 and that they are

not liable under the Court-fees Act. In this connexion, I may also refer to certain other cases under the Civil Procedure Code when the taking of security may be ordered e. g., where there is an attachment or arrest before judgment (O. 38, Rr. 1 and 5) or for costs (O. 25 R. 1 and O. 45, R. 7), where execution or stay thereof is ordered (O. 41, Rr. 5 and 6 and O. 21, R. 26), where money is paid out to the guardian of a minor entitled to it (O. 32, R. 6) and where an arrested judgment-debtor desires to file an insolvency application (S. 55). In most of these cases, security on immovable property is demanded and registered bonds are filed bearing ad valorem general stamp.

Opinion.—In this matter a point was raised by the Government Pleader as to whether the rules in connexion with which this reference arises have now any legal effect.

The power given to the Local Government by S. 269 of the old Code to make rules for the maintenance of attached livestock is now given to the High Court by S. 128 (2) (b). O. 21, R. 43, reproduces the old S. 269, but it does not reproduce the provision requiring the officer attaching the property to act in accordance with the rules notwithstanding they may be inconsistent with the provisions of the section. S. 157 of the Code of 1908 keeps alive the rules etc., made under the old Code so far as they are consistent with the Code of 1908. There is nothing in the Code of 1908, as distinguished from the orders in Sch. 1 to the Code, which is inconsistent with the rules issued under S. 269, though there is an inconsistency between the rules and O. 21, R. 43. But the High Court has power to alter the rules in Sch. 1. This being so I do not think it follows that because the rules made under the old section are inconsistent with the rules in the schedule that "they are not consistent with this Code" within the meaning of S. 157.

The point is not free from doubt, but until rules are made by the High Court I think the rules made by Government under S. 269 of the old Code are in force.

Section 157 is an enabling, not a repealing section. The rules have never been expressly repealed and I do not think we are bound to hold they are implicitly repealed by virtue of the

(1) [1889] 11 All. 16=(1888) A. W. N. 281.

(2) [1866] 5 W. R. Misc. 47.

words, "so far as they are consistent with this Code," which occur in S. 157.

As regards the question raised in the letter of reference as the bond is given in pursuance of a rule made under power conferred by a section of the Code, I think the bond may be said to be given in pursuance of an order made by a Court under a section of the Code of Civil Procedure, that consequently the bond is "otherwise provided for by the Court-fees Act": see Sch. 2, Art. 6, Court-fees Act, 1870 and Sch. 1, Art. 15, Stamp Act, 1899, and that the stamp is an eight-anna stamp under the Court-fees Act.

S.N./R.K.

Appeal dismissed.

*** A. I. R. 1914 Madras 654**

BENSON AND SADASIVA IYER, JJ.

Venugopal Naidu and others—Appellants.

v.

A. Ramanadhan Chetty and others—Respondents.

Second Appeal No. 1022 of 1910, Decided on 28th March 1912, from decree of Sub-Judge, Madura East, in Appeal Suit No. 528 of 1909.

*** Hindu Law—Debts—Liability for money spent unnecessarily as committee member—Son held liable—Debt held not avyavaharika.**

Under Hindu law, a son is liable for the imprudent or unusual debts of his father, such debts not being *avyavaharika* or immoral, or illegal. [P 655 C 2]

Where the members of the committee of a temple unnecessarily expended the temple moneys and they were directed by the Court to reimburse the temple of that amount out of their private funds, and the plaintiff having paid the amount himself, sued the legal representatives, i. e. sons of one of the committee members, along with the rest for contribution,

Held: that the sons of the deceased member were liable for the latter's share in contribution, it being a valid debt, and not an *avyavaharika* debt: 32 Bom. 348, *Disappr.*; 12 I. C. 609, *Appr.*; 16 Mad. 99, *Foll.*; 4 I. C. 105, *Dist.*; 20 Cal. 328, *Ref.* [P 655 C 1]

C. S. Venkatachari—for Appellants.

K. Sreenivasa Iyengar—for Respondents.

Sadasiva Iyer, J.—Defendants 8 and 11 to 14 (five of the legal representatives of defendant 3, who died pending the suit) are the appellants in the above second appeal. The suit was brought by plaintiff, one of the five members of a temple committee, for contribution from the other four committee members in respect of moneys which had been recovered from plaintiff alone in execution of the decree

obtained by the trustee of the Madura Minakshi temple against the members of the committee (inclusive of plaintiff and defendant 3), for moneys which they had spent out of the temple funds in a previous litigation carried on by them in the High Court, the High Court having in that previous litigation directed that the committee members should pay such costs out of their private funds and not out of the Devasthanam funds: see the last sentence of the judgment in *Alagiri-sami Naicker v. Sundareswara Iyer* (1).

The lower Courts decided that defendant 3's legal representatives (sons and grandsons) are liable to discharge defendant 3's debts to plaintiff, the debt being based on defendant 3's liability to contribute his quota of the amount paid by plaintiff alone to discharge the joint decree against plaintiff and his fellow committee members in the temple manager's suit. The only ground argued before us in this second appeal is the 4th ground in the special appeal memorandum. That ground is to the effect that defendant 3's sons and grandsons are not legally bound to discharge the debt incurred by defendant 3 to the Devasthanam whose funds were spent without due authority by defendant 3 and the other members of the committee, as defendant 3's descendants are not under a pious obligation to discharge such a debt.

Reliance is strongly placed by the learned vakil for the appellants on the case in *Durbar Khachar v. Khachar Harsur* (2), where it was held that, under the Hindu law texts, a son is not liable for his father's *Avyavaharika* debts, the term being interpreted by the learned Judges who decided that case as meaning "unusual" or "not sanctioned by law or custom." The learned Judges ruled in effect that the son is not liable for debts which the father ought not "as a decent and respectable man to have incurred." That very learned Judge, Mukerjee, J., of the Calcutta High Court, has elaborately considered the whole question in a case, *Chakouri Mahton v. Ganga Pershad* (3), and I cannot usefully add anything to the observations found in the lucid judgment in that case. The learned Judge virtually dissents from the decision in *Durbar Khachar v. Khachar Harsur*

(1) [1898] 21 Mad. 278.

(2) [1908] 32 Bom. 348=10 Bom. L. R. 297.

(3) [1911] 12 I. C. 609.

(2). Learned Sanskrit scholars have differed from one another as to the meaning of the expression *Avyavaharika* debt: see para. 1 in p. 231 of the judgment in 15 *Calcutta Law Journal* case. I am inclined to adopt Colebrook's paraphrase, namely "a debt incurred for a cause repugnant to good morals" as more nearly approaching the true import of the expression than any of the meanings given by the other authorities. If I might venture upon giving my own translation of the expression *Avyavaharika*, I would paraphrase an *Avyavaharika* debt as a debt which is not supportable as valid by legal argument and on which no right could be established in the creditor's favour in a Court of justice. (Compare the use of the word *Vyavahara* in such expressions as *Vyavahara Mayukha*, *Vyavahara Darpana* &c.) Defendant 3 clearly owed a legally valid debt to the Devastanam even if he had really misappropriated the money which he had taken from the Devastanam funds (instead of having merely sanctioned their expenditure bona fide on inappropriate objects) and his descendants are bound to repay that debt according to the decision in *Natasayan v. Ponnusami* (4), where it is observed: "Upon any intelligible principle or morality a debt due by the father by reason of his having retained for himself money which he was bound to pay to another would be a debt of the most sacred obligation and for the non-discharge of which punishment in a future state might be expected to be inflicted, if in any."

As regards the case in *Ramalingar v. Secy. of State* (5), also relied on strongly by the appellant's learned vakil, that decision rested on its own special circumstances, for the learned Judges found in that case that the father knowingly brought a false case as a pauper. When he lost the suit and was made liable for the Government costs, it was held that his sons were not liable to Government for such costs so incurred. Without saying that I agree with the reasons given in the said decision, that decision is easily distinguishable from the present case. The judgment in *Alagirisami Naicker v. Sundareswara Iyer* (1) does not establish that the committee members

(three of whom joined in the appeal to the High Court with the concurrence of the remaining two) dishonestly preferred the appeal to the High Court, which appeal costs they were directed to bear out of their private funds.

Imprudent and even "unconscionably" imprudent debts of the father are not, in my opinion immoral, illegal or *avyavaharika* debts: see *Khalilul Rahman v. Gobind Pershad* (6), and the sons cannot in Hindu law, escape liability for such debts of their father.

This second appeal consequently fails and is dismissed with the costs of respondent 1 (plaintiff).

Benson, J.—I agree that the sons are liable and that the second appeal should be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(6) [1893] 20 Cal. 328.

A. I. R. 1914 Madras 655

WALLIS AND AYLING, JJ.

Ramalingathudayan—Defendant—Appellant.

v.

Unnamalai Achi—Plaintiff—Respondent.

Appeal No. 223 of 1913, Decided on 16th March 1914, from decree of Sub-Judge, Kumbakonam, in Appeal Suit No. 33 of 1913.

(a) **Contract—Promise absolute—Breach of—Right to sue accrues—Plea of non-damnificatus is bad.**

Where the defendant's promise is an absolute one to do a particular thing, an action may be brought the moment he has failed to perform his contract, and a plea of non-damnificatus would be bad: *Lethbridge v. Mytton*, 2 B & Ad. 772 and *Loosemore v. Radford*, (1842) 9 M. & W. 657, *Rel. on.* [P 656 C 1]

(b) **Contract Act, S. 73—Suit in forma pauperis—Compromise out of Court—Defendant agreeing to pay court-fees if levied—Order for payment made—Defendant's failure to pay—Plaintiff's property attached—Right to claim damages accrues—Damages.**

A suit instituted in forma pauperis was settled out of Court on the terms that if a court-fee were eventually levied, Rs. 250 should be paid by the plaintiff and the balance by the defendant. Order for payment of court-fee being made, the defendant failed to pay, with the result that the plaintiff's property was attached. Upon this plaintiff sued the defendant.

Held: that the suit was not premature inasmuch as the defendant had failed to perform his contract and the plaintiff had suffered damage by having her property attached: 14 M. L. J. 285, *Dist.* [P 656 C 1]

(4) [1893] 16 Mad. 99.

(5) [1909] 4 I. C. 105.

T. Rangachariar—for Appellant.

P. R. Ganapathi Aiyar—for Respondent.

Judgment.—A suit instituted in forma pauperis was settled out of the Court on the terms that if a court-fee were eventually levied, Rs. 250 should be paid by the plaintiff and the balance by the defendant, the present appellant.

An order was subsequently made by the Court against the present respondent, who was the widow of plaintiff 2 in that suit, for payment of the court-fee out of the assets in her hands belonging to the deceased 1 plaintiff, and his son, plaintiff 2; and as the court-fee was not paid the property of plaintiff 1 in her hands, as legal representative of his son, plaintiff 2, was attached in execution of the order. The respondent then filed this suit against the appellant to recover the balance of the court-fee which he failed to pay under the award, and subsequently before trial paid the court-fee. The District Munsif dismissed the suit as premature, but the Subordinate Judge has set aside the decree and remanded the suit. We think the Subordinate Judge was right. Assuming, in favour of the defendant, that his agreement was to pay the balance of the court-fee to the Court and not to the plaintiff, at the date of the suit, the defendant had committed a breach of his contract and the plaintiff had suffered damage by having her property attached. There was therefore sufficient to give her a cause of action, and the case, *Pundi Doraisami Tever v. Lakshmanan Chetty* (1), is clearly distinguishable.

Further, the English cases which were referred to in the argument before us show that in a case of this kind the defendant's failure to pay according to his contract at once give rise to a cause of action in which substantial damages are recoverable. Mayne on Damages, p. 334, 4th Edn. "where the defendant's promise is an absolute one to do a particular thing, as to discharge or acquit the plaintiff from such a bond, an action may be brought the moment he has failed to perform his contract, and a plea of non-damnificatus would on an estate be bad. Therefore, where a party entered into a covenant to pay off encumbrances on an estate by a parti-

cular day, or to take up a note, it was held that an action might be brought and damages to the extent of the encumbrances and note respectively might be obtained, though no actual injury had been sustained." *Lethbridge v. Mytton* (2) and *Loosemore v. Radford* (3). These cases were followed in *In re Allen* (*Adcock v. Evans*) (4).

The appeal is dismissed with costs.

S.N./R.K.

Appeal dismissed.

(2) 2 B. & Ad. 772=9 L. J. (o. s.) K. B. 330=109 E. R. 1332.

(3) [1802] 9. M. & W. 657=1 D. (n. s.) 881=11 L. J. Ex. 284=60 R. R. 852.

(4) [1896] 2 Ch. 345=65 L. J. Ch. 760=75 L. T. 136=44 W. R. 644.

A. I. R. 1914 Madras 656

SANKARAN NAIR AND SESHAGIRI
IYER, JJ.

Bhavaraju Venkatasubba Rao and another—Defendants—Appellants.

v.

Yenumula Mallu Dora Garu—Plaintiff—Respondent.

Second Appeal No. 453 of 1913, Decided on 26th February 1914, from decree of Dist. Judge, Kistna, in Appeal Suits Nos. 216 and 226 of 1912.

Madras Estates Land Act (1908), S. 60, Schedule to Part A, Art. 8—Suit for arrears of rent—Limitation begins to run from end of fasli—Pendency of suit for possession does not save limitation.

For a suit for arrears of rent under the Madras Estates Land Act, limitation begins to run from the end of the fasli, when, in the absence of any contract to the contrary, the rent becomes payable. The pendency of a suit for possession does not save the limitation for the rent suit. [P 656 C 2]

B. Somayya—for *P. Narayanamurti* and *P. Somasundaram*—for Appellants.

V. Ramadoss—for Respondent.

Judgment.—The decree of the lower Court, in so far as it awards arrears of rent, which became due more than three years before date of suit, cannot be supported. Under Art. 8, Part A of the Schedule to the Madras Estates Land Act, the land-holder must bring the suit within three years of the date when the arrears became due. The rent, in the absence of any contract to the contrary, became payable at the end of the fasli and, under S. 60, Madras Estates Land Act, it then became an arrear of rent. Limitation commenced to run from that date. The pendency of the suit for possession is of no avail as it was open to the plaintiff to claim the rent due to him:

(1) [1904] 14 M. L. J. 285.

see *Huro Pershad Roy v. Gopal Das Dutt* (1).

The decree of the District Judge is modified and the decree of the Sub-Collector is restored as regards the claim for faslis 1310 to 1317. The decree is confirmed as regards the other faslis 1318 to 1320. The plaintiff is entitled to interest for the rent due for these faslis. The parties will have their proportionate costs in this and in the lower appellate Court.

S.N./R.K. Decree modified.

(1) [1883] 9 Cal. 255=9 I. A. 82=12 C. L. R. 129 (P.C.).

A. I. R. 1914 Madras 657 (1)

SADASIVA AIYAR AND SPENCER, JJ.

Gouse Moideen Sahib — Defendant—Appellant.

v.

Muthialu Chettiar and another—Plaintiff and Defendant—Respondents.

Civil Misc. Appeal No. 87 of 1913, Decided on 17th November 1913, from order of Dist. Judge, Madura, in Appeal Suit No. 117 of 1912.

Madras Estates Land Act (1 of 1908), Ss. 131, 189 and 213—Setting aside sale for fraud is cognizable by civil Court.

Section 189 does not take away the right to bring a suit in the civil Court to set aside a sale on the ground of fraud, but takes away only the right to apply to the civil Court to set aside the sale in accordance with the provisions of S. 131 of the Act. Consequently, a suit to set aside a sale on the ground of fraud, is maintainable in the civil Court. [P 657 C 2]

C. S. Venkata Chariar—for Appellant.

K. S. Jayaram. Aiyar—for Respondents.

Facts.—Plaintiff was a tenant, and the defendant a landlord. For arrears of rent, the defendant brought the plaintiff's interest in a holding, to sale, and purchased it himself. The plaintiff did not apply to the revenue Court to set aside the sale under S. 131, Estates Land Act, on payment of the purchase-money, but brought the present civil suit for setting it aside on the ground of fraud. The District Munsif held that the only way in which the plaintiff could have obtained a redress of his grievance was to pay the amount under S. 131, Estates Land Act, and have the sale cancelled. On appeal the District Judge held that the Estates Land Act contained no provision for setting aside sales on the ground of fraud, and that civil Courts

were competent to entertain such suits. He accordingly reversed the decree, and remanded it for disposal according to law. Against that order of remand, the present appeal was filed.

Judgment.—The plaintiff's right to pursue the remedy granted by S. 131, Estates Lands Act, through an application to the Collector, cannot take away his right of suit in the ordinary civil Court to set aside the sale on the ground of fraud, especially as the remedy by application to the Collector is accompanied by the imposition of an onerous condition to pay 5 per cent. of the purchase money as a solatium to the purchaser besides the purchase-money, and to make the application within a more limited period than is allowed for a suit in the ordinary Courts : see S. 9, Civil P. C., S. 213, Cl. 4, Estates Land Act and the *Zamin-dar of Etyapuram v. Sankarappa Reddi* (1). The arguments of the appellant's (defendant 1's) learned vakil that S. 189, Estates Land Act, takes away the right to bring a suit in the civil Courts to set aside a sale on the ground of fraud cannot be accepted. It only takes away the right to apply to the civil Court under S. 131, Estates Land Act to set aside the sale in accordance with the provisions of S. 131.

The order of the learned District Judge reversing the judgment of the learned Munsif (who dismissed the suit as not entertainable in a civil Court) and remanding the suit to the Munsif for proper disposal was correct, and we dismiss with costs the appeal preferred against the said order of the District Judge.

S.N./R.K. Appeal dismissed.

(1) [1904] 27 Mad. 483 (F.B.).

* A. I. R. 1914 Madras 657 (2)

SADASIVA AIYAR AND SPENCER, JJ.

Muthu Sastrigal — Plaintiff — Appellant.

v.

Visvanatha Pandara Sannadhi Adhina Karthar—Defendant—Respondent.

Letters Patent Appeal No. 66 of 1913, Decided on 7th November 1913, from Judgment of Miller, J. D/- 19th March 1913, in Civil Revn. Petn. No. 171 of 1912.

* Evidence Act (1 of 1872), S. 91—Unstamped varthamanam agreeing to repay is promissory note—No independent obligatio

implied or can be proved as the note was inadmissible.

A varthamanam addressed by A to B ran as follows: "Amount of cash borrowed of you by me is Rs. 350. I shall in two weeks' time, on returning this sum of Rs. 350 with interest thereon at the rate of one rupee p. c. per month, get back this letter." [P 658 C 1]

The document bore no stamp. B sued A for the recovery of the money due on the account.

Held: (1) that the varthamanam sued on was a promissory-note and was inadmissible in evidence for want of stamp; (2) that no independent obligation could be implied from receipt of B's money by A; (3) that no such independent obligation could be established when the document, which reduced to writing the terms of the loan and the simultaneous contract, was inadmissible in evidence: 10 *Mad* 94 and 17 *M. L. J.* 126, *Foll.* [P 658 C 2]

S. Varadachariar—for Appellant.

K. S. Jayaram Iyer for *G. S. Ramachandra Aiyar*—for Respondent.

Sadasiva Aiyar, J.—The plaintiff is the appellant in this Letters Patent appeal. He sued on the strength of a letter which has been held to be inadmissible in evidence and his suit has been dismissed by all the Courts. I shall now briefly refer to the arguments advanced by his learned vakil and to some of the cases quoted during those arguments.

In the cases in the foot-note to *Queen Empress v. Somasundaram Chetti* (1) and in *Bharata Pisharodi v. Vasudevan Nambudri* (2), relied on by him, the documents themselves showed that they were not to be treated as vouchers or securities unless the persons to whom the letters were sent gave loans as requested in the letters. As said in *Bharata Pisharodi v. Vasudevan Nambudri* (2), "there is no unconditional undertaking on the face of the document to pay the money." In the present case the so-called varthamanam or letter says: "Amount of cash borrowed of you by me is Rs. 350. I shall, in two weeks' time, returning this sum of three hundred and fifty rupees with interest thereon at the rate of 1 rupee per cent. per month, get back this letter." It is clearly an unconditional understanding, on the face of the document, to repay borrowed money, and it is, therefore a promissory note and not merely an offer to borrow or an acknowledgment of indebtedness.

As regards the case in *Tirupathi Goundan v. Rama Reddi* (3) the language

of the document in question in that case was quite different and very vague. Even so, I wish (with the greatest respect to the Judges who decided it) to be permitted to reserve my opinion if a document similarly worded happens to come before me for interpretation.

I therefore agree with the lower Courts, that the varthamanam sued on is a promissory-note and is inadmissible in evidence as not duly stamped.

As regards the contentions that, apart from the promissory note, there was an independent obligation implied from the receipt of the plaintiff's money by the defendant and that that obligation could be established by proof of that fact, I think we are bound by the decisions of *Pothi Reddi v. Velayudasivan* (4) and *Soma Sundaram v. Krishnamurti* (5). It is contended that *Pothi Reddi v. Velayudasivan* (4) is not good law, as the learned Judges misunderstood an observation of Garth, C. J., in the case of *Sheikh Akbar v. Sheikh Khan* (6), on which they relied in support of their position. I am not satisfied that the learned Judges did so misunderstand *Sheikh Akbar v. Sheikh Khan* (6). Even if they misunderstood *Sheikh Akbar v. Sheikh Khan* (6), they give independent reasons as follows: "It is a necessary condition to every written contract that the terms should be orally settled before they are reduced to writing, and to hold, when such a contract has been reduced to writing, that a plaintiff can take advantage of the absence of a stamp on the promissory-note to sue at once for the return of money which he may have contracted to lend for a fixed period, would entirely defeat the provisions of S. 91, Evidence Act." Whatever may be the views of English Courts or even of the other High Courts [see the cases collected in *Baij Nath Das v. Saligram* (7)], I feel bound by *Pothi Reddi v. Velayudasivan* (4), not only because it has never been dissented from, but because the reasons above given appeal to my mind (if I may say so with respect) as very cogent. The contract in the case of a loan and a simultaneous promissory note has been reduced to writing in the form of the note which con-

(4) [1887] 10 *Mad.* 94.

(5) [1907] 17 *M. L. J.* 126.

(6) [1981] 7 *Cal* 256=8 *C. L. R.* 533.

(7) [1912] 16 *I. C.* 33.

(1) [1900] 23 *Mad.* 155.

(2) [1904] 27 *Mad.* 1=14 *M. L. J.* 65 (F.B.).

(3) [1898] 21 *Mad.* 49=7 *M. L. J.* 291.

tains the definite terms of the contract and we cannot, in my opinion, resort to inconsistent or consistent implied contracts in such cases simply because the contract as entered in the promissory-note cannot be admitted in evidence. Not only has *Pothi Reddi v. Velayudasivan* (4) not been dissented from, but it has, without disapproval, only been distinguished in *Ramachandra Rao v. Venkataramana Ayyar* (8) and *Yarulgadda Veeraraghavayya v. Gorantla Ramayya* (9), while it has been expressly followed in *Chinnappa Pillai v. Muthuraman Chettiar* (10) and *Kodali Mallayya v. Tarigopala Ramayya* (11).

To import the doctrines, laid down in English cases about vague obligations to repay arising out of equity and not out of contract, or about obligations which can be enforced if the plaintiff skilfully draws up his plaint as one on account for money had and received, cancelling the real contract of loan which had been reduced to the form of a document, is, it seems to me, merely trying to nullify S. 91, Evidence Act.

I do not intend to say that if there is a contractual or other definite completed obligation capable of proof prior in date to the invalid promissory note the plaintiff cannot sue on that prior independent obligation. But to treat the money paid at the very time of the execution of the promissory-note inadmissible in evidence as giving rise to an independent contractual or other obligation seems to me to be inadmissible.

I would therefore dismiss the appeal with costs.

Spencer, J.— I read the plaintiff's unfiled exhibit as containing a promise to pay. This promise, though not a promise to pay on demand or to order, is an unconditional promise. There are no signatures of attesting witnesses so as to convert the document into a bond.

The mere use of the word "varthamanam" instead of promissory note will not deprive the document of its character of promissory note if its terms show that it is such.

The execution of the document and the payment of the money may be treated as practically simultaneous as the document

was not made over to the plaintiff until it was ascertained that he was prepared to make the advance. It is all part of the same transaction.

It is argued that the plaintiff may have a separate cause of action to fall back on the original liability of the debtor and to sue the defendant for money had and received.

This is the view taken in *Krishnaji Narayan v. Rajmal Manak Chand* (12) and more recently in *Baij Nath Das v. Saligram* (7), where the matter received full discussion.

The trend of Madras decisions is however different: see *Pothi Reddi v. Velayudasivan* (4), the same principle having been followed in *Chinnappa Pillai v. Muthuramana Chettiar* (10) and *Kodali Mallaya v. Tarigopala Ramayya* (11).

I am not prepared to dissent from the view taken repeatedly by this High Court by various learned Judges. I therefore concur in dismissing the Letters Patent appeal with costs.

S.N./R.K. *Appeal dismissed.*
(12) [1900] 24 Bom. 363=2 Bom. L. R. 25.

A. I. R. 1914 Madras 659

SANKARAN NAIR AND BAKEWELL, JJ.
Devaguptapu Bhaskarudu—Plaintiff—Appellant.

v.

Pamarthy Subbarayudu and others—Defendants—Respondents.

Second Appeal No. 1517 of 1912, Decided on 12th November 1913, from decree of Sub-Judge, Rajahmundry, in Appeal Suit No. 108 of 1911.

Madras Land Encroachment Act (3 of 1905), Ss. 5 and 14—Plaintiff's suit after six months of notice of ejectment and penal assessment on denial of plaintiff's title under S. 5, is barred under S. 14.

The Government denying the plaintiff's title to certain land, levied from him a penal assessment under S. 5 and gave him notice to quit the land. Six months after the levy of the assessment and service of notice, plaintiff brought a declaratory suit.

Held: that as the levy of penalty and service of notice was a proceeding under the Act and constituted the cause of action for plaintiff's suit for declaration of his title, the suit, instituted more than six months after the cause of action arose, was barred by S. 14 of the Act.

[P 630 O 1, 2]

G. Venkataramayya—for Appellant.
Govt. Pleader—for Respondents.

Sankaran Nair, J.—The suit is brought by the plaintiff against the Secretary of State for a declaration of his title to certain property and for the

(8) [1900] 23 Mad. 527.

(9) [1906] 29 Mad. 111=15 M. L. J. 484.

(10) [1911] 10 I. C. 663.

(11) [1911] 10 I. C. 177.

recovery of the penal assessment levied from him by Government under S. 5, Madras Act 3 of 1905. The Government claim it as Government land. The suit was dismissed by the lower appellate Court on the ground that it is barred by limitation under S. 14, Act 3 of 1905. In second appeal, it is contended that the prayer for declaration is not barred. The claim to recover the amount levied as penal assessment is not pressed in second appeal. Under S. 3 Act 3, of 1905, the Government is entitled to levy an assessment on land which is unauthorisedly occupied by any person if such land is the property of Government. Under S. 5, in addition to the assessment under S. 3, the Government is entitled to levy a penalty. Then S. 14 confers a right to sue upon the person from whom the assessment is levied. Such suit must be brought within six months: see the Explanation to the section. This suit is admittedly brought after the six months prescribed by that section. Then S. 6 declares that the Government may summarily evict the person who is occupying the Government land without their consent. S. 14 gives a right of suit to the person so evicted and under the section read with the Explanation, that suit must be brought within six months of the eviction. In the case before us there has been no eviction and therefore, the Explanation does not apply to this suit.

Section 14 declares that any suit which may be brought by a person aggrieved by any proceeding under the Act must be brought within six months from the time the cause of action arose. If therefore it is any proceeding under the Act which gives a cause of action for the suit, it must be brought within six months of the date of that proceeding. The cause of action is stated in the plaint to be a proceeding under the Act, i.e. the notice and the levy of penal assessment and the suit was brought more than six months afterwards. The contention before us is that the suit for declaration may be brought within the ordinary period of limitation and reliance is placed upon the decision of *Narayana Pillai v. Secretary of State* (1). It is urged that such suit is maintainable as the title of the plaintiff is not lost till six months have expired from the

date of eviction. It may be that the plaintiff has a cause of action to bring a suit within six months of the levy of the penal assessment from him in any year to recover the amount so levied, so that, if the plaintiff is compelled to pay any assessment next year or the year after, it is possible that he may have a right to bring the suit within six months from that date. On that point, it is unnecessary for us to give any opinion.

It may also be as contended by the appellant, 'that if the Government evict him at some future time from this land, he may have a right to bring a suit within six months from that date of eviction to recover possession of the land and that therefore it cannot be said that he would lose his title to the land till that period has expired. But that again is not the question that we have to consider. The question that we have to consider is: When did the cause of action arise for this suit, and whether it is barred under S. 14. And the cause of action for this suit for the declaration certainly arose, as stated in the plaint, when the Government denied his title to the property or levied the penal assessment from him. If the plaintiff did not feel himself aggrieved by the notice or levy of the penal assessment, he was not bound to bring a suit for declaration. He might wait till any further step taken by Government gives him a right of suit. But as he alleges that it was a proceeding under this Act, i.e., notice to quit the land etc., that gives him a cause of action, he was bound to bring his suit within six months from the date of the act alleged to give him a cause of action, though his title to the property may not have been lost. In the plaint, it is said that the cause of action arose on or before 23rd March 1908. The suit is admittedly brought six months after those dates. The Judge is right, therefore, in holding that the suit for the declaration of title is barred, and we accordingly confirm the decree and dismiss the appeal with costs.

Bakewell, J.—I entirely agree.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 661

BENSON AND SUNDARA AIYAR, JJ.

Parasurama Pattar—Appellant.

v.

Venkatachalam Pattar and *others*—Respondents.

Second Appeal No. 1982 of 1911, Decided on 5th March 1913, from decree of Dist. Judge, South Malabar, in Appeal Suit No. 941 of 1909.

Transfer of Property Act (4 of 1882), S. 68—Mortgagee undertaking to pay certain amount annually is bound to give credit for it in calculating redemption price irrespective of limitation—No accounts of profits if expressly dispensed with.

So long as the relationship of mortgagor and mortgagee continues, the obligation of the mortgagee to make all payments provided in the mortgage deed also subsists. At the time of redemption, when the mortgagor is required to pay the amount due by him under the mortgage, the mortgagee is also bound to give him credit for all payments which he is bound to make under it. [P 661 C 2; P 662 C 1]

The fact that the mortgagee was to make payments every year does not exempt him from liability to pay at the time of redemption, even if more than six years have passed since the stipulated time for the payments.

The mortgagee is not bound to render an account of the profits of the mortgaged property where the parties have expressly dispensed with it. [P 662 C 1]

C. V. Ananthakrishna Aiyar—for Appellant.

J. Rozario—for Respondents.

Judgment.—We accept the finding of the lower appellate Court that Ex. 2 is not binding on the plaintiffs, nor do we see any reason for differing from its conclusion that the defendants have not proved any circumstances which could be held to estop the plaintiffs from setting up the invalidity of Ex. 3 as against them. One further contention remains to be dealt with, namely that the plaintiffs are not entitled to purapad or rent for more than six years before the date of the suit. The facts which lead to this contention are that the karipanayam deed (Ex. 1 dated 1867), as modified by the documents of further charge (Ex. 2, dated 1st May 1876 and Ex. 3, dated 14th July 1881, provides that the mortgagee should deliver the 200 paras of paddy a year to the plaintiffs, that no paddy was delivered subsequent to the karar, (Ex. 12) dated 4th March 1889, and that the plaintiffs, in consequence claim to be entitled to have credit for all the rent due under the mortgages at the taking of account for the purposes of

redemption. The lower Courts have awarded the plaintiffs rent due after the death of Rama Pattar, the executant of Ex. 12, who was authorized to receive the rents during his lifetime. It is contended that the rent due for more than six years before the date of the suit is barred by limitation. We are of opinion that the contention should not be upheld. There can be no doubt that 200 paras of paddy a year was to be delivered by the mortgagee in his character as mortgagee, although a separate kychit was executed at the time of the mortgage. The lease cannot be regarded as a transaction distinct from the mortgage. The position is therefore the same as if the defendants, who are mortgagees in possession, had agreed to deliver the plaintiffs 400 paras of paddy a year out of the total usufruct of the mortgaged property retaining the remainder of it towards the interest due to them on the mortgage money. According to the mortgage deed therefore the mortgagor was bound to pay the principal amount of the mortgage to the mortgagee at the time of redemption and the latter was bound to deliver to the former 200 paras of paddy every year out of the usufruct.

Both are obligations arising under the mortgage. The fact that the mortgagee was to pay the purapad every year does not exempt him from liability to pay it at the time of the redemption if he fails to pay at the stipulated time. There are several cases where although a person may be entitled to require payment at a particular time, he is not bound to insist on enforcing payment then, and limitation would not run against him if he does not do so. Thus an agent may promise to make remittances to his principal at stated times, and a partner may be entitled to receive certain payments from time to time. But stipulations of this sort would not prevent the principal from receiving all the amounts that might have accrued due to him when the agent is called upon to account or the partner from claiming everything which has not been paid to him, at the time of the winding up of the partnership. Similarly, so long as the relationship of mortgagor and mortgagee continues, the obligation of the mortgagee to make all payments provided in the mortgage deed also subsists. At the time of redemption, when the mortgagor is re-

quired to pay the amount due by him under the mortgage, the mortgagee, is also bound to give him credit for all payments which he is bound to make under it. The rule, of course, will not apply to any payment that the mortgagor is liable to make to the mortgagor otherwise than under the contract of mortgage. But, as already observed, the agreement to pay purapad in this case is part of the mortgage transaction.

This view has been adopted by the Calcutta High Court in several cases: *Nursingh Narain Singh v. Babu Lukputty Singh* (1), *Nandu Sahu v. Ram Lukhan Singh* (2) and *Sheo Saran Singh v. Mahalir Pershad Shah* (3), : see also *Ram Nath Mukhopadhyaya v. Brah-momoyi Debya* (4) and *Doolee Chand v. Omda Khanum* (5). In this case there is no obligation on the mortgagee to render an account of the profits of the mortgaged property as the parties have expressly dispensed with this by providing that the mortgagee should be entitled to appropriate them towards interest with the exception of 200 paras of paddy which he is to deliver to the mortgagor. But he is liable to be debited with the payments he was bound to make to the mortgagor in the same manner as he would be debitable with the surplus proceeds after making all proper deductions if he was bound to account for the profits. We therefore disallow the contention. The lower Courts have allowed interest on the arrears of purapad at 10 per cent. per annum. The mortgage deed and kychit contain no provision for the payment of interest. The mortgagors have allowed a long time to elapse without enforcing their right to receive the purapad every year. In the circumstances, they should not have been allowed a higher rate than 6 per cent. per annum. With this modification, we dismiss the second appeal with costs. Time for redemption is extended up to the end of July 1913.

S.N./R.K.

*Appeal modified.***A. I. R. 1914 Madras 662**

AYLING AND TYABJI, JJ.

Raja of Karvetinagar—Plaintiff—Appellant.

v.

Pandur Govinda Mudali—Defendant—Respondent.

Second Appeal No. 1559 of 1912, Decided on 5th November 1913, from decree of Dist. Judge, North Arcot, in Appeal Suit No 396 of 1911.

Madras Estates Land Act (1 of 1908), S. 195—Court bound to investigate plea that patta was not tendered without compelling deposit under S. 195—Tender of patta not necessary for suit under new Act.

When a tenant pleads that a suit for rent is not maintainable under Act 1 of 1908, because no patta was tendered, the Court is bound to record the plea and to take evidence on it without compelling the tenant to deposit the rent under S. 195 of the Act before doing so.

The tender of patta is not a necessary precedent to a suit under Act 1 of 1908, though it was so under Act 8 of 1865 : 15 I. C. 393 and 20 I. C. 689, *Foll.* and 9 I. C. 738, *Dist.*

[P 662 C 2 ; P 663 C 1]

L. A. Govinda Raghava Aiyar—for Appellant.

D. V. Nilamegachariar—for Respondent.

Judgment.—In so far as the claim for faslis 1318 and 1319 is concerned, the order of the District Judge remanding the suit for disposal on its merits is correct. The Revenue Divisional Officer appears to have overlooked the fact that the defendant, in his written statement, not only disputed the correctness of the amount of rent claimed by the plaintiff, but pleaded that in consequence of the plaintiff's failure to tender him a proper patta, the suit was not maintainable. Whether this latter plea was valid or not (a point with which we shall deal later), the defendant was entitled to have it adjudicated on ; S. 195, Madras Estates Land Act is no obstacle, for it merely enacts that the Collector shall, except for special reasons, refuse to take cognizance of the plea that the amount claimed is in excess of the amount due, not of any other plea which the ryot may raise against the maintainability of the suit. The Revenue Divisional Officer has, in effect by decreeing the plaintiff's claim as sued for, for faslis 1318 and 1319 struck out the defendant's whole defence to the suit. This is illegal.

As regards fasli 1317, the District Judge has held, relying on *Sri Rajah Bommadevara Venkata Narasimha Naidu*

(1) [1880] 5 Cal. 333.

(2) [1909] 2 I. C. 633.

(3) [1905] 32 Cal. 576=2 C. L. J. 73.

(4) [1905] 1 C. L. J. 531.

(5) [1881] 6 Cal. 377=7 C. L. R. 875.

v. *Sajja Sattayya* (1) that, as there was no tender of patta, the suit for next fasli will not lie. In that case the suit was instituted before the Madras Estates Land Act came into force, so that it is no authority on the point now under consideration. The cases of *Sri Rajah Satrucherla Veerabhadra Raju Garu v. Ganta Kumari Naidu* (2) and *Muthiah Chettiar v. Ramasami Chettiar* (3) are clear authorities for holding that under the present Act, tender of patta is not a necessary precedent to a suit for rent.

The suit, in so far as it relates to fasli 1317, must therefore be remanded to the revenue officer for disposal according to law.

Costs in this and the District Court will be costs in the cause.

S.N./R.K.	Case remanded.
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(1) [1911] 9 I. C. 733=35 Mad. 139.	
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(2) [1912] 15 I. C. 393.	
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(3) [1913] 20 I. C. 689.	
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A. I. R. 1914 Madras 663 (1)

SADASIVA AIYAR AND SPENCER, JJ.

Murugesu Mudali and others—Defendants—Appellants.

v.

Ramaswami Chettiar—Plaintiff—Respondent.

Appeal No. 85 of 1913, Decided on 14th November 1913, from order of Dist. Judge, Salem, D/- 22nd January 1913, in Appeal Suit No. 22 of 1912.

Limitation Act (9 of 1908), Ss. 4 and 31—S. 4 applies to suits under S. 31 and is not confined to Sch. 1.

A suit on a mortgage governed by S. 31 was instituted on 8th August 1910, the grace period of two years expiring on Sunday, 7th August 1910:

Held: that the suit was in time.

Section 4, Limitation Act, can be invoked in the case of a suit governed by the limitation period prescribed by S. 31 (prescribed whether as a matter of grace or otherwise), and not merely the periods prescribed in Sch. 1: 14 I. C. 154, *Foll.* [P 663 C 2]

L. S. Veeraragava Aiyar—for Appellants.

Srinaminathan—for Respondent.

Facts.—The plaintiff brought a suit for redemption of a mortgage, taking benefit of the two years' period of grace allowed by S. 31, Lim. Act, 1908. The District Munsif dismissed the suit on the ground that as the period had expired on Sunday, the suit should have been instituted on Saturday. On appeal, the District Judge reversed it on the ground that the general rule of limitation might

be applied, and remanded the suit for disposal according to law. The present appeal was against that order of remand.

Judgment.—Adopting the reasoning of the judgment of *Hira Singh v. Mt. Amarti* (1), we hold that the suit was not barred by limitation. We are not prepared to follow the decision of *Sheodas Daulat Ram Marwadi v. Narayan Asaji* (2) and we think that the benefit of S. 4, Lim. Act, can be invoked in the case of a suit governed by the limitation period, prescribed by S. 31 (prescribed whether as a matter of grace or otherwise) and not merely the periods prescribed in Sch. 1.

It is unnecessary to consider the other two questions raised by the appellant's learned vakil, one of them whether on general principles of jurisprudence, a suit whose limitation period expired on a Sunday could be filed on the next day and whether *Gelmini v. Moriggi* (3) was correctly decided.

The other question is whether S. 10 General Clauses Act, applied in favour of the plaintiff, a question answered in the affirmative by Chamier, J., in *Hira Singh v. Mt. Amarti* (1).

In the result the appeal is dismissed with costs.

S.N./R.K.	Appeal dismissed.
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(1) [1912] 14 I. C. 154=34 All. 375.	
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(2) [1911] 12 I. C. 811 36 Bom. 268.	
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(3) [1913] 2 K. B. 549=82 L. J. K. B. 949.	
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A. I. R. 1914 Madras 663 (2)

SADASIVA AIYAR AND SPENCER, JJ.

T. Varadiah—Petitioner—Appellant.

v.

Rajakumara Venkata Perumal Raja Bahadur Varu and others—Counter-Petitioners—Respondents.

Civil Misc. Appeal No. 257 of 1909, Decided on 7th November 1913, from order of Dist. Judge, North Arcot, in Execution Petn. No. 3 of 1909.

(a) Civil P. C. (5 of 1908), O. 34, R. 5—Mortgage-decree holder must first proceed against mortgaged property.

Where a mortgage decree directs the sale of mortgaged property, it cannot be construed as giving the decree-holder a right of abandoning his claim against the mortgaged property and proceeding against the other property of judgment-debtor in the first instance. [P 664 C 1, 2]

(b) Civil P. C. (5 of 1908), O. 21, R. 17—Amendment of execution application should be allowed for bona fide mistake.

Where a decree-holder, believing in good faith that he is entitled to pray for attachment of properties, other than the mortgaged pro-

erty, prays for such attachment, he should be allowed to amend his application by praying for the sale of mortgaged property. [P 664 C 2]

(c) Civil P. C. (1908), S. 11—Order in execution without notice is not *res judicata*.

An order in execution proceeding cannot operate as *res judicata* when there is nothing to show that that order was passed after notice to the judgment-debtor, and after giving the latter an opportunity to contest it. [P 664 C 2]

(d) Limitation Act (9 of 1908), Art. 182 (5)—Application under O. 21, R. 22, is step-in-aid of execution.

An application for execution praying for the legal representative of the judgment-debtor to be brought on the record is sufficient to give a fresh starting-point for limitation even if it contains errors in the matter of property reliefs, etc. [P 664 C 2]

C. V. Ananthakrishna Aiyar—for Appellant.

A. Ramachandra Aiyar—for Respondents.

Judgment.—The learned District Judge has dismissed the execution application No. 3 of 1909, on the grounds: (a) that it was barred by limitation because the prior application, No. 11 of 1906, was not an application for execution in accordance with law, because this prior application wrongly prayed for attachment of non-mortgaged properties before the mortgaged properties were brought to sale: and (b) that this same prayer, repeated in the present petition, No. 3 of 1909, cannot be legally granted as the decree obliges the decree-holder to bring the mortgaged properties to sale in the first instance and allows him to proceed against the other properties only for the balance of the decree amount (if any).

As regards the second ground, the appellant's (decree-holder's) learned vakil relied on certain Allahabad cases [especially *Pirbhu Narain Singh v. Amir Singh* (1)] for his contention that the mortgagee decree-holder was entitled to abandon his claim under the decree to bring the mortgaged properties to sale and, on such abandonment, to apply for execution in the first instance against the other properties. Even if *Pirbhu Narain Singh v. Amir Singh* (1) is not distinguishable as relating to an application under S. 90, T. P. Act, we think we are bound by the decision in *Manit Kamoji v. Chodimalla Ramamurthy Pantula Garu* (2). In that case, the learned Judges (Miller and Munro, JJ.) held that the question in execution pro-

ceedings is: What does that decree (the decree sought to be executed) direct? We are of opinion that the decree must be construed as requiring the decree-holder to exhaust his remedy against the mortgaged property before he can commence proceedings against defendant 1 or the other property referred to. The decree cannot be construed as giving the decree-holder the right of abandoning his claim against the mortgaged property to create a necessity to proceed against other property. The case of *Damodar v. Vyanku* (3) also prohibits attachment of other properties till the mortgaged properties are sold as directed by the decree.

But we think that this is a fit case where we should allow the petitioner to amend his application by praying for sale of mortgaged properties in execution, as there is nothing to show that he did not believe in good faith that he was entitled to pray for attachment of properties other than the mortgaged properties. The contention of the appellant's learned vakil, that an order passed in 1898 in prior execution petition allowing him to attach other property is *res judicata* cannot be accepted, as there is nothing to show that that order was passed after notice to the judgment-debtors and after giving the latter an opportunity to contest it: see *Ramaswamy Naik v. Ramasawmy Chetty* (4).

Hence, the petitioner, unless he is allowed to amend his application, might be barred by the 12 years' rule, and we allow him to so amend it in this Court within two weeks of this date.

The lower Court was, in our opinion, in error in having decided that Execution Petition No. 11 of 1906 is not an application in execution in accordance with law or to take a step in aid of such execution. The petitioner prayed also in that petition for the legal representative of defendant 1 to be brought in and, even if it contained errors in the matter of the proper reliefs, etc. it is sufficient to give a fresh starting point for limitation, provided it was itself not barred by limitation.

We think that the principles of the decisions in *Mahalinga Moopanar v. Kuppanachariar* (5), *Kamakshi Pillai v.*

(1) [1907] 29 All. 369=(1907) A. W. N. 83.

(2) [1908] 3 M. L. T. 335.

(3) [1907] 31 Bom. 244=9 Bom. L. R. 199.

(4) [1907] 30 Mad. 255=17 M. L. J. 201.

(5) [1907] 30 Mad. 541=17 M. L. J. 485.

Ramaswami Pillai (6), *Ramayyan v. Kadir Bacha Sahib* (7) and *Appaniangar v. Dharni Mudaly* (8) are more binding on us than the case of *Mumtaz Husain v. Jani Bijai Shankar* (9), quoted by the respondent's learned vakil.

In the result we direct that, on the appellant's amending in two weeks the Execution Petition No. 3 of 1909 by praying for sale of the mortgaged properties, the lower Court's order be set aside and Petition No. 3 of 1909 be reheard by the District Court to decide the question whether Execution Petition No. 11 of 1906 was itself filed beyond the time allowed by law for an execution application and also to pass fresh orders having regard to the above remarks. If the application is not amended, the appeal will stand dismissed. In any event, the appellant will pay the respondent's costs in this Court.

S.N./R.K.

Case remanded.

(6) [1908] 18 M. L. J. 14.

(7) [1908] 31 Mad. 68=17 M. L. J. 596=3 M. L. T. 254.

(8) [1907] 17 M. L. J. 475.

(9) [1905] 27 All. 619=2 A. L. J. 376=(1905) A. W. N. 132.

A. I. R. 1914 Madras 665

MILLER AND SANKARAN NAIR, JJ.
N. Subhaya—Plaintiff—Appellant.

v.

Bhavani—Defendant—Respondent.

Second Appeal No. 725 of 1912, Decided on 28th April 1914, from decree of Sub-Judge, South Canara, in Appeal Suit No. 454 of 1909.

(a) **Hindu Law—Maintenance—Wife living in adultery and vicious life is not entitled to maintenance from husband.**

A wife is not entitled to maintenance from her husband if at the time of the suit she is living in adultery and persists in her vicious course of life. [P 665 C 2]

(b) **Hindu Law — Maintenance—Wife not living in adultery at time of suit is entitled to maintenance.**

A wife who gave birth to an illegitimate child, but at the time of the suit was not living in adultery, is entitled to maintenance: 19 Mad. 6 and 5 I. C. 960, *Foll.* [P 666 C 1]

B. Sitarama Rao and K. Y. Adiga—for Appellant.

K. Narain Rau and K. Sundara Rau—for Respondent.

Judgment.—The plaintiff sues for a declaration that he is not bound to provide maintenance for his wife. The defendant has been since 1903 living in her parents' house, and in October 1907, a

little less than a year before the suit, she gave birth in that house to a child which is found by the Courts below to be illegitimate, her husband having had no access to her. She has, it is stated offered to return to her husband's house but he, we are informed by his vakil, is unwilling to receive her.

The second issue framed by the District Munsif is, whether the defendant lives in adultery; and the finding on that issue is in the affirmative and is accepted by the Subordinate Judge. But we find ourselves unable to accept this finding, because the judgment of the District Munsif shows that it is based only upon the evidence that the plaintiff is not the father of the defendant's child. There is other evidence in the case, but the District Munsif seems to have thought it unnecessary to consider it, and the Subordinate Judge does not refer to it, and though the Courts may have been entitled in the circumstances to draw from the mere fact that the defendant has given birth to an illegitimate child the conclusion that she was at the time of the suit living in adultery, neither of them deals with the matter in this way; both seem to consider that the defendant having been guilty of adultery once may be held, without further evidence, to be living in adultery. That is not so, and we cannot accept the finding as it stands.

As to the law, it is contended that the plaintiff is not bound to maintain his wife if she has been unchaste. In *Kandasami Pillai v. Murugammal* (1) Subramania Aiyer, J., formulates a rule which he says may be safely laid down, even in the case of a wife, that no maintenance should be awarded if it appears that about the time of the litigation the woman persists in a vicious course of life.

The question has been very fully discussed in *Prami v. Mahadevi* (2), mainly with reference to the text of Yagnavalkya and the Mitakshara Commentary thereon.

It is there shown that, according to the Mitakshara, even in the cases where the sins of the woman are so great as to justify her "abandonment" by her husband, she is to be abandoned only for the purpose of conjugal relations and religious ceremonies, she is still to be fed and clothed and retained under her hus-

(1) [1896] 19 Mad. 6.

(2) [1910] 5 I. C. 960=34 Bom. 276.

band's control, but is to be supplied only with the bare necessities and to be kept in a place apart.

We see no reason why we should not accept this exposition of Hindu Law on the subject.

We were referred to certain texts of Manu as suggesting that a husband is entitled to cast off entirely an unchaste wife, but these texts do not directly lay down this rule, and we prefer to accept the rule which is discussed and laid down in Mitakshara and has been accepted as the law by the learned Judge in the Bombay High Court.

Taking the view, so far as it is consistent with *Kandasami Pillai v. Murugammal* (1), the plaintiff will be entitled to the declaration he seeks, only if it is found that at the time of the suit the defendant was living in adultery, and we must, in order to decide this, ask the District Judge for a revised finding on the second issue on the evidence on record.

The finding should be submitted in six weeks, and seven days will be allowed for filing objections.

(This second appeal and the memorandum of objections filed by the respondent, coming on for final hearing, after the return of the finding of the lower appellate Court, that it was not proved that at the time of the suit she was living in adultery, upon the issue referred by this Court for trial, the Court delivered the following:)

Judgment.—We accept the finding and reverse the decrees of both the Courts below and dismiss the suit with costs in all Courts.

S.N./R.K.

Decree reversed.

A. I. R. 1914 Madras 666

WHITE, C. J. AND OLDFIELD, J.

Andalammal—Defendant—Appellant.

v.

Narasimharaghavachariar and others—Plaintiffs—Respondents.

City Civil Court Appeal No. 28 of 1912, Decided on 11th March 1914, from decree of Madras City Civil Court in Original Civil Suit No. 119 of 1911.

Hindu Law—Minority—Purchase of immovable property by mother in her name with money belonging to minor sons—Sale was held not void—Contract Act (1872), S. 11.

Where a Hindu mother purchased certain immovable property in her name with funds belonging to her major and two minor sons:

Held: that the sale was not void as being in

favour of minors: 30 Cal. 539 (P.C.) and 4 I. C. 383, Dist. [P 667 C 1]

P. R. Srinivasa Iyengar—for Appellant.

S. Krishnama Chariar—for Respondents.

Facts.—The plaintiffs, the first of whom was a major and the other two his undivided minor brothers sued for recovery of possession from the defendant of two rooms and a verandah in a house sold to their deceased mother by the defendant's husband and purchased by her with funds belonging to the plaintiffs. The defendant contested the suit on the ground that the portions of the house in question were allotted to her by her husband for her residence, that a charge was also created thereon for her maintenance that the purchase by the plaintiffs' mother was with notice of her rights and that she was therefore not liable to be evicted. She also set up *jus tertii* in plaintiffs' sister on the ground that the house was the *stridhanam* property of the plaintiffs' mother and descended on her death to the plaintiffs' sister. In the course of argument another plea was raised by the defendant viz., that the sale being in favour of minors, was void in law and so no property passed to them. The City Civil Judge held that the plaintiffs' mother purchased the house with plaintiffs' funds without notice of the defendant's right of residence and that no charge was created and decreed possession to the plaintiffs. The defendant appealed.

Judgment.—We agree with the learned Judge's findings of facts: (1) that the purchase of the house in which the defendant claims a right of residence was made by the plaintiffs' mother with funds belonging to the plaintiffs and for their benefit; (2) that the plaintiffs' mother did not purchase with notice express or constructive of the defendant's alleged right. We also agree with his findings that no charge on the house was created in favour of the defendant and that the defendant had not acquired any right of residence therein.

The contention on which the appellant mainly relied was, as the learned Judge points out, not raised in the pleadings or the issues. This being so, it is, to say the least, doubtful whether the defendant was entitled to raise it at the hear-

ing of the suit. The contention was that inasmuch as plaintiffs 2 and 3 were minors at the date of the purchase, the sale was void. The judgment of the Privy Council in *Mohori Bibee v. Dharmodas Ghose* (1), where it was held that a mortgage by a minor was void and the judgment of this Court in *Narakoti Narayana Chetty v. Logalinga Chetty* (2) where it was held that a sale to a minor was void, were relied upon.

We are of opinion that, on the facts, the present case is not governed by either of these decisions. The purchase was in the name of the mother, but the purchase money belonged to the plaintiff and his two minor brothers. On the facts one view is that the mother purchased as trustee for her sons. The other view is that the plaintiff 1, then a major, and as managing member of his family purchased the house out of family funds, though for convenience the title deed stood in the name of the mother. In either view the sale, in our opinion is good and plaintiff 1 is entitled to sue on his own behalf and plaintiffs 2 and 3 are entitled to sue by plaintiff 1 as their next friend. This appeal is dismissed with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1903] 30 Cal. 539=30 I. A. 114 (P.C.).

(2) [1909] 4 I. C. 383=33 Mad. 312.

A. I. R. 1914 Madras 667

SANKARAN NAIR AND AYLING, JJ.

P. V. Raghunathasami Iyengar and others — Appellants.

v.

Janaki Ammal — Respondent.

Misc. Second Appeal No. 71 of 1911, Decided on 25th March 1914, from order of Dist. Judge, Trichinopoly, in appeal Suit No. 131 of 1910.

Civil P. C. (1908), S. 100 — New plea — Party cannot be allowed in second appeal to contend for the first time that decree obtained by one judgment-debtor against appellant's father cannot be set off against decree obtained by appellant in his own right.

An appellant will not be allowed to raise for the first time in second appeal the contention that a decree obtained by one of his judgment-debtors against the appellant's father on whose death the appellant was brought on the record as his legal representative, cannot be set off against a decree obtained by the appellant in his own right. [P 667 C 2]

R. Rangaswami Iyengar — for Appellants.

N. Rajagopalachariar — for Respondent.

Judgment.—This is an appeal by the plaintiffs in Original Suit No 62 of 1905 on the file of the District Munsif of Srirangam, against an order of execution proceedings allowing Janaki Ammal, defendant 2 in the suit to set-off against the plaintiffs' decree, the decree in Original Suit No. 86 of 1903 obtained by her. It is contended before us that the order allowing this set off is wrong in law because the decree in Original Suit No. 86 of 1903 was obtained against the appellants' father, on whose death the appellants were brought on record as his legal representatives, while the decree now under execution was obtained by them in their own right. It is also contended that Janaki Ammal, who seeks to set off the decree passed in her favour, is only one of the judgment-debtors in Original Suit No. 62 of 1905, while under O. 21, R. 4, Civil P. C., it is only if the decree had been against her singly that she is entitled to claim a set-off. It is conceded that this contention was not raised in the lower appellate Court. There the question was, whether the plaintiffs had their father's assets in their hands and were, therefore, bound to pay the decree-debt in Original Suit No. 83 of 1903. That point was decided against them. The further contention they advanced, that the sons were not liable for the costs incurred in litigation conducted by their father, was not allowed to be raised in appeal as it was a new ground. It was also contended in the lower Court that Mr. Hari Rao who appeared for the appellants did not fill the same character in Original Suit No. 86 of 1903 as in Original Suit No. 62 of 1905. This also was disallowed as it was a new ground not taken in the grounds of appeal. The same reasons apply to this contention also. Moreover, if it had been raised in the lower appellate Court, the decree-holder, Janaki Ammal, might have taken steps to execute her decree against the present appellants and realize the amount to pay their debt. Some years have elapsed and she might now find it difficult, if not impossible, to execute her decree if this contention is allowed. We are not therefore prepared to allow this contention now to be raised in this Court and we dismiss the appeal with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 668 (1)

WALLIS AND AYLING, JJ.

Vengidusawmy Aiyar and others—Defendants—Appellants

v.

Narayanasaawmy Aiyar and another—Plaintiffs—Respondents.

Appeals. Nos. 269 and 270 of 1913, Decided on 3rd March 1914, from orders of Sub-Judge, Kumbakonam, in Appeal Suits Nos. 908 and 904 of 1912.

Hindu Law—Widow—Widow in possession of properties without legal title for more than statutory period—Burden of proof that widow had limited interest lies on reversioners recovering possession.

Where a reversioner claims to recover possession of properties of which a widow was in possession without any legal title for more than the statutory period, the burden is on the reversioner to show that the widow had only a limited interest in such properties: 9 M. L. J. 33 and 10 I. C. 63, *Fell*. [P 668 C 1]

K. Srinivasa Aiyangar and T. Natesa Aiyar—for Appellants.

V. Visvanatha Sastri and T. R. Venkatarama Sastri—for Respondents.

Judgment.—According to the finding of the Subordinate Judge the property vested in Vaidyanatha Aiyar as the last surviving member of the joint family of himself and his two brothers. His brother's widows and their mother-in-law enjoyed the property on his behalf for many years during his absence. In 1864 after the mother-in-law's death, one of the widows sued the other claiming the whole property as heir to Vaidyanatha who had not been heard of for many years and was presumably dead. It was held, though that is not now the law, that the two widows were entitled to succeed as heirs to the property of Vaidyanatha, the last male owner. On the death of one of the widows the properties which fell to her share passed to the reversioners of Vaidyanatha. On the death of the surviving widow, the claim of the reversioners is contested by the daughter's sons of her husband by a previous wife; and the plaintiffs have sued as reversioners to establish their title. The Subordinate Judge has held correctly that the onus was on the plaintiffs to show that a widow who took possession in these circumstances acquired only a limited estate, following *Bapanayya v. Peddichalamaiya* (1); see also *Kuppusawmy v. Srinivasaiengar* (2). He has

also held for the reasons given by him that that onus has been satisfactorily discharged, and we are not prepared to interfere with his finding. The appeals are dismissed with costs.

S.N./R.K.

*Appeal dismissed.**** A. I. R. 1914 Madras 668 (2)**

WALLIS AND AYLING, JJ.

A. Kasturi Ranga Aiyar—Appellant.

v.

Venkatarama Aiyar and another—Respondents.

Letters Patent Appeal No. 170 of 1912, Decided on 10th March 1914, against order of Sadasiva Aiyar, J., in Appeal Against Order No. 262 of 1912.

*** Civil P.C. (1908), Ss. 50 and 53—Decree against assets of deceased father—Property in son's hands proceeded against—Property does not cease to be "property of deceased father" by reason of son's death.**

Where a decree was against the assets of a deceased father in the hands of his son, and property in the hands of the latter was proceeded against in execution:

Held: that the property did not cease to be "property of the deceased father" for purposes of Ss. 50 and 53, merely because the son died and the property passed into the hands of the son's heir or legal representative.

[P 668 C 1; P 669 C 1]

N. P. K. Thathiachariar — for Appellant.

T. Arumai Natham Pillai and K. S. Jayaram—for Respondents.

Judgment.—The High Court decree was against the assets of the deceased in the hands of his son who had been brought on as his legal representative. The term "assets," if not co-extensive with, is at least included in, the term "property" and the new S. 53 says that property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor in respect of which a decree has been passed, shall be deemed to have come to the hands of the son or other descendant as his legal representative. Unless the debt was incurred for immoral or illegal purposes, the ancestral property of the father which passed by survivorship to the son was by this section to be deemed to be the property of the deceased father which had come to the hands of the son as his legal representative, that is to say, as soon as it got into the son's hands after the father's death it became the father's property for the purposes of Ss. 50 and 52. The fact that the son died subse-

(1) [1899] 9 M. L. J. 33.

(2) [1911] 10 I. C. 63.

quently and that execution is now sought against his heir and legal representative does not, in our opinion, in any way, affect the operation of S. 53 or make the property in question any less the father's property for the purposes of Ss. 50 and 52. We agree with the learned Judge and dismiss the appeal with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Madras 669 (1)

SADASIVA AIYAR AND AYLING, JJ.
Saraswathi Ammal—Appellant.

v.

R. Subbiar and others — Respondents.

Appeal No. 167 of 1912, Decided on 20th November 1913, from order of Dist. Judge, Coimbatore, D/- 20th March 1912.

Succession Certificate Act (7 of 1889), S. 7—Some inquiry must be made though many facts are admitted.

Barring the very exceptional cases in which on facts admitted by both parties, the Court can determine the right to the certificate, some inquiry ought to be held even in cases in which many facts are admitted by both sides: 17 *Mad.* 477 and 18 *I. C.* 733, *Foll.* [P 669 C 1]

T. K. Garuda Aiyer—for Appellant.

A. Sundaram—for Respondents.

Judgment.—In *Sivamma v. Subbamma* (1), it was remarked (p. 478) as follows: "The Court is bound to determine the right to the certificate by summary inquiry. The difficulty felt must be the result of summary inquiry, and not the a priori theory that every inquiry into a special ground of claim urged to the certificate necessarily involves an inquiry too intricate for determination in a summary proceeding."

Of course, if certain facts are admitted by both parties and if on those admitted facts the prima facie title to the certificate clearly belongs to one of the claimants, the Court may grant the certificate to that claimant: see *Angappa Chettiar v. Meenakshi Ammal* (2). But such cases must be treated as exceptional, and ordinarily, some inquiry ought to be held even in cases in which many facts are admitted by both sides.

In the present case, the widow denied that the debts belonged to her husband and his brothers jointly, and she set up a will in her favour. Two of the amounts for which certificate was applied for were sums due from a Fund Office and from a Post Office Savings Bank, the deceased, who was an overseer, having evidently

deposited money in the Fund Office and in the Savings Bank.

We think that in this case some inquiry ought to have been held before the District Court passed its order in favour of the petitioners before him. We set aside the District Judge's decision and request him to dispose of the application after taking some evidence on the following (among other) points: (1) Whether the will set up by the appellant is genuine. (2) Whether the sums mentioned in the application belonged to the deceased as his separate or self-acquired property.

Costs hitherto will be costs in the application.

S.N./R.K.

Case remanded.

A. I. R. 1914 Madras 669 (2)

AYLING AND TYABJI, JJ.

(*Sri Veera Sri Veeradi Veera Veera Pratapa Sri*) *Krupamaya Ananga Bheema Kesari Deo Gajapathi Maharaju Garu*—Plaintiff—Appellant.

v.

Sondi Prahaladha Bissoyi Ratno and another—Defendants—Respondents.

Second Appeals Nos. 841, 842 and 843 of 1912, Decided on 11th November 1913, from decrees of Dist. Judge, Ganjam, in Appeal Suits Nos. 208, 210 and 209 of 1911.

Land Tenure—Service—Inam granted by zamindar for personal service is ordinarily resumable—In absence of default of rent and willingness to serve tenant cannot be ejected.

An inam granted by a zamindar to a servant for performing services of a personal character is resumable whenever the zamindar chooses to dispense with his services. [P 670 C 1]

When a zamindar grants certain lands on favourable rent to his servants, in consideration of their performing services for him of a personal character, the fact of the services being dispensed with does not necessarily give him the right to resume the lands; so long as the servants did not commit any default in the payment of the rent stipulated for, and are willing to render the services for the performance of which the grants were originally made to them; they cannot be ejected. [P 671 C 1]

L. A. Govindaraghava Aiyar—for Appellant.

K. Naraina Row—for Respondents.

Ayling, J.—The suits out of which these second appeals arose were brought by the Zamindar of Peddakimidi to recover possession of certain darmilla service inam lands resumed by him in 1906. The Subordinate Judge gave a decree as sued for. The District Judge, on first

(1) [1894] 17 *Mad.* 477.

(2) [1913] 18 *I. C.* 733.

appeal, while agreeing with the Subordinate Judge that the inams were resumable by the zamindar, held that the zamindar was not entitled to eject the defendants from the land, but merely to raise the rent to the melvaram ordinarily payable in place of low quit-rent which they paid while the services were being performed.

Against this decision, the zamindar has preferred appeals, and the respondents in Second Appeal No. 841 of 1912 have filed a memorandum of objections against the decisions of both Courts that the inams (whatever they were) were resumable.

I have no hesitation whatever in rejecting the memorandum of objections. The respondents' vakil argues that the services rendered by his clients were of a public or quasi-public nature. The nature of the services is set forth in para. 7 of lower appellate judgment. They consist in: (a) attending the estate office for 15 days in a year to do service of errand going, guarding treasury, etc.; and (b) collecting rents, serving demand notices, going in guard of money sent to the Collector's office at Chatrapore, accompanying the Zamindary Officials on tour taking letters, etc., to Chatrapore and the village officials. The services are entirely of a personal character for the benefit and convenience of the zamindar alone and for that reason, the inams (whether consisting of the lands themselves or only of an interest in them) are resumable by the zamindar whenever he chooses to dispense with the services.

The real difficulty in the case is to determine what was the nature of the beneficial interest in the suit lands which was granted to the defendants or their predecessors-in-title in lieu of wages for the services to be performed by them; and it is due to the extremely scanty materials for forming a decision. The learned District Judge has discussed the point in para. 11 of his judgment. After giving careful consideration to the able arguments of Dewan Bahadur L. A. Govindaraghava Aiyar for the appellant, I do not feel prepared to differ from the Judge's conclusion while, on the other hand, I can find nothing material to add to the reasoning with which he has supported it.

Mr. K. Narayana Rao, for the respondents, has attempted to support the

decree by showing that the lands at the time of the inam grant were already in the occupation of his clients or their predecessors-in-title as ordinary jeroiyati tenants. If this were so, the correctness of the District Judge's decision would be self-evident and the arguments with which he has supported it would be superfluous. I need only say that the very nature of the Judge's reasoning shows that he did not hold it to be so, that the suggestion now put forward is contradicted by the defendant's written statement in each of the suits which asserts in the most explicit manner that the lands were waste and covered with jungles when granted as inam: and that there is practically no evidence even tending to suggest that they were already in the occupation of the defendants or their predecessors as tenants at the time of the inam grant.

Fortunately however for the defendants, their case in this respect is not dependent on the line of argument adopted by the vakil in this Court. Assuming that the lands were waste (whether requiring reclamation or not) at the time of the grant and therefore at the disposal of the zamindar, I am still of opinion that the District Judge was right in distinguishing between the favourable rate of quit-rent, which represented the remuneration of their services, and the tenancy right, which there is no reason to regard as different from that usually obtaining in the zamindari. Mr. Govindaraghava Aiyar has argued that the rebuttable presumption of occupancy right [which is the substantial burden of the ruling in *Cheekati zamindar v. Ranasooru Dhora* (1)] does not arise where the circumstances under which the tenant is admitted by the zamindar to the land differ in any respect from the ordinary, that is to say, from the case of a tenant applying for or being granted the use of the land for purely agricultural purposes subject to the payment of the usual rent. I do not see why the presumption should not be applied to a case like the one with which we are dealing. No doubt, it is open to the zamindar to prove the existence of a special contract or a special custom in the estate (vide the concluding portion of Shepherd, J.'s judgment). But where he does not do so (and I do not think he can possibly be held to have

(1) [1900] 23 Mad. 318.

done so here), the ordinary presumption as to the tenancy right must be applied.

I may add that there is nothing inequitable in doing so. The favourable rate of rent paid by the defendants may be regarded as the recompense for their services; the tenant's profits are the recompense for his labour as a cultivator and there is no reason why these defendants should be placed in a worse position in the way of permanence of tenure than any other tenant.

With regard to the case referred to in the lower appellate Court's judgment [*Sri Raja Viseswara Nissenka Bahadur v. Gorla Budaradu* (2)], a reference to the record shows that the case cannot be distinguished, as the learned District Judge surmised, on the ground that the lands were private lands; on the other hand, it is perfectly clear that the question with which we are now concerned, was never raised in that case, and that it cannot be regarded as an authority for the view contended for by the appellants.

I would dismiss all three appeals and the memoranda of objections with costs.

Tyabji, J.—These appeals have reference to the rights of the Zamindar of Peddakimidi as against the respondents, who have been holding lands on a favourable rent on condition that they should perform certain services. The zamindar does not require the services to be performed any more, and the question arises whether he is entitled in any way to alter the relations so far subsisting between himself and the respondents (1). The zamindar claims that he can put an end to the relationship entirely and eject the respondents from the lands in question. (2) The respondents claim that the relationship cannot, in any way, be altered at the mere will of the zamindar, and so long as they are willing to perform the services hitherto performed by them the rent cannot be raised. (3) A third view lying intermediate between these two contentions is that the zamindar may at his pleasure dispense with the services, and in that case he can raise the favourable rent hitherto paid by the respondents so as to make it equal to the usual customary rent paid by the occupancy ryots in the zamindari, but that he cannot eject the respondents so long as they do not commit any default in respect of the payment of rent, or in

some other respect. It is the third view that has found favour with the learned District Judge. The Subordinate Judge had accepted the contentions of the zamindar in their entirety.

The respondents by their cross-objections ask us to adopt the second contention. I agree with my learned brother that the services which had to be performed in lieu of the inams were personal, and not of a public nature, and that the inams may be resumed in so far as they represent the services. I agree therefore that the cross-objections should be dismissed with costs.

It remains to consider whether on the services ceasing, the zamindar can eject the respondents, or whether he can only raise their rents. This question could be conclusively put at rest if there were any definite and satisfactory evidence as to the terms of the contract between the zamindar and the respondents. No such evidence was placed before the lower Courts, and the rights of the parties have therefore to be determined mainly from presumptions and legal inferences.

It is argued on behalf of each party that the presumption is in its own favour. For the appellant, it is argued that though, when a tenant pays the usual rent, the presumption is that "he is entitled to occupy his lands so long as he pays what is due," *Venkatanarasimha Naidu v. Dandamudi Kotaya* (3), yet that presumption does not arise here as the respondent's admittedly held a position quite distinct from that of an ordinary ryot: that there is no room for the presumption that the respondents were given the rights to occupy their lands permanently; for the basis of the presumption is that the holder of the land has been in occupation of it prior to the zamindar, whereas here the respondents were let into possession of their lands by the zamindar, and that in such a case, inasmuch as the zamindar must have once possessed the full ownership of the lands, he could have contracted with the respondents or their predecessors-in-title as he chose, when they first came to hold the land.

This argument does not however seem to me to be conclusive. Assuming that the zamindar could have insisted upon letting the respondents or their predecessors-in-title into possession of the land

on such terms as he himself desired, and could therefore have reserved to himself the right to eject the respondents, the question is whether he did so, and whether in the absence of proof it is to be presumed that he did so.

This question appears to me to depend, to a great extent, on the theory of the law relating to land and of the usual relations between the zamindar and the holder of the land. In 1876, the majority of the Court, deciding *Fakir Muhammad v. Tirumala Chariar* (4), laid down that the distinction between the old resident cultivator and the stranger and new comer had not been obliterated, and that just as the tenant had the right to terminate the tenancy at the end of any fasli, so the landlord, the Government, had an equal right to do so. That view of the relation between the holder of the land and the Government has slowly given place to the view that (1) "the Sovereigns ancient or modern, did not here set up more than a right to a share of the produce raised by the ryots in lands cultivated by them :"
Venkatanarasimha Naidu v. Dandamudi Kotayya (3). (2) That the payments made to the zamindars as such "are universally deemed the due of the Government;" though, (3) the zamindar may hold land in which he has not merely the said interest of receiving the due of the Government, but the whole dominium of the land: this happens admittedly in the case of his private or home-farm lands; but such rights must be proved by the zamindar, and ordinarily it will be presumed that he never had more than the restricted right of demanding a portion of the produce (4).

On the other hand, it follows that the ordinary ryot does not necessarily hold the land as a grantee of the zamindar, and as a general rule it is rather as a charge on the land than as an incident of contract that a portion of the produce has to be paid to the zamindar; the liability to make such payment does not imply that the land is held by virtue of a contract with the owner of the land; nor does it necessarily establish between the occupant and the zamindar the relationship of landlord and tenant: *Srinivasa Chetty v. Nanjunda Chetti* (5), *Raja Vellanki Venkata Rama*

Rau v. Raja Papamma Rau (6), *Cheekati Zemindar v. Ranasooru Dhora* (1). A presumption that the ryot has the right of permanent occupancy is based not merely on the fact that the present holder of the land is assumed to derive his title from the person who first made a beneficial use of the soil and who therefore acquired a right to possess it: *Secretary of State v. Vira Rayan* (7), *Venkata Narasimha Naidu v. Dandamudi Kotayya* (3). For the distinction between the old resident cultivator and the new comer to which Morgan, C. J., referred in *Fakir Mohammad's* case (4) is not obliterated; in the case of the former, there is no question of a contract of tenancy, in the case of the newcomer there must be some contractual relationship express or implied but it is presumed that he is admitted into possession on the same terms as the prior occupants, that if it is not shown that any special contract was made with him differentiating his case from that of the other occupants, then the contract must have been with similar incidents.

This view of the relations that must be presumed to have existed between the parties to the present appeal is strengthened by the Judge's conclusion (which seems to me to be warranted by the evidence) that the lands in question were ryoti lands when the respondents or their predecessors-in-title first took possession of them.

It is argued however that the case of the tenant, who is admitted on the terms that he is to perform service, is quite different from that of the ordinary ryot who only pays rent, and that the one can present therefore no analogy to the other. The question is not free from doubt. But it seems to me that the tendency of decisions for a long time (based, no doubt, on an increasing knowledge of the conditions existing in zamindaris) has been distinctly in favour of the view that the zamindar's right to eject is exceptional and must be proved by the person asserting it. The zamindar may therefore well be required to adduce evidence of the fact, if it be a fact, that when the respondents or their predecessors-in-title were admitted into possession, the contract was that the zamindar should have the right to eject

(4) [1876-78] 1 Mad. 205.

(5) [1882] 4 Mad. 174.

(6) [1898] 21 Mad. 299=25 I.A. 84 (P.C.).

(7) [1886] 9 Mad. 175.

them in case when the other ordinary tenants would not be liable to be ejected.

I should have had greater hesitation in coming to this conclusion had I thought that it had no foundation except in the theory of the law as understood by me. Presumptions of this nature, ought, it seems to me, to be carefully watched and constantly tested by a consideration of "the common course of natural events and human conduct." The consideration of these matters appears to me to lead to the same conclusion as that to which I have arrived on the other basis. Here we have on the one hand a powerful zamindar, having systematic records of the transactions connected with the zamindari and on the other, a humble and possibly an illiterate occupant of the land. In such a case, it seems proper and just, no less than in accordance with the ordinary course of human affairs, to assume that the zamindar would be best able initially to provide for and safeguard his interest in his contract with the tenant and later to adduce satisfactory evidence of his just claims arising under the contract. *Sri Raja Visweswara Nissenka Bihadur v. Gorla Budaradu* (2) has been cited to us by the appellant. In that case the Court did not consider the question with which we have to deal. The only question before the Court was that the tenants could continue in possession on the same rent after the services had ceased.

For these reasons I agree that the learned District Judge was right in presuming (until the contrary was proved) that the zamindar cannot eject the respondents from the lands in their possession so long as they are willing to pay the proper melvaram due upon the lands, and that that therefore the appeal should be dismissed with costs.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 673

WALLIS, J.

P. P. Thangavelu Chetty—Plaintiff.

v.

P. Mukunda Naidu and another—Defendants.

Original Civil Suit No. 255 of 1912,
Decided on 13th October 1913.

(a) **Compromise**—Abandonment of bona fide claim is good consideration for compromise—Onus of mala fide claim is on defendant.

The abandonment of a bona fide claim is

good consideration for a compromise even though the agreement on which the claim was based was void as being in restraint of trade. The onus in such a case is on the defendant to show that the compromise was not the compromise of a bona fide claim: (*Case law discussed.*) [P 674 C 1]

(b) **Contract Act (9 of 1872), S. 27**—Agreement not to supply coolies is in restraint of trade.

Where one of two rival coolie suppliers agreed with the other not to supply coolies in consideration of the latter agreeing to pay to the former Rs. 50 per mensem.

Held: that the agreement was void under S. 27: (*Case law discussed.*) [P 674 C 2]

C. P. Ramaswami Ayyar and M. Singaravelu Chetty—for Plaintiff.

V. Masilamani Pillai—for Respondents.

Judgment.—This is a suit brought by the plaintiff on two agreements which were entered into on 28th October 1909. The plaint recites that the plaintiff was before July 1907 supplying stevedoring coolies to unload steamers to one Chockalinga Naicker and the defendants were also working as landing contractors, that in July 1907 the defendants requested the plaintiff to refrain from supplying stevedoring coolies to Chockalinga so long as they carried on the business of landing agents for coal steamers at Madras; and it was then agreed between the parties that in consideration of plaintiff's so abstaining from supplying stevedoring coolies as aforesaid, the defendant should pay to the plaintiff the sum of Rs. 50 for every coal steamer for which they became landing contractors. The plaint goes on to allege that a suit was brought in the City Civil Court by the plaintiff against the defendants for breach of this agreement of July 1907 and that that suit was compromised on 28th October 1909, when the two agreements, now sued on, were entered into. By the first of these agreements, the defendants bound themselves to execute a promissory note for Rs. 400 in favour of the plaintiff which has since been paid—and also within two years to build a choultry at a cost of Rs. 1,600, and on failure so to do to pay Rs. 1,600 to the plaintiff for the same purpose. That sum the plaintiff sues to recover in this suit. The other agreement was really in effect a renewal of the original agreement of July 1907, that the plaintiff was not to supply these stevedoring coolies to Chockalinga Naicker and that in consi-

deration of his abstaining from so doing the defendants were to pay him Rs. 50 for every coal steamer for which they acted as landing contractors.

Now, the objection taken by these defendants is that both these agreements are void under S. 27, Contract Act as being in restraint of trade. Mr. Ramaswami Aiyar for the plaintiff argues that so far as the first agreement is concerned, this question does not arise because, he contends this agreement is supported by good consideration, viz., the abandonment of the bona fide claim made by the plaintiff in the suit in the City Civil Court and he has referred to *Callisher v. Bischoffsheim* (1), *Miles v. New Zealand Alford Estate Company* (2) and *Stapleton v. Stapleton* (3). On the other hand, it is admitted by Mr. Masilamani in accordance with the authority which he cited that the burden is upon the defendants to show that the particular compromise was not the compromise of a bona fide claim and it seems to me that the defendants have altogether failed to show that in this particular case. On the contrary, they would appear to have regarded such an agreement as was being sued on in the City Civil Court as enforceable because they proceeded, as I have already pointed out, at once, to renew it for the future. I hold therefore that the first agreement was a bona fide compromise of a disputed claim and is binding and that therefore defendants are bound to pay Rs. 1,600 to the plaintiff for the purpose of erecting the choultry specified in the agreement.

As regards the second agreement which merely reproduces the agreement of July 1907, it is sufficiently set out in the plaint. The defendant contends that it is void as in restraint of trade under S. 27, Contract Act. That section provides that every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind is, to that extent, void. There are three exceptions to that rule, none of which covers the present case. The cases dealt with in these exceptions had been held not to be in restraint of trade under English decisions; but by making them exceptions the legislature shows, in my

opinion, that it considers them to be agreements in restraint of trade but agreements which it is desirable to allow. Various cases have been referred to which have been decided on different facts and I do not think that anything would be gained by referring to any of them except *Shaikh Kalu v. Ram Saran Bhagat* (4). My reason for referring to that case is that the learned Judges have quoted the section of the draft Civil Code for the State of New York from which this section is admittedly taken, and also the explanatory note which was appended to it by the framers of the section and curiously enough, the note shows that the section was intended to avoid an agreement such as the present although it had been held to be enforceable in *Dunlop v. Gregor* (5). In that case according to the note, "a contract not to run on certain steam boat before Sanger-ties on the Hudson was enforced although there was no sale of goodwill nor any circumstance to justify the contract, except that it was made upon a sale of the vessel by an association of persons who had previously used it to run before Sanger-ties and wished to avoid competition." Here the agreement is made with a view of avoiding the competition of Chockalinga Naicker, and it does so merely by providing that the plaintiff is not to supply stevedoring coolies to Chockalinga Naicker. This, it seems to me, is clearly an agreement by which the plaintiff is restrained from exercising a lawful trade or business. It is not an agreement securing to the defendants the services of all the coolies at the disposal of the plaintiff and it is therefore, unnecessary to consider whether such an agreement might not be supported. The present agreement is not of that kind, and I am of opinion that it is void under S. 27, Contract Act. The result is that there will be judgment for the plaintiff for Rs. 1,600 for the erection of a choultry as stipulated in the first agreement. The plaintiff will be entitled to costs on Rs. 1,600.

S.N./R.K.

Order accordingly.

(1) [1869] L. R. 5 Q. B. 449=39 L. J. Q. B. 181=18 W. R. 1127.

(2) [1886] 32 Ch. D. 236=55 L. J. Ch. 801=54 L. T. 582=34 W. R. 669.

(3) (1910) White & Tudor Ed. 231.

(4) [1909] 1 I. C. 94.

(5) 10 N. Y. (6 Seldea) 241=61 A. M. Dec. 746.

A. I. R. 1914 Madras 675

WHITE, C. J. AND TYABJI, J.

Batcha Sahib—Defendant 1—Appellant.

v.

Abdul Gunny and others—Plaintiffs and Defendants 2 to 12—Respondents.

Appeal No. 15 of 1911, Decided on 1st April 1913, from decree of Dist. Judge, Coimbatore, in Original Suit No. 33 of 1908.

Civil P. C. (5 of 1908), Sch. 2, Para. 16—Judgment and decree in terms of award is final in absence of order remitting award or order allowing application to set aside award made within ten days.A judgment and decree passed in accordance with an award under para. 16, Sch. 2, are not open to appeal or revision : 9 I. C. 173 (F. B.), *Foll.* [P 675 C 1; P 676 C 1]In order to secure finality to the judgment and decree, the necessary conditions are that there has been no order remitting the award and that no application has been made to set aside the award within ten days or, if an application has been made, it has been refused after judicial determination by the Court : (*Case law discussed*). [P 675 C 2, P 676 C 2]*T. R. Ramachandra Aiyar* and *T. R. Krishnaswami Aiyar*—for Appellant.*C. V. Ananthakrishna Aiyar*—for Respondents.**White, C. J.**—This is an appeal against a decree on a "judgment according to the award" under para. 16, Sch. 2, Civil P. C. The decree is impeached by the appellant on two grounds : it is said, first, that there has been no award ; secondly, that on the application to the District Judge to pronounce judgment according to the award, the learned Judge ought to have given an opportunity to one of the arbitrators, who is described by the learned Judge as the "dissenting arbitrator," to give evidence, that he did not give that opportunity and, that being so, the judgment according to the award is "bad."On behalf of the respondents a preliminary objection was taken that no appeal lies. It seems to me that, on the authority of the Full Bench decision, which is reported as *Tallapragada Suryanarayana Rao v. Tallapragada Sarabaya* (1), the preliminary objection is good and should be upheld. The judgment of the Full Bench was with reference to a case which arose under the Code of 1882. Now the doubts which had arisen under the provisions of the old Code were removed by certain amendments (1). [1911] 9 I. C. 173 (F. B.).

being made in the corresponding provisions of Sch. 2 to the new Code. Para. 15, (which corresponds to S. 521 of the old Code), provides that no award should be set aside "except on one of the following grounds." In para. 15 (i) (c), we have a new ground, namely, the award having been made after the expiration of the period allowed by the Court. At the end of the paragraph, we have the general words added "or being otherwise invalid." These amendments of the law were made for the purpose of removing doubts which had arisen. If, on the authority of the Full Bench case, the objection that no appeal lies would have been good under the old Code, a fortiori it is a good objection as the law now stands.

The time prescribed for an application to set aside an award is ten days from the submission of the award : Limitation Act, 1908, Sch. 1, Art. 158. Under para. 15, Sch. 2, Civil P. C., as amended, the Court might have set aside the award in the present case on the ground that it was otherwise invalid if the application had been made in time. In the present case, the award would seem to have been submitted on 29th June. The application to set it aside was made on 18th July 1910. This would seem to have been overlooked. The order refusing to set aside the award appears to have been made at the same time (2nd September 1910) as the judgment according to the award under para. 16, Sch. 2, Civil P. C., (which corresponds to S. 522 of the old Code), was given. In the present case, the judgment according to the award was pronounced after the time for making the application to set aside the award had expired. But even if this had not been so, as it seems to me, inasmuch as an application to set aside the award had been made and refused it would have been open to the Court to pronounce judgment even though the ten days had not expired. The words "after the time for making such application had expired" would seem to apply only where there has been no application made to set aside the award. The law is thus stated by Mr. Banerjee in his book on the Law of Arbitration in India and I think correctly on p. 293. "In order to secure finality to the judgment and decree the necessary conditions are that there has been no order remitting the award, and

that no application has been made to set aside the award within the ten days, or if an application has been made it has been refused after judicial determination by the Court."

In the present case, the Court refused to set aside the award. The judgment pronounced under para. 16 is therefore final under para. 16 (2).

Then we are asked to deal with the matter by way of revision. There is no formal application before us to revise but as has been pointed out under S. 115 of the Code, a formal application is not necessary. In *Gulam Khan v. Muhammad Hussain* (2), the Privy Council observed (on p. 185): "Their Lordships are inclined to agree with the view of Clark, C. J., in *Jhanghi Ram v. Mt. Rudho Bai* (3) that in the case of an award, revision would be more objectionable than an appeal." We are asked to interfere on the ground that the learned Judge ought to have given one of the arbitrators an opportunity to give evidence on the hearing of the application to set aside the award. Speaking of this arbitrator the Judge said: "He was here on 11th August; now he has been summoned but cannot be found. Petitioner's case turns on that man; yet petitioners took no steps to secure his presence on the last occasion." Then he says: "I see no reason to adjourn this matter further; panchayatdars have given an award, but all that has really happened is that the third, the absent man, does not agree with them in some points and so did not sign the award." If it were quite clear that the learned Judge has exercised discretion wrongly in this case, we might be prepared to take the strong steps of interfering on revision, but the general policy of the legislature is clear that in these matters the judgment in accordance with an award should be final. Mr. Ramachandra Iyer has been unable to call our attention to any case in which this Court has interfered by way of revision where a decree has been passed in accordance with an award given by arbitrators, excepting a case decided by Wallis, J., *Velu Pillay v. Appasawmi Pandaram* (4). In that case, it does not appear that there was any application to set

aside the award and judgment was pronounced two days after the award was submitted. It was not a case of impeaching an award, but a case where express provisions of para. 16, Sch. 2, Civil P. C., had been contravened. I may refer to a decision of Munro, J., and Abdur Rahim in *Kanakku Naga'inga Naick v. Nagalinga Naik* (5). There it was held under the old section that no appeal lay against a decree passed in accordance with an award excepting on the grounds stated in the section and that no appeal will lie on the ground that an award is void ab initio. I refer to this case for the purpose of pointing out that it was never suggested there that the Court should or could interfere in the exercise of its powers of revision. I think we should uphold the preliminary objection and dismiss the appeal with costs and I think we should decline to interfere by way of revision.

Tyabji J.—I agree.

S.N./R.K.

Appeal dismissed.

(5) [1909] 4 I. C. 871=32 Mad. 510.

A. I. R. 1914 Madras 676

AYLING, J.

Thirukonam Kuppachari—Accused—
Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 174 of 1913, and Criminal Revn. Petn. No. 146 of 1913, Decided on 18th July 1913, from order of Dist. Magistrate, Nellore, in Revn. Petn. No. 2 of 1913.

Criminal P. C. (5 of 1898), S. 437—Order for further enquiry without solid reasons is bad.

No Court can properly set aside an order of discharge without having and assigning solid and sufficient reasons for doing so.

An order for further inquiry, under S. 437, without setting out grounds therefor is bad and must be set aside. [P 677 C 1]

S. Swaminadhan—for Petitioner.

C. F. Napier—for the Crown.

Order.—In this case the Deputy Magistrate, after considering the prosecution evidence adduced against the petitioner in a long and careful judgment, has come to the conclusion that it does not establish the offence, and has accordingly discharged the accused. The District Magistrate has, under S. 437, Criminal P. C., ordered further inquiry by another Magistrate; but for some reason, not apparent, has deliberately

(2) [1902] 29 Cal. 167=29 I. A. 51 (P. C.).

(3) [1901] 84 P. R. 1901=112 P. L. R. 1901.

(4) [1911] 9 I. C. 197.

refrained from setting out any grounds for his order. This order is open to review by this Court; and it is essential that the Magistrate's reasons should be explained. The discretion conferred upon the District Magistrate is a judicial discretion and, as observed by four learned Judges of the Calcutta High Court in *Hari Dass Sanyal v. Saritulla* (1): "No Court can properly set aside an order of discharge without having and assigning solid and sufficient reasons for doing so."

I set aside the order of the District Magistrate, and direct that if, on consideration he deems it necessary to order further inquiry, he should pass a fresh order setting forth the reasons for the same.

S.N./R.K.

Order set aside.

(1) [1888] 15 Cal. 693 (F. B.).

A. I. R 1914 Madras 677

WHITE, C. J., AND OLDFIELD, J.

N. A. Srinivasa Iyengar—Appellant.

v.

Official Assignee of Madras and another—Respondents.

Original Appeal Suit No. 105 of 1912, Decided on 8th August 1913, from order of Bakewell, J., in Insolvency Petn. No. 231 of 1912.

Presidency Towns Insolvency Act (3 of 1909), S. 90—Act differs materially from Provincial Insolvency Act—District Court is not competent to try petition filed in High Court.

Where an insolvency petition, which was pending before the High Court at Madras, was transferred to the District Court of Tanjore:

Held: that the District Court was not competent to try or dispose of the said petition.

The jurisdictions conferred by the Presidency Towns Insolvency Act and the Provincial Insolvency Act are distinct and the provisions of the two Acts differ in several important respects. [P 677 C 2]

D. Chamier—for Appellant.

Official Assignee—for Respondents.

White, C. J.—This is an appeal from an order made by Bakewell, J. transferring an insolvency petition pending before him to the District Court of Tanjore. The learned Judge, as appears from the terms of the order, purported to make it under the powers conferred by S. 90, Presidency Towns Insolvency Act, and S. 24, Civil P. C.

The question as to whether the learned Judge had jurisdiction to make the order does not appear to have been raised before him. But Mr. Chamier,

who appears for the appellant (the insolvent), has taken the point here that the Judge had no jurisdiction to make the order.

Section 90, Presidency Towns Insolvency Act, states: "In proceedings under this Act the Court shall have the like powers and follow the like procedure as it has and follows in the exercise of its ordinary original civil jurisdiction." In S. 2 of the Act "Court" is defined as meaning "the Court exercising jurisdiction under this Act," and by S. 3, the Court having jurisdiction under the Act for the purpose of this case is the High Court of Judicature at Madras. This order was therefore made by the High Court of Judicature at Madras exercising the jurisdiction in insolvency. Under the Provincial Insolvency Act 1907, "the Court" is defined as meaning "the Court exercising the jurisdiction under this Act." The jurisdictions conferred by the two Acts are distinct, and the provisions of the two Acts differ in several important respects.

Section 24, Civil P. C., states: "On the application of any of the parties the High Court may at any stage transfer any suit appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same." It is not necessary for me to express any opinion as to whether this Court, in the exercise of its ordinary original civil jurisdiction, can make an order under S. 24, Civil P. C. For the purposes of this appeal we assume that it can. The question then remains, is the Court to which this petition has been transferred competent to try or dispose of the same? It seems to me to be clear that it is not; for the reason which has already been stated, viz., that the two jurisdictions are distinct.

It has been suggested that there are sometimes collusive assets within the jurisdiction of the High Court exercising jurisdiction in insolvency under the Presidency Towns Insolvency Act in cases where it would be convenient for the estate to be administered when the estate is situate under the Provincial Act. That may be so. If it is, it is a matter for the legislature to deal with.

I may add that this point came before Wallis, J., and in dealing with it he said

that he was not prepared to make an order of the kind asked for.

We must therefore set aside the order and allow the appeal.

Oldfield, J.—I agree.

S.N./R.K.

Appeal allowed.

A. I. R. 1914 Madras 678 (1)

SANKARAN NAIR AND AYLING, JJ.

Suppan Achary and others—Defendants—Appellants.

v.

Vannia Konar and others—Plaintiff and Defendants—Respondents.

Civil Appeal No. 1618 of 1912, Decided on 19th February 1914, against decree of Dist. Judge, Tinnevely, in Appeal Suit No. 332 of 1911.

Easements Act (1882), S. 15—Caste is corporation with civil right and can acquire title by user to a right of way though user is by few members.

A caste, in India, is a corporation with civil rights and can acquire title by user to a right of way, even if that user be by a few members of the caste, provided it is exercised on behalf of and for the caste. [P 678 C 2]

T. R. Ramachandra Aiyer and G. S. Ramachandra Aiyar—for Appellants.

M. D. Devadoss—for Respondents.

Judgment.—This suit is brought by certain plaintiffs named on behalf of themselves, their caste the Konars and the Pillais. The lower Courts have found that they have been using the A. B. which runs on the northern side of the Kamatchiamman temple in Tinnevely town and leads to the bathing ghat and the temple for a long time and therefore they have acquired a customary right to use it. The main objection that is raised in second appeal is that a caste cannot acquire a customary right. It is argued that every custom must be local and must be alleged to be confined to a village or district.

According to English law this may be so. But the question is, when it is found that certain castes have been exercising a certain right, whether a legal origin cannot be found for it. For it is clear law that when a right has been enjoyed time out of mind—as in this case—and the origin of the right is not shown, a legal origin if possible will be presumed. If the right is claimed with reference to a defined locality then it is a customary right. But when the right is claimed on behalf of individuals or bodies politic or corporations then

the right is said to be acquired by prescription. A caste is for the purpose recognized as a corporation with civil rights. The cases show that properties are purchased for the caste and by the caste. Their right to hold and manage property has been recognized.

Courts have often given effect to the resolutions of the caste as a body as to the management of property. Suits have been brought on behalf of caste and against caste. All the members of the caste cannot be parties to such suits. Certain persons were allowed therefore to represent them under S. 30, Civil P. C. In these circumstances we do not see why the members of a caste cannot acquire a right by long user. It may be true that all the members of the caste may not have been exercising the right, but it is sufficient if the persons who did exercise the rights claimed to do so on behalf of the caste.

In principle there is no difference between such acquisitions and the acquisition of a right by a joint family or a corporation. We are therefore of opinion that on the facts proved in this case the castes represented by the plaintiffs must be held entitled to the right claimed by them.

The next contention is that the suit is not maintainable as the right claimed is a public right. The right that is found is a right existing in the castes represented by the plaintiffs and certain other castes. It is not a right vested in the general public. The castes, as already stated, must for this purpose be treated as corporations. The argument of the appellants' pleader assumes that for this purpose the exclusive right claimed by a caste is a public right. We disallow this contention also and dismiss the second appeal with costs of respondents 1 to 4.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 678 (2)

WALLIS, J.

South Indian Export Co. Ltd.—Plaintiffs.

v.

Viswanatha Iyer and others—Defendants.

Civil Suit No. 90 of 1912, Decided on 2nd March 1914.

(a) **Hindu Law—Alienation**—Widow can carry on husband's business descended to

her—Alienation by her must be shown to be for necessary purpose.

A widow is entitled in proper cases to carry on the business of her husband which has descended to her, and alienations made by her in regard thereto rest on the same footing as other alienations made by a Hindu widow, that is to say, they must be shown to be made for a necessary purpose: 21 All. 71 (P.C.), *Expl.*; 14 All. 420 (P.C.) and 26 Bom. 206, *Ref.*

[P 682 C 1, 2]

(b) Hindu Law—Widow—Reversioner inducing creditor to deal with minor widow—Suit by creditor to recover money—Reversioner was held to be estopped from disputing her minority—Evidence Act (1872), S. 115.

A Hindu minor widow succeeded to the business of her husband. A reversioner with full knowledge of her minority took a power-of-attorney from her and induced a creditor to make advances to and deal with her in respect of the business.

Held: that he was estopped from disputing her minority in a suit brought by the creditor to recover the money lent to the business: *Arnison v. Smith*, (1888) 41 Ch. D. 348, *Ref.*

[P 630 C 1]

N. Grant—for Plaintiffs.

C.P. Ramaswamy Iyer and *D. Chamier*—for Defendants.

Judgment.—This is a suit brought by the South Indian Export Co. on certain mortgages, one of which was executed by one T. Krishna Iyer, who carried on business in Trichinopoly, in favour of Best & Co., and was afterwards transferred to the plaintiff company and the others in favour of the plaintiff company. The plaintiff also sues upon a mortgage created by Krishna Iyer's widow Pattammal after his decease by a deposit of title-deeds.

These transactions with the exception of the last are set out at great length in the plaint, and form the subject of issues 1 to 5. There is no real dispute about these issues. The plaintiffs' case has been proved as to them, and these issues must be found for the plaintiffs.

The real questions in the case are as to what was done after the death of T. Krishna Iyer in March 1909. Issue 1 which I propose to deal with is No. 8: "Had Pattammal attained her majority prior to 19th March 1911 and, if so, on what date?" The allegation made by the defence is that at that time she was a minor. The evidence as to majority adduced by the plaintiff is distinctly weak. * * *

On the whole, coming to the best conclusion I can on the balance of evidence, I am constrained to hold that she was a

minor. That is also the conclusion which was come to by the District Judge—of course, that has not influenced my finding—on the question of the grant of a succession certificate.

The next important question is, if Pattammal was a minor, is defendant 1 estopped by his conduct from denying her minority? As to that, the first question is, was he aware that she was a minor? According to the documents executed by both sides in the case before any quarrels arose, Viswanatha Iyer was the adopted son of Narayana Iyer, the divided brother of Krishna Iyer; and he lived in the next house to Krishna Iyer all along. And according to some of the defence witnesses, everybody knew all along that this woman was a minor; and I have no hesitation in finding that if she was a minor defendant 1 Viswanatha Iyer knew all about it. If the defence evidence is accurate that she was really born in 1894, it is absurd to suggest that he did not know all about that. But he had not the courage to go into the box and say that he did not know the fact. I have therefore no hesitation in holding that he knew she was a minor. If he knew that she was a minor, then the question is: Is he estopped by his conduct from setting up defence? We have a letter, Ex. JJ, which he wrote to the South Indian Export Co. on 28th March 1909, very shortly after the death of Krishna Iyer in which, after dealing with his own tannery business, he adds a postscript with reference to the tannery business which had been carried on by Krishna Iyer. "With regard to the business of my uncle, the late Mr. T. Krishna Iyer, I beg to state that myself and Mr. Ponnuswami Pillai have the power-of-attorney from Mrs. Krishna Iyer. It has been duly registered and is in office." That is to say, he had taken a power-of-attorney from this minor to deal with the plaintiff company in the tannery business. "On receipt of the same it will be despatched to your office for future reference. As we have to clear his outside debts we are in need of Rs. 20,000 in this connexion. I beg to state that your company has previously once advanced Rs. 20,000 as a special case. So now I take the same opportunity and approach you with the same hope that you will comply with my request." This is important with reference to a subsequent

advance of Rs. 10,000 which the company made in June 1909. "The amount which you will give in advance may be deducted from Mr. T. Krishna Iyer's surplus. If any re-draft occurs the company need not fear, because the company have already sufficient security. With regard to the company's standing advance you have sufficient stock in the tannery. It is known to your dubash." Considering that this man certainly claims to be the sole reversioner of Krishna Iyer and, therefore the only person interested except the widow herself, what follows is exceedingly important. "In conclusion, I beg to state that you will render your help in the affair of Mr. Krishna Iyer since his business has been a long standing one which I do not like to give up. Awaiting your favourable reply." It seems to me that the effect of defendant 1's conduct in taking a power-of-attorney from this minor widow whose minority he knew all about and sending it to the plaintiff company to be acted upon and writing to the plaintiff company requesting them to help him by going on doing business with this woman of whom he was the nearest reversioner, is certainly such as to estop him from afterwards denying her minority; but as I said, he did not go into the box to explain his conduct under this head. Probably he knew that if he did he would be forced to make more damaging statements.

It is however suggested that though he may be estopped, the estoppel does not apply to transactions after October 1909 when he opposed the grant of the succession certificate to the widow on the ground that she was a minor as that was sufficient notice to the plaintiffs and that they cannot plead the estoppel as enuring for their benefit any longer. I am unable to accept that contention. The plaintiff company knew nothing of the internal affairs of this family. Having regard to the readiness with which false allegations are made when quarrels break out in families like this, the fact that the nearest reversioner asserted that the widow was a minor was of no probative value whatever. The plaintiff company had no means of knowing whether she was a minor or not. It was very difficult even for this Court to arrive at a decision whether she was a minor or not. By that time the plaintiff company in conse-

quence of the representations of defendant 1, had become involved in dealings with this woman Pattammal. The mere fact that they heard of those proceedings in which her majority was being questioned would not enable them to put themselves in the same position as when they began to deal with her. Defendant 1 was not able to make what is called restitutio in integrum, i.e. to put them back in the same position as they were before, and I do not think the cases cited for the defendants at all go to establish the proposition that the fact that the majority of the widow came to be questioned before all these transactions were over, operates so as to take away the effect of the estoppel. I think the case reported as *Arnison v. Smith* (1) cited for the defence is quite as near to the facts of this case as those cited for the plaintiff. I hold that defendant 1 is estopped from setting up the minority of Pattammal.

There remains another very important question from a general point of view as to whether the widow Pattammal, assuming that she was a major, was justified in carrying on this tannery business after her husband's decease, and, whether while she was so doing she was entitled to mortgage the property which she had inherited from her husband. In *Amar-nath Sah v. Achan Kurr* (2) the Allahabad High Court had doubted whether a widow was justified in carrying on the business of her husband. Their Lordships of the Privy Council say at p. 423: "The view of the High Court is that the widow ought to have wound up the business at once, and that not having done so, she could not allege necessity to mortgage the inheritance in order to keep the money business going. But they do not lay down any general rule for such cases, and they feel the difficulty of a decision in the entire absence of authority. Their Lordships also feel great difficulty, and they would require to know much more about the nature of the business in question, and of the condition and fluctuations of this particular business before venturing to endorse the opinion of the High Court." So that the effect of that is that their Lordships by

(1) [1888] 41 Ch. D. 348=61 L.T. 63=37 W. R. 739=1 Meg. 338.

(2) [1892] 14 All. 420=19 I.A. 106=6 Sar. 197 (P.O.).

no means countenance the position that a widow is not entitled in proper cases to carry on the business of her husband. A family business may be carried on on behalf of a minor, *Sanka Krishnamurthi v. Bank of Burma* (3), and a widow's case seems even stronger. With reference to the Privy Council decision a reference to the terms of the mortgage in *Amarnath Sah v. Achhan Kuar* (2) which is set out in the Indian Appeals report, will show that in that case the money was borrowed expressly for the purpose of paying the debts incurred for marriage expenses and for litigation. It was only as an after-thought that they set up that that money was borrowed for the purposes of business. The same family curiously enough gave rise to the next case which was cited and reported in *Sham Sundar Lal v. Achhan Kunwar* (4). That was an appeal from the judgment of the High Court of Allahabad which is reported as *Achhan Kuar v. Thakur Das* (5) and a perusal of the judgment of Sir John Edge, C. J., in *Achhan Kuar v. Thakur Das* (5) shows that there was absolutely no evidence that the money had been borrowed for the business at all or for any purpose of necessity.

When however the case came before the Privy Council, finding that on the facts there was absolutely no case whatever, the learned counsel for the appellant relied upon a proposition of law which was this, that when a family business is being carried on, there is an implied authority on the part of those carrying it on to pledge the family property for the purpose of the business, that is to say, without any proof of necessity at all, and no proof of necessity being called for. That as I understand the case is the proposition which Lord Davey in delivering the judgment of their Lordships refused to assent to. At p. 82 their Lordships say: "The second point made by the appellants is unsupported either by reason or authority. The owner of the business at the time of the execution of the bond of 1877 was Hulas Kunwer, and Lalji was managing it as her agent only and for her benefit, and she could not of course confer on her agent any larger power than she

had herself and there is no exception from the restriction on alienation by a Hindu widow when the estate consists of or includes a business." That is to say, the alienations made by a Hindu widow with regard to her business rest on the same footing as other alienations made by a Hindu widow, that is to say, they must be shown to be made for a necessary purpose. The authorities quoted by Mr. Cowell (for the appellants) have no application to the case. They were cases of a family business being carried on by the manager of an undivided family estate. In that case the manager of a family business has a certain power of pledging assets for the requirements of the business. But the position of a Hindu widow or daughter is not by any means the same as that of the head of an undivided family and even in the latter case the validity of a mortgage by the manager of a family business without the concurrence of the other members of the family, or when some of those members are minors, depends on proof that the mortgage was necessarily entered into in order to pay the debts of the business. This is clear from the cases cited including that of *Daulat Ram v. Mehr Chand* (6).

To use the language of Pontifex, J. in a judgment quoted in that case, "the touchstone of the authority is necessity." I do not think that case goes further than laying down that with regard to the alienations made by a widow properly carrying on the business of her husband which has descended to her the alienations must be shown to be made for necessary purposes. The proposition which was contended for by Mr. Cozens-Hardy for the appellants was that where a family business was carried on there was implied power to pledge similar to that which exists in the case of partnership. That I think was the proposition which their Lordships were dissenting from. This subject has been again most carefully considered by Sir Lawrence Jenkins C.J., in *Sakrabhai Nathubhai v. Maganlal Mulchand* (7), where he points out that a family business is descendible according to the Hindu law. The decisions in *Amarnath Sah v. Achhan Kuar* (2) and

(3) [1912] 14 I.C. 889=85 Mad. 692.

(4) [1899] 2 All. 71=25 I.A. 183=7 Sar. 417 (P.C.).

(5) [1895] 17 All. 125=(1895) A.W.N. 24.

(6) [1888] 15 Cal. 70=14 I. A. 187=5 Sar. 84 (P. C.).

(7) [1902] 26 Bom. 206=3 Bom. L. R. 738.

Sham Sundar Lal v. Achhan Kunwar (4) were also considered. With regard to the 14th *Allahabad case*, Sir Lawrence Jenkins says at p. 214: "It would seem then that their Lordships thought there might be circumstances under which a business debt could form the basis of a charge by a widow that would prevail against the title of the reversioners, and they give an indication of what those circumstances would be." Later on he says at p. 219: "The cases show that the manager of a family business can make its assets liable for a trade debt without a specific charge, and *Kameswar Pershad v. Run Bahadur Singh* (8), shows that the ability of a widow to charge the inheritance so as to affect it in the hands of the reversioners is judged by the same principles as are applicable to a charge by a manager." And he refers to the case of *Sham Sundar Lal v. Achhan Kunwar* (4) and says: "I do not think that it was intended to disturb that principle when it was said in *Sham Sundar Lal v. Achhan Kunwar* (4) that the position of a Hindu widow or daughter is not by any means the same as that of the head of an undivided family for it appears from the rest of the judgment that as in the case of a manager, so in relation to a widow the touchstone is necessity." I respectfully adopt that interpretation of Sir Lawrence Jenkins of the judgment of their Lordships in *Sham Sundar Lal v. Achhan Kunwar* (4).

These being the principles it remains to apply them to the facts of this case. First as to the propriety of a widow carrying on business, that of course is a question of fact. No doubt there is a certain amount of speculation in the tannery business as spoken to by Mr. Chambers; at the same time it is one of the largest and most important sorts of business carried on in this presidency. On this point it seems to me that the letter of defendant 1 is conclusive claiming himself to be the sole reversioner. And he says in that letter: "I do not want to let this business stop." There is evidence that it was a business which had acquired a very good reputation and its mark is well known in the London market. There is no reason for suggesting that there were not competent people to assist the widow or that the business

was not properly carried on during the two years that elapsed before her death. Guided very largely by the fact that the person who was most interested in the business, the reversioner, approved of its being carried on, I have no hesitation in holding that it was a proper business for the widow to carry on. I should add that according to the evidence to close the business would have involved the estate in heavy loss, for there were large debts besides those due to the plaintiff and some of the outstandings were bad debts.

That being so, the question remains as to whether the plaintiffs can claim under these mortgages. What happened was that a new agreement was drawn up between the widow and the company to replace an agreement which had existed between her husband Krishna Iyer and the company in which she bound herself to carry on the business under the supervision of the company in the same way in which he carried it on and with money advanced by the plaintiff company. An indebtedness of a sum of Rs. 41,000 owing by the deceased to the company was written off and was debited against the widow in his estate, that is to say, the widow took over from her husband's estate an indebtedness to the company of Rs. 41,000. It is said that the whole indebtedness of Krishna Iyer was secured by mortgages executed in his lifetime and that the same properties which he had mortgaged were to stand security for further advances made by the company to Pattammal; and in the ordinary course of business the advances which had been made to Krishna Iyer during his life-time were cleared off by realizations, and fresh advances took their place to enable the business to be carried on. The course of business was for the plaintiff to make advances on skins consigned to them for sale on the security of the goods themselves and of the immovable and other property mortgaged to them as security for any indebtedness that might arise on the transaction and I have no hesitation in finding that if the business was to go on at all it could only go on on these terms which appear to have been customary and usual to the trade.

Having held that the business was properly conducted by the widow, it seems to me to follow that the mortgaged

(8) [1881] 5 Cal. 843=8 I. A. 8=4 Sar. 210=4
Shome L. R. 81=8 C. L. R. 361 (P. C.).

properties are liable for the indebtedness incurred in the ordinary course of business under the terms of the agreement with the company. There is, however, a further advance of Rs. 10,000 which was made by the company in June 1909. Applying the rules laid down by their Lordships of the Privy Council to this case, it appears to me that it is necessary for the plaintiff company to show that that was an advance made for necessary purposes. The onus is on them to show that it is a question of fact. As to that we have the fact that the nearest reversioner, in the letter Ex. JJ., which I have read, asked for an additional advance of Rs. 20,000 to be made by the company for the purpose of this business. That is some evidence that it was a proper and necessary advance.

Then we have also the fact that a new tannery was before October erected by this Pattammal at a cost of Rs. 15,000 with money advanced by the company and we have evidence—it is not disputed I think—that the whole of this Rs. 10,000 was spent on the business. The evidence is that during the two years of her life-time Pattammal drew very little indeed out of the business—Rs. 3,000 or Rs. 4,000, I think—and the whole of the other money was devoted to the business. Possibly the evidence might have been put in, but I am not sure that the plaintiff was fully alive to the necessity of proving necessity. On the whole I think that the money borrowed in the ordinary course of business for the purpose of the business was honestly put into the business and expended on the business and must *prima facie* be taken to have been properly borrowed, and I hold that this advance of Rs. 10,000 was made to the widow for proper and necessary purposes. That follows in my opinion largely from my findings that the business was a proper one to carry on. This case is entirely different from the money lending business in *Sham Sundar Lal v. Ashan Kunwar* (4) which does not necessarily involve borrowing money to the same extent.

The next question which arises is as to whether the mortgage for this further advance in June 1909 was put an end to by the return of the title deeds to Pattammal in November 1910. The evidence for the plaintiff is that she asked

for the return of the title-deeds, because she was anxious to secure a purchaser for the property and that they were returned to her for the purpose of negotiations; but when she found it difficult to find a purchaser they were given back to the plaintiff's dubash Ramanjulu Naidu who deposited them in Madras. Now there is a letter asking for the return of these title-deeds which is consistent with either case, because it says, "Will you please give the title-deeds for the purposes which I have mentioned?" or something of that sort. The deposit of title-deeds is mentioned in a book of the plaintiff firm called the deposit book and the withdrawal is mentioned in another book, the despatch register, as follows: "The title-deeds of new tannery, (i. e., the Sembathur Tannery) given us instead. Returned and re-deposited." The suggestion for the defence is that the Sembathur title-deeds, that is to say those of the new tannery were deposited in replacement for the Madras title-deeds and the entry in the despatch book would seem to show that that was the business of the clerk who made the entry in the despatch book.

This is denied by Mr. Simpson who says that the deposit of the new tannery deeds was insisted on because it had been constructed with the company's money and it was the invariable practice of the company to have a mortgage on tanneries in respect of which the company was making advances. I see no reason to doubt this. The return of the title-deeds is also posted in the despatch book and not in the deposit book and at first it struck me as somewhat odd that when the title-deeds were given out and returned the return was posted in the despatch book and not in the original deposit book. An examination of the despatch register however showed that this same thing had occurred in several other cases. Ramanjulu Naidu in his oral evidence speaks to taking back these title-deeds and mentions that one reason for getting them back was the indebtedness of the firm had increased. I see no reason for doubting this in the absence of any other reason for the way in which the title-deeds were returned. The suggestion which was made on the other side is that these title-deeds were never re-deposited at all with the consent of Pattammal during her life-time,

but taken possession of fraudulently after her death. This is a very curious suggestion indeed, and I have no hesitation in rejecting that suggestion as it does not appear to be supported by anything in the evidence. Another point was made that the mortgage was bad because the deposit was in Trichinopoly and not in Madras. That does not seem to be a fact. They were sent to be deposited in Madras and were given even on the second occasion to the dubash to be taken back and deposited in Madras. I have no hesitation in holding that there was a sufficient deposit of the title-deeds in Madras.

The last point raised is with reference to jurisdiction. The suit was for balance of account for the realization and for the enforcement of certain mortgages in respect of that account on property both in and out of Madras and leave to sue was obtained. I hold that there was jurisdiction. The balance of indebtedness claimed by the plaintiff has been proved to be due.

By some oversight the question of estoppel of defendant 1 had not been raised in the issues and I framed an additional issue after notice had been given to the other side, that an application would be made to raise it. Mr. Grant also applied that a similar issue should be framed as to Ramier, the father of Pattammal, who has purchased the right of the other reversioners. I reserved the question of framing this issue until I had heard more of the case, but having heard it I am not satisfied that there was any estoppel on that point. He simply purchased the rights of the reversioners other than defendant 1 and it seems to me that he stands in the shoes of the people whose right he has purchased—defendants 2 to 8. It is not suggested they were in any way estopped and I cannot see how his own conduct in the matter is to affect the rights which he acquired by purchase from the reversioners, defendants 2 to 8. And no authority was cited for this purpose. If this issue is considered to have been raised, I find the issue against the plaintiff.

There will be a judgment for the plaintiff for Rs. 26,032-13-2 with interest at 6 per cent and costs as against defendants 1 and 9. Costs on the higher scale to counsel.

During the course of the suit Mr. Grant for some reason or other withdrew his case against defendant 2. Defendant 2 is entitled to his costs—to be paid by the plaintiff.

The costs of the guardian ad litem will be taxed and his vakil's fees will be paid on the ad valorem scale on the amount claimed—to be paid by the plaintiff and recovered later from defendants 1 and 9.

S.N./R.K.

Suit decreed

A. I. R. 1914 Madras 684

TYABJI AND SPENCER, JJ.

Ramaswami Chettiar — Plaintiff—Appellant.

v.

Sundara Reddiar and others—Defendants—Respondents.

Second Appeal No. 791 of 1912, Decided on 9th April 1914, from decree of Tempy. Sub-Judge, Ramnad, in Appeal Suit No. 96 of 1911.

Transfer of Property Act (4 of 1882), S. 58 — Consideration — Mortgage without consideration is prima facie nullity and cannot be enforced against subsequent purchaser.

A mortgage without consideration is prima facie a nullity and therefore inoperative. It creates no charge on the property and cannot be enforced against a subsequent purchaser: 21 *Mad. 56, Dist.* [P 685 C 1]

R. Kuppuswami Aiyar—for Appellant.

C. V. Ananthakrishna Aiyar—for Respondents.

Judgment. — The plaintiff sued for enforcement of a mortgage, Ex. A, as against the purchaser from the mortgagor. It has been found that there was no consideration for the mortgage. It is argued before us that the mortgage notwithstanding subsists, inasmuch as it is a registered transaction, and it has been shown that the transaction was a sham: that as it has not been found that there was any object for this transaction being entered into without having any effect and the charge is already created on the property, it must subsist on it when it is transferred to a purchaser from the mortgagor. *Ranga Ayyar v. Srinivasa Aiyangar* (1) is relied upon for these contentions. There it was said that "when a conveyance has been duly executed and registered by a competent person, it requires strong and clear evidence to justify a Court in holding that the parties did not intend that any legal effect should be given to it. It needs to be

(1) [1898] 21 *Mad. 56.*

proved that both parties had it in their minds that the deed should be a mere sham, and in order to establish this proof, it needs to be shown for what purposes other than the ostensible one the deed was executed." But these remarks were made, where circumstances were proved, showing that the intention was to pass the title to the property to the wife and daughters of the transferor in order that the next heir of the transferor who was at enmity with him, should be prevented from inheriting the property. Further, it must be pointed out that in that case the Court was dealing with the sales. When the ownership of property is purported to be passed by means of sale and from the attendant circumstances it can be inferred that the ostensible vendor wished to benefit the transferee so that S. 81, Trusts Act, does not come into operation, the case may have a very different complexion from where (as in the case before us) what is purported to be done is to create a charge on the property, and there are no circumstances from which it can be inferred that a charge was intended to be created for a higher amount than the consideration which actually passed in order that the mortgagee may benefit by such charge being for the higher amount. The extent of the charge on the property would prima facie be measured by the actual consideration for securing which the charge was created and, when the consideration is found to be nil, the charge prima facie disappears.

We are therefore of opinion that on the finding that no consideration passed and in the absence of such circumstances as we have referred to, the decree of the lower appellate Court dismissing the plaintiff's suit was right. The appeal will therefore be dismissed with costs.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Madras 685 (1)

SADASIVA AIYAR, J.

V. R. Jagannatha Mudaliar — Petitioner.

v.

Vathyar Appasawmy Mudaliar—Respondent.

Civil Revn. Petn. No. 178 of 1913, Decided on 5th February 1914, from order of Dist. Munsif, Ranipet, in Misc. Petn. No. 953 of 1912.

Civil P. C. (1908), S. 115.—Order setting

aside ex parte decree will not be interfered with in revision.

The High Court will not interfere under S. 115, with an order setting aside an ex parte decree, it being open to the plaintiff to contest the order when appealing against the final decree in the suit, if it is decided against him.

[P 685 C 2]

T. Ethiraja Mudaliar—for Petitioner.

R. Rangaswami Iyengar—for Respondent.

Facts.—The suit was for damages for defamation. The District Munsif first passed an ex parte decree, which he subsequently set aside on defendant's application, on the ground that though he was not satisfied that sufficient cause had been shown for the non-appearance of the defendant on the date of hearing, still in his opinion the defendant had a good case on the merits. The plaintiff thereupon applied to the High Court to revise the above order.

Judgment.—I do not wish to express any opinion upon the legality or propriety of the District Munsif's order setting aside the ex parte decree: see however *Venkatarama Aiyar v. Nataraja Aiyar* (1).

I think that as the petitioner could object to the order of the Munsif in appeal in the regular course to the District Court, if the suit was decided against him at the re-hearing, this is not a fit case to interfere under S. 115, Civil P.C.: *Devata Sri Ramamurthi v. Venkata Sitaramahandra Row* (2). I dismiss the petition but without costs.

S.N./R.K. *Petition dismissed.*

(1) [1913] 18 I. C. 360.

(2) [1914] 22 I. C. 279.

A. I. R 1914 Madras 685 (2)

TYABJI AND SPENCER, JJ.

Palaniandy Chetty — Plaintiff—Appellant.

v.

Kambaraya Chetty and others — Respondents.

Second Appeal No. 2292 of 1912, Decided on 17th March 1914, against decree of Dist. Judge, Trichinopoly, in Appeal Suit No. 495 of 1911.

(a) Practice — Lower Court should pronounce opinion on all important points raised so as not to necessitate remand.

In appealable cases the Courts below should, as far as possible, pronounce their opinions on all the important points raised, so as not to necessitate a remand: 10 M. I. A. 476 (P. C.), *Foll.*

[P 686 C 2]

(b) Civil P. C. (1908), S. 100—**Misconstruction.**

The misconstruction of a document is a ground for second appeal: 18 Cal. 23 (P. C.), Ref. [P 86 C 1]

T. M. Krishnaswami Aiyar—for Appellant.

K. R. Rangaswami Aiyangar — for Respondents.

Judgment.—The question involved in this appeal is whether the plaintiff is entitled to claim a certain lane marked L in the plan prepared by the commissioner. It was argued before us that we cannot entertain this appeal and *Durga Chowdhuri v. Jewahir Singh Chowdhuri* (1) was cited to us. The point, as argued before us, however is that the learned Judge has misconstrued a document on which both parties rely. The misconstruction of a document is a matter which has always been considered as capable of being corrected in second appeal.

It is argued before us that the document was clearly in favour of the appellant. The relevant portions are paras. 5 and 6. The land seems, no doubt, to be referred to as forming the boundary of the portion which is allotted to the defendants. This fact has been considered by the District Judge. He however refers to the fact that the lane is not mentioned in para. 6 of the partition deed which specifies the portions of the family property allotted to the plaintiff. The dispute arises because the lane is not definitely allotted either to the predecessor-in-title of the plaintiff or to those of the defendants; nor is the lane specifically mentioned as having been left joint.

We have had the benefit of very elaborate arguments on this question. In the result we are not prepared to say that the learned District Judge was wrong in considering that the plaintiff had not shown that the partition deed gave him any title to the lane. The partition deed is ambiguous. The appellant cannot succeed unless he can show that the document is in his favour.

We must point out that the learned District Judge has not considered the question whether the defendants have acquired any right of way over the lane by prescription. Had we differed from him in the construction of Ex. A

(1) [1891] 18 Cal. 23=17 I. A. 122=(P. C.).

this would have necessitated our calling for a fresh finding. This is a matter on which their Lordships of the Privy Council expressed themselves in the following terms:

"The Courts below, in appealable cases, by forbearing from deciding on all the issues joined, not infrequently oblige this Committee to recommend that a cause be remanded which might otherwise be finally decided on appeal. This is certainly a serious evil to the parties litigant, as it may involve the expense of a second appeal as well as that of another hearing below. It is much to be desired therefore that in appealable cases the Courts below should, as far as may be practicable, pronounce their opinions on all the important points:" *Tarakant Banerjee v. Puddomoney Dossee* (2). For the reasons indicated we think there is no reason to interfere and dismiss the appeal with costs.

S.N./R.K.

Appeal dismissed.

(2) [1863-66] 10 M. I. A. 475 = 5 W. R. 63 = 19 E. R. 1052 (P. C.).

A. I. R. 1914 Madras 686

AYLING AND SESHAGIRI AIYAR, JJ.

Ramineedi Ramachandrayya — Plaintiff—Appellant.

v.

Bobba Jankiramayya and others — Defendants—Respondents.

Second Appeal No. 2606 of 1913, Decided on 25th August 1914, from decree of Sub-Judge, Bazwada, in Appeal No. 45 of 1912.

Minor—Alienation by guardian — Recitals in deeds are insufficient to prove binding nature—Evidence—Recitals.

Mere recitals in documents as to the binding nature of debts incurred by a minor's guardian are not enough to charge a minor with liability. There must be evidence aliunde to establish it: *A. I. R. 1914 P. C. 38, Foll.* [P 637 C 1]

V. Ramesam—for Appellant.

P. Narayanamurthi—for Respondents.

Facts.—A mother, acting as the guardian of her minor son, sold the inam lands in order to pay off debts incurred by her husband and to give maintenance to the paternal grandmother of the minor. The sale deed recited how the purchase-money was spent. On attaining majority the son sued to have the sale set aside and to get possession restored to him. The first Court found that the entire consideration had not passed and decreed the suit. On appeal the District Judge

set aside the decree holding that the recitals in the sale-deed were sufficient evidence of the binding nature of the debt and the money was satisfactorily shown to have been spent by the guardian for purposes binding upon the plaintiff. The plaintiff then preferred a second appeal to the High Court.

Judgment.—The Subordinate Judge, reversing the decree of the District Munsif, has held that considerations binding on the plaintiff passed to the extent of Rs. 291 out of Rs. 425 recited in Ex. 1 and that the circumstances of the case justified the inference that the balance of the sale price was also applied for his benefit. We do not find any evidence on which these findings could be legitimately based. Except for two items (to which Exs. 2 and 7-C relate) aggregating to Rs. 129, there is no evidence beyond recitals in the documents themselves to show that the debts were binding on the minor (plaintiff).

In the case of the suit sale-deed, Ex. 1, the recital is to the effect that the sale was effected (apart from the debts evidenced by Ex. 2) to clear of debts left by the minor's father, which is not at all the case put forward now and which is found to be untrue by the Subordinate Judge. It has been held by the Privy Council in *La'la Brij Lal v. Mt. Indar Kunwar* (1) that such a recital should not by itself be treated as evidence of the binding nature of the debt and that there must be evidence aliunde. There is no such evidence here. The same principle applies to the recitals in Exs. 2 to 7-C. There is no evidence of representations made by the plaintiff's mother to defendant 2 and no evidence of inquiries made by him.

We must therefore set aside the decree of the Subordinate Judge and give the plaintiff a decree for recovery of possession of the suit property on payment of Rs. 122 and the declaration sued for.

Each party should bear its own costs throughout.

S N./R.K.

Suit decreed.

A. I. R. 1914 Madras 687

WHITE, C. J., AND WALLIS, J.

T. Mahomed Ayyab Sahib — Appellant.

v.

G. P. Gunnis & Co.—Respondents.

Original Side Appeal No. 4 of 1913, and Civil Misc. Petn. No. 149 of 1913, Decided on 4th February 1913, from order of Bakewell, J., D/- 19th December 1912, in Insolvency Petn. No. 68 of 1912.

(a) **Presidency Towns Insolvency Act (3 of 1909), S. 9—Omission to mention petitioner as secured creditor, and value of his security can be amended within three months if adjudication order not subsisting.**

When there is no subsisting order of adjudication there is no obstacle to granting leave to amend his position to the petitioning creditor provided the amendment is made within three months from the date of the act of insolvency. [P 688 C 2]

Quære: Whether amendment could not be allowed even when there is a subsisting order of adjudication.

The omission to state the fact that the petitioning creditor is a secured creditor and the value of security is a defect which can be cured by amendment of the petition. [P 688 C 2]

(b) **Presidency Towns Insolvency Act (3 of 1909), S. 9—Act of insolvency disclosed in petition and affidavit is sufficient**

The act of insolvency under S. 9 need not necessarily be verbatim in the words of that section but it will be enough if the petition and affidavit read together sufficiently disclose the meaning of the section and there is a substantial compliance with the requirements of that section: *Ex parte Fiddian in re Fiddian*, (1892) 66 L. T. 203, *Foll.*; *Ex parte Coates, In re Skelton*, (1877) 5 Ch. D. 979, *Dist.*; (*Case law discussed*). [P 689 C 2]

D. Chamier — for Appellant.

N. Grant — for Respondents.

White, C. J.—This case comes before us, the appellant being one T. Mahomed Ayyab Sahib by way of appeal from an order of Bakewell, J., sitting in Insolvency giving leave to the petitioning creditor to amend his petition. The petition was presented in March 1912 against four persons of whom the appellant is one and the petitioner alleges that the appellant and three other persons carried on business as partners under the names of T. Noordeen Sahib and Co., and T. Abdul Kareem Sahib and Co. On 22nd March an order of adjudication was made against these four persons. This order was not served upon the appellant and no order for substituted service was applied for or made. On 4th May the petitioning creditor applied to the Court by motion

for an order under R. 18, Sch. 2, Insolvency Act.

That rule relates to the taking of accounts of mortgaged property and their sale. The next step in the proceedings was an application on 22nd August made by the appellant to annul the adjudication and the grounds on which he asked to have the adjudication annulled are stated in the affidavit filed in support of his application; one ground is that no notice of the adjudication had been served upon him. Another ground is that he was never a partner in either the firm of T. Noordeen Sahib and Co. or T. Abdul Kareem Sahib and Co., that he took no part in the management of the business and had no connexion with the business. This application came before the learned Judge at the same time as the application made by the petitioning creditor asking for an order under R. 18, Sch. 2. As we are told after the arguments were concluded and the Judge had taken time to consider, the learned Judge took the point that the petitioning creditors had failed to prove that there was any debt due to them upon which they were entitled to present a petition. That is how the Judge puts it in his judgment. Mr. Chamier, on behalf of the appellant took a further point on his own behalf that the petition was bad in that in relating the act of insolvency on which the petitioning creditor relied there was no allegation of an intention to defeat or delay creditors. There can be no question that the petition is defective or perhaps I should say informal in two respects. It does not state that the petitioning creditor is a secured creditor. S. 12 (2) provides: "If the petitioning creditor is a secured creditor he shall in his petition either state that he is willing to relinquish his security for the benefit of the creditors on the event of the debtor being adjudged insolvent or give an estimate of the value of the security. In the latter case, he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same way as if he were an unsecured creditor." R. 21 says; "If the petitioner is a secured creditor, he shall give full particulars of his security and value the same." I do not know whether that carries the matter any

further. With regard to the statement of the debt all that the petition says is "that at the time aforesaid (i. e., at the time of the alleged act of insolvency on which the petitioning creditor relies) the insolvents were and are now indebted to your petitioners in the sum of seven lakhs and upwards for goods sold and your petitioners are informed and believe that they are indebted to other creditors to the extent of about two lakhs of rupees or thereabouts." It is clear therefore that that statement in the petition with reference to the debts is not in accordance with the Act or rules. Bakewell, J., uses the expression. "The petitioning creditor failed to prove his debt." By this I take it the learned Judge means he failed to prove the balance of the debt due to him after deducting the value of his security. Then the petition is also informal with regard to the statement of the act of insolvency upon which the petitioning creditor relies. S. 9 says: "A debtor commits an act of insolvency in each of the following cases:

- (a)
- (b)
- (c)
- (d) If, with intent to defeat or delay his creditors.
 - (i) he departs or remains out of British India;
 - (ii) he departs from his dwelling house or usual place of business or otherwise absents himself;
 - (iii) he secludes himself so as to deprive his creditors of the means of communicating with him."

The petitioning creditor relies on an act of insolvency within S. 9 (d) (i) and the petitioner does not expressly allege an intent to defeat or delay creditors. I shall have to refer to the exact words of the petition and of the affidavit filed in support later on. I will content myself with saying now that having regard to the express provisions of S. 9 and R. 20, it is clear that the petition is informal. As regards the omission to state the fact that the petitioning creditor is a secured creditor and the value of the security, Mr. Chamier has not seriously contended that it could not be cured by amendment and speaking for myself I think that is a defect which could be cured by amendment at the time leave to amend was given. The

other matter is whether the learned Judge was right in giving leave to amend when the petitioning creditor did not ask for leave to amend. In fact his case was that no amendment was necessary. As regards the statement of the act of insolvency it is one of greater difficulty. Mr. Chamier pressed us very strongly with the case of *Ex parte Coates, In re Skelton* (1). That was a case in which it was held by Bacon V. C., sitting as Chief Judge in Bankruptcy, that a petition against a trader which alleges an act of bankruptcy that he has departed from his dwelling house or otherwise absented himself, must allege that he did so with intent to defeat or delay his creditor; otherwise the petition will be demurrable and must be dismissed; that such a defect was a matter of substance, not merely a formal defect and it could not be cured by amendment.

This case came before the Registrar in the first instance who I think gave leave to amend. Bacon, V. C., took the view that the amendment could not be made and his view was confirmed by Lord Justice James and Lords Justices Baggallay and Cotton on appeal. We have also considered the case of *Ex parte Fiddian, In re Fiddian* (2), excepting in one very important particular which I shall have to refer to in a moment and it seems to me that the present case comes nearer to *Ex parte Fiddian, In re Fiddian*, (2) than it does to *Ex parte Coates, In re Skelton* (1) and for this reason: In *Ex parte Coates, In re Skelton* (1), there was a subsisting order of adjudication and the Chief Judge held that so long as there was subsisting order of adjudication an amendment could not be made by inserting in the petition the words "with intent to defeat or delay creditors." With regard to S. 208, of the rules of 1869, which is reproduced in S. 105 of the Act of 1883, the Chief Judge held that a petition, after an order of adjudication had been made, was not a proceeding within the meaning of the rule. Now in the case before us the order of adjudication has been set aside. It was set aside by the learned Judge before he made the order

giving leave to amend although it was all done in the same order. There is now therefore no subsisting order of adjudication in this case. That brings the case near to the case of *Ex parte Fiddian, In re Fiddian* (2); where leave to amend was given before the receiving order.

I desire to express no opinion as to whether I should feel bound to follow the decision in *Ex parte Coates, In re Skelton* (1) if a case came before us in which the facts were the same as the facts in *Ex parte Coates, In re Skelton* (1). The case is cited in Williams on Bankruptcy under S. 143 as an authority under the Act of 1883, when it came before a Divisional Court in the case of *Ex parte Fiddian, In re Fiddian* (2). It was not disapproved of, although apparently Collins J., did not like it. But for the reasons I have stated, I think the present case is distinguishable from *Ex parte Coates, In re Skelton* (1). I said that in my opinion, the case came near *Ex parte Fiddian, In re Fiddian* (2) excepting one important respect. That is that the order of amendment in that case was made within three months of the act of bankruptcy upon which the petitioner relied. The order of amendment in this case was made more than three months after the date of the act of insolvency on which the petitioning creditor in this case relies and that really is the crux of the case. Can we in view of the well-settled principle as to the circumstances in which an amendment ought to be allowed, give the petitioning creditor, leave to amend in this case, the effect of which would be to give him rights which he would not have if he sought to file his petition in insolvency in the first instance on the date when the leave to amend was given. Lord Esher, in *Weldon v. Neal* (3), says that "We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her

(1) [1877] 5 Ch. D. 979=37 L. T. 43=25 W. R. 800.

(2) 9 Morrell's Bankruptcy Rep. 95=66 L. T. 203.

(3) [1887] 19 Q. B. D. 394=56 L. J. Q. B. 621=35 W. R. 820.

former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust." I may also refer to the case of *In re Maund, Ex parte Maund* (4), which as a bankruptcy case is perhaps more in point. There it was held that the Court would not amend a bankruptcy petition by adding as petitioners, after three months had elapsed from the date of the act of bankruptcy upon which the petition was founded, creditors whose debts are other than those in respect of which the petition was presented. If the petition was bad in the form in which it originally stood, having regard to the fact that the alleged act of insolvency is now more than three months old, and the principle laid down in the decisions to which I have referred, I do not think it could, or ought to be cured by amendment.

Then the question is "Was the petition bad in the first instance in that it did not comply with the requirements of S. 9?" I have come to the conclusion that the petition was not bad with regard to this matter in the first instance. Although Mr. Chamier has strongly contended to the contrary, I think that, for the purposes of this question, we are entitled to take into consideration the language of the affidavit which is filed in support of the petition. The petition says that on or about 20th March 1912, the appellant (and three other persons who, the petitioner alleges, are partners of the two firms) "being heavily indebted did depart from their business and residence and are secreting themselves so as to deprive their creditors of the means of communicating with them whereby your petitioners are advised and believe that the said insolvents are liable to be adjudged to have committed an act of insolvency." The affidavit in support of the petition alleges in para. (1) indebtedness of the appellant and three others. There is a further statement in para. 3 that, on or about 20th March 1912, these partners in the two firms, of whom the appellant is said to be one, "left Madras leaving no one in charge of their respective businesses and are secreting themselves for the purpose of evading their creditors." I think it is

clear that the draftsman of the petition had before him the words of S. 9 although he does not follow the words verbatim and adopts the word "secreting" instead of "secluding." But I do not know whether that is very important for the question we have to consider.

The question is, taking the petition and the affidavit together, are we able to say that there is a substantial compliance with the requirements of S. 9? It is true that there is no express allegation that the act done was done with intent to defeat or delay creditors. But we have the words in the petition "secreting himself so as to deprive his creditors of the means of communicating whereby the petitioners are advised and believe that the insolvent is liable to be adjudged to have committed an act of insolvency" and we have in the affidavit the express words "for the purpose of evading their creditors." I think the phrase "for the purpose of evading their creditors," which occurs in the affidavit may be read as a statement, in the affidavit at any rate, of an intention to defeat or delay creditors. I think *Ex parte Coates, In re Skelton* (1) on this point also is distinguishable on the facts. In *Ex parte Coates, In re Skelton* (1), it seems pretty clear, though I do not find it in the report (because the affidavit is not set out in the report), that there was no statement either express or by implication of an intention to defeat or delay "either in the petition or in affidavit." The Chief Judge observes: "No amendment of the petition can amend the affidavit upon which the adjudication has been made. That affidavit would still remain imperfect." That observation would seem to be meaningless unless it implies that the words "with intent to defeat or delay" did not occur either in the petition or in the affidavit. The present case is, I think, distinguishable at any rate upon the ground—may be on other grounds also—that in the affidavit we have words, though not the words which occur in the section, which may be taken to satisfy the requirements of the section. My view therefore is that the order which the learned Judge made, giving leave to amend the petition as regards the statement of the act of insolvency, was unnecessary and I think the proper course

(4) [1895] 1 Q. B. 194=64 L. J. Q. B. 183=15 R. 159=72 L. T. 58=43 W. R. 207.

is to set that aside. The order that I would make in this case is that the order of the learned Judge giving leave to amend, be modified by setting aside so much of that order as gave leave to amend with reference to the statement of the act of insolvency; subject to this I would dismiss the appeal and make no order as to costs. As regards the question of partnership, we do not think it necessary to deal with it in this appeal. The memorandum of objections will be allowed, but we make no order as to costs. With regard to the application to stay we make no order, and no order as to costs.

Wallis, J.—I agree and have very little to add. S. 9, Cl. (ii), makes it an act of bankruptcy if the debtor departs from his dwelling house or usual place of business or otherwise absents himself with intent to defeat or delay his creditors. The petition in this case charges that the partners did depart from their place of business and residence, and that is a charge of an act of bankruptcy if it is accompanied by a charge that they did it with the intent already mentioned. But the petition goes on to say that they did "depart from their place of business and residence and are secreting themselves so as to deprive their creditors of the means of communicating with them, whereby your petitioners are advised and believe that the said insolvents are liable to be adjudged to have committed an act of insolvency." It may be true that the language of this paragraph is taken from S. 9, Cl. (ii), but reading it as a whole it seems to me that it does convey with sufficient certainty that the debtors committed an act of insolvency by leaving their place of business and residence with intent to defeat and delay their creditors. But if that act of insolvency is not expressed with sufficient certainty, I quite agree that we are at liberty to look at the affidavit, and after reading the petition with the affidavit, the act of insolvency is charged with sufficient certainty. The important thing in this matter seems to me is that there should be proper materials before the Court to justify the exercise of the serious jurisdiction of making an order of adjudication. For the reason stated, I have come to the conclusion that this petition did not require any amendment in this respect. Therefore the question whether

it would be open to us to amend the petition does not really arise for decision. We have been referred to the case of *Ex parte Coates, In re Skelton* (1), which, as has been pointed out, is distinguishable from this, seeing that there was nothing apparently either in the petition or in the affidavit, to show with what intent the debtor left his place of residence. That was the decision in the first place of an eminent Judge whose experience lay very far in the past, the late Vice-Chancellor Bacon, and it seems to me that, though it was affirmed on appeal, it was treated by Lord Justice James rather as a matter of discretion and that the application refused on the ground that to allow the amendment "would be an encouragement to slovenly procedure" rather than on the ground that the Court was incompetent to allow it on the pleadings.

I cannot help feeling some doubt as to whether Sir George Jessel would have taken the same course, having regard to his observations in the case of *Ex parte Vanderlinden, In re Pogose* (5), where the ground on which the dismissal of the petition was asked for, was the second ground of Mr. Chamier which he did not press before us, viz. that the petition did not state that the petitioner was a secured creditor. Sir George Jessel said: "I am sorry, very sorry, to see this kind of thing. I thought the day had passed for raising such technical objections. But I am satisfied that the Act enables us to do what is right." Now I may point out that to set aside an order of adjudication is a comparatively small matter, but to set aside a creditor's petition is a very serious thing indeed where there has actually been an act of insolvency. Because the effect of setting aside the petition is to render inapplicable all those safeguards which are enacted by the Insolvency Act against the frauds which so often accompany the commission of an act of insolvency. Although I feel the weight of the observations of Lord Esher in *Weldon v. Neal* (8) as to the inexpediency of making orders of amendment which would interfere with the rights of the parties yet I cannot help feeling some doubt as to whether a case such as this, will not come within the last sentence in his

(5) [1882] 20 Ch. D. 289=51 L. J. Ch. 760=47 L. T. 138=30 W. R. 980.

judgment where he says that "under peculiar circumstances, the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so." It is unnecessary to express any final opinion about this part of the case. It is quite sufficient to say that in our opinion the petition sufficiently charged an act of insolvency. I agree with the order proposed by the learned Chief Justice.

S.N./R.K.

*Appeal dismissed.***A. I. R. 1914 Madras 692**

MILLER, J.

Naduvil Edom Kelu Achan—Plaintiff—Petitioner.

v.

Varadaraja Iyer—Defendant—Respondent.

Civil Revn. Petn. No. 906 of 1912 Decided on 23rd December 1913, from decree of Sub-Judge, Palghat, in Small Cause Suit No. 507 of 1912.

(a) Limitation Act (1908), Art. 116—Suit for rent by jenmi against kanomdar's assignee—Art. 116 is inapplicable.

Article 116, Lim. Act, does not apply to a jenmi's suit for rent against his kanomdar's assignee under a registered deed. [P 692 C 2]

(b) Assignment—Obligations of kanomdar's assignee are based on a privity of estate created by assignment.

The obligations of a kanomdar's assignee to the jenmi are based on a privity of estate created by the assignment. [P 692 C 2]

(c) Assignment—Effect of taking assignment of kanom estate.

The effect of taking an assignment of a kanom is no doubt to raise by implication a promise by the assignee to pay the rent, but this implied promise is for the benefit of the kanomdar and not a promise for the benefit of the jenmi; therefore, the non-payment by the assignee to the jenmi, though it may be a breach of the implied promise to the kanomdar, is not a breach of any covenant on which the jenmi can sue, that is, the non-payment of the rent reserved under the original kanom is not a breach by the assignee of contract to the jenmi. [P 692 C 2, P 693 C 1]

C. K. Ananthakrishna Aiyer—for Petitioner.

K. V. Subramania Sastry—for Respondent.

Judgment.—The question is whether the jenmi is entitled to recover six years' arrears of rent from the assignee of a kanom or only arrears for three years. The original kanom is not for a term of years expressed, but is in writing and registered, and the assignment was also, it is said, in writing and registered.

The assignee obtained a decree against the jenmi for a renewal deed, which it is stated, has not yet been executed. For the petitioner it is contended that Art. 116, Sch. 1, Lim. Act, is applicable because the assignee has impliedly contracted with the kanomdar to pay the rent to the jenmi and the jenmi can sue on the contract which is for his benefit. Reliance is placed on *Krishnan Nambiar v. Kannan* (1) and some cases which have accepted the same view for the position that when a covenant is implied by law in a contract of transfer, if the deed effecting the transfer is registered, Art. 116, Lim. Act will apply to a breach of the implied covenant. That principle does not seem to me to come in question here, because I do not understand the assignee to contract with the kanomdar for the benefit of the jenmi. The obligations of the assignee to the jenmi have been held in this country to be based on a privity of estate created by the assignment: *Kunhanujan v. Anjelu* (2) and *Monica Kitheria Saldanha v. Subraya Hebbara* (3). No doubt it may be said that the effect of taking the assignment is to raise by implication a promise by the assignee to pay the rent (18 Halsbury, para 1133); but that is I think a promise for the benefit of the lessee and not a promise for the benefit of the lessor. The lessee remains bound to pay the rent under his contract and the agreement between him and the assignee is for his benefit and not for that of the lessor. The non-payment of rent to the lessor, though it may be a breach of an implied promise to the lessee, is not, therefore, a breach of any covenant on which the lessor can sue and consequently *Krishnan Nambiar v. Kannan* (1), is not applicable and Art. 116, Lim Act, also is not therefore applicable to the breach.

Moreover the deed of assignment is not exhibited in this case and I am unable to say what its contents are, but even assuming that it contains an express promise to pay the rent to the jenmi, Mr. Ananthakrishna Aiyer's client could not succeed, for the suit is not on the deed of assignment but on the original kanom. As regards the original kanom it seems clear that the non-payment of

(1) [1898] 21 Mad. 8.

(2) [1894] 17 Mad. 296.

(3) [1907] 30 Mad. 410.

the rent reserved under the kanom is not a breach by the assignee of any contract with the lessor.

Mr. Ananthakrishna Aiyer argued that the contract had in some way devolved upon the assignee, and it was to enable him to substantiate that contention that I adjourned the hearing, but he did not pursue that point further in his argument at the adjourned hearing.

I dismiss the petition with costs.

S.N./R.K. *Petition dismissed.*

A. I. R. 1914 Madras 693

AYLING AND OLDFIELD, JJ.

Subramania Pillai and another—
Plaintiffs—Appellants.

v.

Palaniappa Mudali and others—
Defendants—Respondents.

Second Appeal No. 1542 of 1912, Decided on 18th November 1913, from decree of Dist. Judge, Trichinopoly, in Appeal Suit No. 172 of 1911.

Transfer of Property Act (4 of 1882), S. 76—Vendee paying off mortgage debts must be deemed to have kept mortgages alive if deprived of security by auction sale.

Where a vendee discharges certain mortgages on properties purchased by him in the belief that he has a complete title to such properties but his title to the properties is defeated by the purchase of a third person at an auction sale, an intention to keep alive the mortgages discharged by the vendee must be imputed to him. In imputing such an intention the Court must look to the real facts and not to the facts as the person who paid off the mortgages conceived them to be at the time of payment: 11 I. C. 865 and 10 Cal. 1035 (P.C.), *Foll.*; 30 Mad. 67 and 6 I. C. 781, *Dist.* [P 693 C 2, P 694 C 1]

T. Natesa Aiyar—for Appellants.

R. Kuppusawmy Aiyar—for Respondents.

Ayling, J.—The only question argued in this appeal is whether the District Judge is correct in refusing to allow the plaintiffs the right of subrogation in respect of sums admittedly expended by them in discharge of two mortgage decrees (Original Suits Nos. 841 of 1900 and 178 of 1902 on the file of the Court of the District Munsif of Namakal) enforceable against the suit properties.

The facts are as follows: The plaintiffs' father was the vendee of the suit lands under a sale deed, Ex. B, dated 14th December 1904, for Rs. 1,500. Of this sum Rs. 870 was represented by the discharge of a mortgage decree held by the plaintiff's father himself against the property. In respect of this the Judge

has allowed the plaintiffs' claim. The balance was to be applied and admittedly was in fact applied, in discharge of the two decrees above mentioned based on mortgages of the said property. Ex. B was executed during the pendency of a suit (Original Suit No. 1092 of 1904) brought by defendant 5 Kali Mudali on a fourth mortgage; and on this ground it was held to be invalid against Kali Mudali: (vide Ex. H. Judgment in Original Suit No. 358 of 1906 on the same Munsif's file, confirmed on appeal). The present contesting respondents 1 to 3 are parties who purchased the property in execution of Kali Mudali's decree.

The plaintiffs' rights as purchasers having thus disappeared, they claim to be subrogated in respect of the prior mortgages on the property discharged by them.

The District Judge has refused to allow their claim on the following ground. He says:

"The test is, did the plaintiffs' father intend to keep alive the prior mortgages? Admittedly he knew nothing of defendant 5's mortgage at the time he purchased the properties conveyed to him under Ex. B and there seems no reasonable doubt that when he agreed to discharge the three previous mortgages as consideration for his sale deed he had no intention of keeping them alive."

The leading case on the point is that of *Gokul Das Gopal Das v. Puranmal Premsukhdas* (1), wherein their Lordships of the Privy Council laid down the rule, which has been followed in all later cases, that where a man who pays off a mortgage has a right to extinguish it and a right to keep it alive, in the absence of express evidence of intention he should be assumed to have acted according to his interest. The present is a case exacty in point. The plaintiffs' father at the time he discharged the mortgages had the option of extinguishing them or keeping them alive. It cannot be said that there is any express evidence of what his intention actually was. No doubt at the time of payment, he believed himself to have acquired a good title to the equity of redemption. But this was not so. His title was invalid against Kali Mudali, as has been already explained and for all the good it did him was non-existent. His real interest

(1) [1885] 10 Cal. 1035=11 I. A. 126 (P.C.).

certainly dictated keeping alive the encumbrances and this is the intention that should be ascribed to him in pursuance of the rule laid down in the case above quoted. As authority for holding that we must look to the real facts and not to the facts as the person who paid off the mortgages conceived them to be at the time of payment, we may refer to the judgments of the Chief Justice and Munro, J., in *Yellapadi Mahalakshmal v. Sriman Madhva Sidhantha Oonahini Nidhi* (2).

Reliance is placed by the respondents' vakil on the cases reported as *Renga Srinivasachari v. Gnanaprakasa Mudaliar* (3) and *Govindaswami Thevan v. Doraiswami Pillai* (4). These cases are simply authority for holding that where a person who has actually acquired the equity of redemption pays off a prior mortgage, he cannot claim the right of subrogation in respect of that mortgage as against a puisne mortgagee. Such a person does not really come within the scope of the Privy Council ruling in *Gokuldas* case (1). Any doubt as to his intention is cleared up by S. 101, T. P. Act. Unless he declares his intention to keep the mortgage alive it becomes extinguished by the mere fact of discharge.

I would reverse the decree of the District Judge and restore that of the Munsif. Defendants 6 to 8 should bear the costs of the plaintiffs-appellants in this and the District Court.

Oldfield, J.—I concur.

S.N./R.K.

Decree reversed.

(2) [1912] 11 I. C. 865=45 Mad. 642.

(3) [1907] 30 Mad. 67=2 M. L. T. 36.

(4) [1910] 6 I. C. 781=34 Mad. 119.

A. I. R. 1914 Madras 694

AYLING AND SESHAGIRI AIYAR, JJ.

Nachimuthu Chetty—Petitioner.

v.

Muthusami Chetty—Accused.

Criminal Revn. No. 71 of 1914 and Criminal Revn. Petn. No. 62 of 1914, Decided on 1st May 1914, from judgment of 1st Class Sub-Divl. Magistrate, of Dindigal in Criminal Appeal No. 84 of 1913.

(a) Criminal P. C. (1898), S. 250—"Information given by Police Officer" includes report sent by village headman under S. 45 (c) on complaint of commission of non-bailable offence—Criminal P. C. (1898), S. 45 (c).

The words "information given to a Police Officer" in S. 250 include also a report which

a village headman is bound to send under S. 45 (c) on a complaint made to him of the commission of a non-bailable offence: 25 Mad. 667 and 13 I. C. 221, Dist.; 1 I. C. 187 (F.B.), Foll. [P 695 C 1]

(b) Criminal P. C. (1898), S. 250—Complaint of theft to village headman—Report sent to Station House Officer—Charge upon accused by police found to be vexatious by Magistrate—Order directing payment of compensation to accused is not illegal.

Where a complaint of theft was made to a village headman and he sent a report of the same to the Station House Officer upon which the police charged the accused and that charge the Magistrate found to be false and vexatious:

Held: that an order by the Magistrate directing payment of compensation to the accused by the complainant was not illegal. [P 695 C 1 2].

S. Swaminathan—for Petitioner.

J. C. Adam—for the Crown.

Ayling, J.—The petitioner gave information to the Village Magistrate of of Ayakudi to the effect that one Muthuswami Chetty had stolen a load of cotton belonging to him. The Village Magistrate sent a report to the police under S. 45 (c), Criminal P. C. The police put in a charge-sheet under S. 379, I. P. C., before the Second Class Magistrate of Palni against Muthuswami Chetty. The case ended in discharge and the petitioner was ordered to pay compensation under S. 250, Criminal P. C.

It is contended that the order is illegal inasmuch as the case was not instituted by complaint as defined in this Code or upon information given to a police officer or to a Magistrate: (vide S. 250, Criminal P. C.).

This view is supported by some authority vide *Emperor v. Thammana Reddi* (1) and also two later cases. *In re Arulaatham Pillai* (2) and an unreported case (*Criminal Revision Case No. 627 of 1913*).

On the other hand there is a Full Bench decision of this Court in *The Sessions Judge of Tinnevely Division v. Sivan Chetty* (3) which seems to me conclusive on the matter. The first case quoted above was disposed of prior to this decision and with the greatest respect to the learned Judges who decided the second case they do not seem to us to have given sufficient weight to it.

In the third case the attention of the learned Judge does not appear to have been drawn to it at all. I feel constrained

(1) [1902] 25 Mad. 667.

(2) [1911] 13 I. C. 221=13 Cr. L. J. 29.

(3) [1909] 1 I. C. 187=32 Mad. 258=9 Cr. L. J. 170 (F.B.).

to follow the Full Bench ruling the more particularly as I feel strongly that the application of the principles therein enunciated to the question for our decision is in accordance with reason and equity and the true intention of the section.

The question before the Full Bench in the case quoted was whether the complaint or information given to the Village Magistrate constituted the institution of criminal proceedings under S. 211, I. P. C., but the reasoning of Benson and Munro, JJ., in their judgment applies with undiminished force to the question before us while the reasoning of the learned dissenting Judge, Sankaran Nair, J., however applicable in that case has little or no bearing in the present case. I cannot do better than quote from the judgment of Benson and Munro, JJ:

"He (i. e., the injured party) almost invariably gives information or makes his complaint to the Village Magistrate well knowing that the latter will report the information or complaint to the Magistrate or the Station House Officer, or to both which latter is the regular course in this presidency. He has in fact set the criminal law in motion just as effectually as if he had gone direct to the Station House Officer under S. 154 or to the Magistrate under S. 191, for the village headman is bound by law to pass on the information or complaint to those officers. The case would of course be different if the information or complaint was not a matter which the village headman was bound by law to pass on to the higher constituted authorities: *In the matter of the petition of Jamoona* (4). In that case it could not be said that the criminal law was in any way set in motion. But when the information or complaint is one that the village headman is bound by law to pass on, then the language of the Full Bench in the case referred to above is just as applicable to it as to an information given direct to the Station House Officer or a complaint to the Magistrate."

In other words, a man who complains to a Village Magistrate of a non-bailable offence knowing that the latter must in the ordinary course of his duty report the substance of the complaint to the police gives information to the police just as effectively as if he went in

person to the police station and if the police charge the case it is a case instituted on information given to a police officer within the meaning of S. 250, Criminal P. C.

A comparison of the opening words of S. 250 with S. 190, Criminal P. C., will show that they closely correspond and that the former are intended to cover all the three methods marked in S. 190 as (a)(b) and (c) in which the Magistrate may take cognizance of a case with the single exception of "his own knowledge or suspicion," which would in the nature of things be inappropriate to S. 250. I find it difficult to understand why a person who chooses to institute a frivolous or vexatious charge in one way should be less liable to pay compensation than if he instituted it in another seeing that all are equally effective methods of inducing the criminal Courts to take action.

A consideration of the cases relied on by the petitioner will show that both in *Emperor v. Thammana Reddi* (1) and *Criminal Revision Case No. 627 of 1913* the Court confined itself to the consideration of whether the village headman to whom the complainant went to complain was "Magistrate" within the meaning of S. 250. The question of whether the information was not in effect given to the police was not considered at all. It was however decided in the Full Bench case and it is this decision which in my opinion destroys the authority of *Emperor v. Thammana Reddi* (1) for the proposition that a case of this kind does not come within S. 250. I would dismiss the petition.

Seshagiri Aiyar, J.—In this case, the petitioner complained to the village Magistrate of theft against the accused. The complaint was forwarded to the police, the Sub-Magistrate before whom the police charged the accused discharged him and directed the complainant to pay compensation. This order was upheld in appeal. Dr. Swaminathan contends that S. 250, Criminal P. C., cannot apply as there was no "information given to a police officer or to a Magistrate."

I am not satisfied that the term "Magistrate" does not include a Village Magistrate. Cl. (2) (b) of S. 1 only says that the Procedure Code does not apply to heads of villages in the Presidency of

(4) [1881] 6 Cal. 620=8 C. L. R. 215.

Fort St. George. It is true that S. 6 of the Code does not recognise the Court of the Village Magistrate but there is no definition of the term Magistrate. Moreover the High Court exercises jurisdiction over Village Magistrates under the transfer sections by transferring cases from one Magistrate to another. I have therefore doubts whether the term Magistrate in S. 250 does not include a Village Magistrate as well. However that may be I am satisfied that when the Village Magistrate transmits a complaint to the police, information is given to the police officer under S. 250 by the complainant. The object of the complainant was that his complaint should be forwarded to the police and it would be straining the language to hold that when he preferred the complaint with this obvious intention he was not giving information to the police officer. I see no reason in principle, why an accused person who goes direct to the police officer should be in a worse position than one who achieves the same object by placing his case before a Village Magistrate. With all respect to the learned Judges who decided the case of *In re Arulanandhan* (2) I am unable to agree with their conclusion. The Full Bench ruling of *The Sessions Judge of Tinnevely Division v. Sivan Chetty* (3) is in point. The learned Judges say at pp. 262 and 263: "In point of fact in this Presidency the complaint on information to the Village Magistrate is ordinarily the first step in setting the criminal law in motion."

The injured person hardly ever gives information direct to the Station House Officer of Police. He almost invariably gives information or makes his complaint to the village Magistrate well knowing that the latter will report the information or complaint to the Magistrate or the Station House Officer. The case would of course be different if the information or complaint was not a matter which the village headman was bound by law to pass on to the higher constituted authorities.

I agree with this view and in the conclusion at which my learned colleague has arrived. The petition will be dismissed.

S.N./R.K.

Petition dismissed.

A. I. R. 1914 Madras 696

SADASIVA AIYAR AND SPENCER, JJ.

Sokkappa Reddi—Appellant.

v.

Singana Reddi and others—Respondents.

Second Appeal No. 1115 of 1909, Decided on 21st January 1914, from decree of Addl. Sub-Judge, Madura, in Appeal Suit No. 199 of 1908.

(a) **Benami—Property transferred benami to defraud creditor is still transferor's when creditor is not defrauded—Transferor may prove want of title in transferee.**

Property transferred to another benami to defraud creditors is still the transferor's when no creditor is defrauded by the transfer, and the transferor is not estopped from proving that the transferee has no title and that the property is the transferor's: 35 Cal. 551 (P. C.), *Foll.* [P 697 C 1]

(b) **Civil P. C. (1908), O. 41, R. 4—Appeal Court can reverse decree against non-appealing parties if ground of reversal is common.**

Where the ground of reversal is common, an appellate Court can under O. 41, R. 4, reverse the decree not only against the party appealing, but also against those who have not appealed.

[P 697 C 1]

M. Narayanaswami Iyer—for Appellant.

K. N. Aiyar—for Respondents.

Facts.—This is a suit on a mortgage bond. The father of defendants 2 and 3 was the owner of the lands; on 17th October 1873, he usufructually mortgaged the same to defendants 4 and 5 who are brothers. Defendant 4 arranged to create a sub-mortgage in favour of defendant 6, but as the latter was pressed by his creditors, in order to screen this property from them, he induced defendant 4 to execute the mortgage in favour of the plaintiff on 20th January 1898 for Rs. 175, while defendant 6 himself continued to be in possession of the lands and paid kist thereon till 1906. The plaintiff instituted the present suit to recover from defendant 4 the amount due under the mortgage bond by the sale of the mortgaged properties. Defendants 4 and 6 contested his claim. Defendant 4 pleaded that no consideration was paid on the date of transfer by the plaintiff and that the mortgage was executed benami for defendant 6; defendant 6 pleaded that he was in fear of creditors, and in order to screen this property from them he had it transferred in the name of the plaintiff, and that he (the transferor) paid all his creditors in full and none of

them was ever defrauded by the transfer. The District Munsif found that consideration passed for the mortgage and accordingly decreed the suit as against the mortgaged property, and passed also a personal decree against defendant 4. Defendant 6 only then appealed. The Sub-Judge held on appeal that there was clear evidence of the benami nature of the transaction, and the fact that the patta itself stood in the name of defendant 6, and that he was in possession of the land for a long time after 1898, was clear evidence of it. Accordingly he reversed the decree of the District Munsif and also the personal decree even as against defendant 4. The present appeal is by the plaintiff.

Judgment.—We take the Subordinate Judge's finding to be that defendant 6's statement, that none of his creditors was really defrauded, might be accepted as true even though the Subordinate Judge goes on to say that "in any case," that is, even if that statement is false, his conclusion would be the same. We accept that finding of fact and on that finding there is no estoppel to prevent defendant 6 from proving that the plaintiff had no title to, and that defendant is the real owner of the sub-mortgage right on which the plaintiff (appellant) brought his suit: see *Petherpermal Chetty v. Muniandy Servai* (1).

As regards the right of the lower appellate Court to set aside even the personal decree passed in the plaintiff's favour against defendant 4 on the appeal of defendant 6, though defendant 4 was not made a party to the appeal, O. 41, R. 4, Civil P. C., applies and the appellate Court was entitled to pass a decree in favour of defendant 4 also. The second appeal is dismissed with respondent 8 and 9's costs.

S.N./R.K.

*Appeal dismissed.***A. I. R. 1914 Madras 697**

SANKARAN NAIR AND AYLING, JJ.

Gobinda Chetty and others—Petitioners.

v.

Emperor—Opposite Party.

Civil Revn. No. 636 of 1913 and Civil Revn. Petn. No. 517 of 1913, Decided on 21st October 1913, from Order of Sub. Magistrate, Salem.

Criminal P. C. (5 of 1898), S. 144—Order in force only for two months unless extended by Government notification—Order without facts showing urgency is ultra vires—Order renewing previous is ultra vires.

Section 144 applies to all temporary orders in urgent cases of nuisance or apprehended dangers and, except where specially extended by a notification of Government, no such order can remain in force for more than two months.

[P 697 C 2]

Where an order itself does not set forth the material facts of the case, as required by law and no urgency is indicated, the order is without jurisdiction.

[P 697 C 2]

L. A. Govindaraghava Iyer—for Petitioners.

C. F. Napier—for the Crown.

Order.—In our opinion, the order of the Sub-Magistrate, which we are asked to review, does not satisfy the requirements of S. 144, Criminal P. C., and must be considered to be passed without jurisdiction. S. 144 applies to temporary orders in urgent cases of nuisance or apprehended danger, and it is distinctly provided that, except when specially extended by a notification of Government, no such order shall remain in force for more than two months. Neither in the present order itself nor in the records referred to as forming the basis of it, is there any indication of urgency, and the order itself does not set forth the material facts of the case as required by law. The order purports to renew a previous order prohibiting the pattagar procession for two months from 3rd July 1913. It is in effect a second extension for two months of an order, dated 2nd May 1913, prohibiting the procession.

It is open to the District Magistrate to address Government for issue of notification under Cl. 5 of the section, but the present order is in contravention of the same and ultra vires.

It is hereby set aside.

S.N./R.K.

Order set aside.

(1) [1908] 35 Cal. 551=12 C. W. N. 562=25 I. A. 98=7 C. L. J. 528=5 A. L. J. 290=14 Bur. L. R. 108=10 Bom. L. R. 590=18 M. L. J. 277=4 M. L. T. 12=4 L. B. R. 266 (P. C.).

A. I. R. 1914 Madras 698

WHITE, C. J. AND SESHAGIRI AIYAR, J.
Kunhanna Shetty—Defendant—Appellant.

v.

Timmaju and others—Plaintiffs—Respondents.

Appeals Nos. 245 of 1910 and 44 of 1911, Decided on 21st April 1914, from decree of Dist. Judge, South Canara, in Original Suit No. 9 of 1910.

(a) **Aliyasanthana Law**—Grounds for removal of ejaman of aliyasanthana family stated.

Where an ejaman of an aliyasanthana family sets up a title to family properties in himself, and alienates them, and does not discharge the family debts when funds are available and his conduct is inconsistent with the interests of the family, he is liable to be dismissed: 7 I. C. 153, *Foll.* [P 700 C 1]

(b) **Aliyasanthana Law**—Suit by aliyasanthana family to recover properties alienated by ejaman is governed by Art. 144, Lim. Act, and not by Art. 91—Limitation Act (1908), Art. 144.

A suit by an aliyasanthana family to recover possession of the family properties alienated by its ejaman, not being a suit "to set aside an instrument" within the meaning of Art. 91, Lim. Act, is governed by Art. 144 of the Act: 14 *Mad.* 26 and 14 *Mad.* 101, *Foll.*; 15 I. C. 365; 30 *Mad.* 18; 17 I. C. 4 and 28 *Mad.* 349, *Dist.* [P 700 C 2]

(c) **Aliyasanthana Law**—Consideration binding on family is charge on family property.

The portion of the consideration found to be binding on the family is a charge on the family property. [P 700 C 2]

K. Narayana Rao and H. Balakrishna Rao—for Appellant.

B. Sitaram Rao—for Respondents.

White, C. J.—These are two appeals from a judgment and decrees of the District Judge of South Canara. The plaintiffs asked for an order that defendant 1 should be removed from ejamanship; they also asked for a decree for possession of certain items of property (this would be consequential on any order for the removal of defendant 1 from his ejamanship). The plaintiffs also asked that certain alienations of family property which had been made by defendant 1 should be set aside. The family is a joint aliyasanthana family consisting of defendant 1 and the plaintiffs. Defendant 1 is the last survivor of his branch of the family. He is now a very old man, some eighty years of age. He has been the ejaman of the family since 1900, when he succeeded his elder brother, Manjanna Shetty. The learned Judge gave the

plaintiffs a decree for the removal of defendant 1 from the ejamanship; and as consequential on that he gave them a decree for possession of certain family lands, items 1 to 10. As regards other items which were in dispute, items 12, 13, 14 and 15, the learned Judge held that item 14 belonged to the ejaman as his self-acquired property. He held that items 12, 13 and 15 belonged to the family, but that the plaintiffs' right to recover those lands for the family was barred by limitation. Appeal No. 245 of 1910 is an appeal on behalf of defendant 1 against so much of the decree as directs his removal from the ejamanship. Appeal No. 44 of 1911 is an appeal by the plaintiffs on the ground that the learned Judge was wrong in holding that item 14 was the self-acquired property of defendant 1, and also on the ground that the Judge was wrong with reference to the question of limitation in regard to items 12, 13 and 15.

I take Appeal No. 245 of 1910 first. As I have stated, defendant 1 succeeded his brother as ejaman in the year 1900. Within a year or two of his succession to the office he set up a claim to certain properties as self-acquisition of his branch of the family, and a suit was brought in 1901 by the family. It was held that the properties in question were family property. In that suit however although the plaintiffs asked for a decree for the removal of defendant 1, no decree for his removal was given.

We thus have a state of things in which for the second time in the course of seven or eight years a suit has been brought against the ejaman of the family to establish the proprietary rights of the family in lands which the ejaman has purported to deal with as his own self-acquisition. It is quite true, as pointed out by Mr. Naraina Rao, that the particular items of property which are in the present suit were not included amongst the items of property which were claimed by the family when the suit of 1901 was brought, and Mr. Naraina Rao has contended that, assuming that these items of property now in question are family property, it is consistent with good faith in the ejaman that he should have purported to deal with them as his self-acquired property. Speaking for myself I should feel some difficulty in acceding to that contention, because

I find it difficult to conceive how, having regard to the position of an ejaman of a family such as this and to the means of knowledge which must be at his disposal, how he could honestly deal with family property under a bona fide belief that it was his self-acquired property. However I do not think it is necessary for us to take the view in this case that the ejaman, when he purported to convey these items of property in 1906 under the instrument Ex. 36, was acting dishonestly. For the purposes of this case I will assume that he acted under a bona fide mistake. Taking that to be so, we have at any rate this, that in 1902, he, the ejaman, set up a claim to family property which, as against the family, he was unable to maintain, and that, since then he has dealt with property, which, in our view, is family property (I deal with this part of the case later), as his own. There are other matters which we must consider.

It became necessary for the family to raise a very substantial sum of money for payment of a decree debt owing to one Abakke under a mortgage of family property executed in her favour. It is scarcely necessary to observe that if the ejaman was in possession of family funds, sufficient to meet that decree it would have been his duty to pay off the decree out of family funds or devote the family funds, so far as practicable or so far as they existed, towards paying off the decree, and not to encumber the family property with unnecessary mortgages. I think it may be taken as established by the evidence that he had in his possession a sum of Rs. 2,108 which might have been applied in reduction of this decree debt. There is evidence that this Rs. 2,108 was family property. I do not say that evidence is conclusive, but the presumption of law is that the money which stood in his hands was family property, and I think it may be safely said that that presumption has not been rebutted. Then there is evidence that the net profit which he received from the family lands came to a sum of Rs. 2,324 per annum. There is no evidence as to what became of this sum. There is no evidence that it was devoted to purposes of family necessity; and although I do not suggest that the ejaman was under a liability to render an account for this Rs. 2,324, I think

that if it was family property, as I am prepared to hold it was either his duty to devote it to the discharge or reduction of the family debt or to show generally that it was utilized for family purposes.

Then there are various other matters which the learned Judge discusses. I do not suggest that the separate or cumulative effect of these, if they stood alone, would be sufficient to show dishonesty or even incompetence on the part of defendant 1. But taking them in conjunction with what has been proved to have been his conduct with reference to the property which he purported to deal with as his own, and with the evidence as to this substantial sum of Rs. 2,324, although I am free to admit that the case is near the border line, I am not prepared to say that the learned Judge was wrong in his view that the plaintiffs have made out a case for the removal of defendant 1 from the ejamanship.

I do not know that it is necessary to say anything with reference to the fact that defendant 1 is 85 years of age, although it is possibly a matter which one may legitimately take into consideration in considering the case as a whole. We have the fact that, although defendant 1 was present in Court during the hearing of the case, as Mr. Naraina Rao says, he did not go into the box, but left the evidence to be given by his son who was, I think, admittedly managing the property on his behalf. As defendant 1 did not go into the box, that fact may not unnaturally give rise to the suggestion that he may be—I do not put it higher than that—physically or mentally incompetent to manage this property.

With regard to the authorities cited, the only case to which I need refer is that of *Thimmakke v. Akku* (1). In that case as in this there was something more than unbusinesslike or improvident conduct on the part of the two ejamans. In that case it was held that the conduct of the ejaman was inconsistent with a due regard to the interests of the family, because he had gone into the box to support the alienation which the family impeached and which the Courts held was bad as against the family. In one sense the present case may be said to be an a fortiori case, because here the

(1) [1910] 7 I.C. 153=34 Mad. 481.

ejaman has himself made an alienation and the Courts have held that the property was not his, but belonged to the family. That, of course, is conduct which it is impossible to reconcile with the interests of the family. This being my view with regard to the question raised in this appeal, I think the appeal should be dismissed with costs.

As regards Appeal No. 44 of 1911, as I said, there are two questions. As regards item 14, I think the appeal fails.

Then there remains the question of limitation. The alienation was made on 27th March 1906. The suit was instituted in August 1909. The learned Judge held that the article applicable was Art. 91. It is argued on behalf of the plaintiffs that the appropriate article is Art. 144. It is to be observed that this is not a case in which the plaintiff is seeking to set aside an instrument which he has either made himself or which has been made on his behalf. The plaintiffs are asking to have a transaction set aside on the ground that the party who entered into the transaction was dealing with property which was not his. In other words the plaintiffs' case is that this transaction, if void at all, was void from its inception. The authorities are to the effect that even if defendant 1 in this case had been acting on behalf of the family, Art. 91 could not apply: see *Unni v. Kunchi Amma* (2) and *Anantan v. Sankaran* (3). With regard to the former of these cases, Mr. Naraina Rao has called our attention to a decision reported as *Sivavadevelu Pillay v. Ponnammal* (4) in which the learned Judges declined to follow the decision in *Unni v. Kunchi Amma* (2). They do not say that they distinguish the earlier case; they say they decline to follow it, which, I take it, means that in the view of the learned Judges they considered that the decision was wrong. With reference to that case, all that I desire to point out is that the case of *Sivavadevelu Pillay v. Ponnammal* (4), as I understand it, was a case in which a minor, after he came of age, was seeking to set aside an instrument which had been executed on his behalf. In the case before us, the instrument which the family in effect seeks to have set aside was not executed by them

or on their behalf. Further in the *Madras Weekly Notes* case, the contest was not between Art. 144 and Art. 91 but between Art. 144 and Art. 44. I may also refer to the case of *Chingacham Vitol Sankaran Nair v. Chingacham Vitol Gopala Menon* (5) and to the recent decision of *Ganapathi Aiyar v. Sivamalai* (6) which seems to proceed upon the principle that where a party seeks to set aside an instrument which he has himself executed or which has been executed on his behalf, Art. 91 applies. The case upon which the learned District Judge relies, [*Govindasamy Pillai v. Ramasawmi Pillay* (7)], was a case in which a seller of property sought to set aside an instrument by which he purported to sell property to a purchaser. That was clearly a case where the instrument was impeached by the party who had executed it. The same observation applies to the case of *Sinyagappa v. Talari Sanjivappa* (8). I think Art. 144 applies and that the plaintiffs are entitled to recover the lands, if the Judge was right in holding that they were acquired out of family funds. As regards that, I am not satisfied that the Judge was wrong in his view as to the source from which these properties were acquired. Therefore, in my opinion (subject to any charge which may exist in favour of defendant 4) the plaintiffs are entitled to a decree for possession of items 12, 13 and 15.

As regards the question of charge, I think the matter stands thus. The consideration for the instrument of transfer, Ex. 36, consisted in part of items which were binding on the family: in other words when the instrument was executed there was family necessity for raising money to the extent of Rs. 1,569-4-0. The family had the benefit of this Rupees 1,569-4-0. That being so, I think the defendant 4 is entitled in equity to say: "I have a charge on these lands", items 12, 13 and 15, to the extent of this amount. The decree will therefore have to be modified as I have indicated and defendant 4 will be given a charge on items 12, 13 and 15 for the amount of Rs. 1,569-4-0. In this appeal (No. 44 of 1911) there will be no costs for defendant 4 either here or in the Court below.

(2) [1891] 14 Mad. 26.

(3) [1891] 14 Mad. 101.

(4) [1912] 15 I.C. 365.

(5) [1907] 30 Mad. 18.

(6) [1913] 17 I.C. 4=36 Mad. 575.

(7) [1909] 1 I.C. 719=32 Mad. 72.

(8) [1905] 28 Mad. 349.

Defendant 1 in Appeal No. 44 of 1911 will get his costs on the sum of Rs. 2,323. There will be no further order as to costs in this appeal. The interest will be set off as against the mesne profits.

The memorandum of objections is dismissed.

Seshagiri Aiyar, J.—I agree.

S.N./R.K.

Decree modified.

A. I. R. 1914 Madras 701

AYLING AND TYABJI, JJ.

Iswaram Pillai—Plaintiff—Appellant.

v.

Tharagan and others—Defendants—Respondents.

Second Appeal No. 998 of 1912, Decided on 13th November 1913, from decree of Dist. Judge, Tinnevely, in Appeal Suit No. 406 of 1911.

Contract Act (1872), S. 2 (d)—*S, B's debtor, executed hypothecation bond in favour of C for consideration including debt kept with C to be paid to B — B cannot sue C to recover amount—Contract.*

S, a debtor of B, executed a hypothecation bond in favour of C for a consideration including the amount of the debt, which was kept with C to be paid to B. B sued C to recover the amount.

Held: that the plaintiff, being no party to the hypothecation bond, could not enforce it.

[P 704 C 2]

B. Narasimha Rao for *T. M. Krishna-swami Aiyar*—for Appellant.

S. Ramaswami Aiyar — for Respondents.

Tyabji, J.—The plaintiff sues for a decree for a sum of Rs. 610, which includes the principal sum of Rs. 450 and interest. This sum is claimed as due on a hypothecation bond purporting to be executed on 27th August 1907 to which the plaintiff was not a party, but which was executed by one Sahib Sheik Uduman Tharagan in favour of defendants 1 and 2 and of the father of defendants 3 and 4, whom I shall refer to for brevity as the defendants. Sheik Uduman Tharagan, the executant of that bond, was a debtor of the plaintiff and he asked the defendants (in terms to which I shall immediately refer) to pay off the sum of Rs. 450, which was due from Sheik Uduman Tharagan himself to the plaintiff.

The material portions of the hypothecation bond are as follows: "The hypothecation bond executed on 27th August 1907 to defendants the sum received on the hypothecation to you of

the following properties belonging to me". Then the particulars of the Rs. 2,000 are given which includes the following item "a sum of Rs. 450 is kept with you in order to be paid to and get a receipt from the plaintiff" on account of the balance "due to him in respect of the purchase of yarn."

It will thus be seen that the plaintiff claims to have a contract enforced, to which he was not a party but which was entered into between his debtor and the defendant.

The defence is first, that the plaintiff being a stranger to the contract could not sue on it; and secondly, that though the consideration for the hypothecation bond was originally fixed at Rs. 2,000, (including the payment of the sum now in question), yet that agreement was modified by a notice given by the defendant's wakil 20 days after the date of the hypothecation bond; and that subsequent to that notice even as between the said Sheik Uduman and the defendants there was no contract that the defendants should pay the said sum to the plaintiff and that the charge created by the hypothecation in favour of the defendants was effective only in so far as the consideration had actually passed between the parties thereto at the date of the said notice, viz. for Rs. 1,250. The endorsement of the hypothecation bond and a decree, Ex. 4, which refers to it are relied upon as evidence of this modification of the terms of the hypothecation bond.

Both the lower Courts have dismissed the suit and the learned District Judge in doing so said, "The only question argued is whether there was privity of contract between the plaintiff and the defendants."

It was argued before us that plaintiff was entitled to sue on the contract notwithstanding that he was not a party to it—and mainly on two grounds. The first argument was that by the terms of the hypothecation bond it was agreed that a trust should be created in favour of the plaintiff, and that if this was so the plaintiff could enforce the agreement. In the second place it was argued that the general rule of law that a person who is not a party to a contract cannot become entitled by that contract to demand the performance of any duty under it was no more applicable in India after the

decision of the Privy Council in *Nawab Khwaja Mahommad Khan v. Nawab Husaini Begam* (1), especially as that decision is explained and applied in *Deb Narain Dutt v. Ram Sarhan Mandal* (2), a decision of Sir Lawrence Jenkins, C. J., and Sir Asutosh Mukerjee, J., of the Calcutta High Court. It seems to me however that what were put forward as two distinct heads of arguments were in the circumstances of the present case indistinguishable and that both depend upon the consideration of the same question. For it is admitted that if the terms of the hypothecation deed are given effect to in their entirety, the plaintiff would receive the money from the defendants. The consideration of the question whether the plaintiff is entitled to have the terms of the hypothecation deed enforced is not, it appears to me, materially advanced by determining whether, if they were enforced, the money would be payable to the plaintiff through a trust or otherwise, or, to use the terms the Trusts Act, by determining whether the defendants agreed to annex to their ownership of the money the obligation of paying it to the plaintiff or he merely agreed to pay it to the plaintiff. Assuming that the money would be payable through a trust, the question would still remain whether the plaintiff can require that the trust should be completed. Assuming, in other words, that when the defendants agreed to pay to the plaintiff the sum claimed they agreed to become the trustees of the plaintiff, the question still remains whether that agreement can be enforced by the plaintiff. Every trust requires at its creation an agreement between the trustee and the author of the trust: see S. 10, Trusts Act. It is true that such an agreement is not always expressed, but is often implied, and in the case of constructive trusts it may be imposed upon a person against his will.

Here it is evident that it is sought to be imposed against the will of the alleged trustee. It is necessary to mention that in the present case the trust can be imposed only if the agreement is enforced at the instance of the plaintiff, for here there is no property transferred to the defendants of which

they agreed to become trustees, but all they agreed to do was at the most to allocate a certain sum in their own hands and to make that sum the trust fund. The principle of constructive trust can have no bearing on this point, for it cannot be contended that if A agrees with B to become a trustee for C, the mere agreement between A and B, even if B afterwards repudiates it (and if A consents to such repudiation), will make B a constructive trustee for C. An agreement to become a trustee is not for the purposes of the present case and in respect of its enforceability distinguishable from an agreement to pay a sum of money. In such cases the trust can arise only after the contract has been performed; until the trust arises it is merely a contract to create a trust and so long as the trust is not complete it is what in another connexion is called an executory trust as distinguished from an executed trust; and until the trust is executed there will be no trustee but only some person possibly "in progress towards being a trustee" in the words used by Sir Thomas Plumer in *Wall v. Bright* (3). Even after he has completed his progress of being a trustee he may occupy a position such as the vendor in *Shaw v. Foster* (4) was held to occupy. That position is thus described by Earl Cairns: "The trustee was not a mere dormant trustee; he was a trustee having a personal and substantial interest in the property—a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it. The relation therefore of trustee and cestui que trust subsisted, but subsisted subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property": p. 338.

The present case for these reasons seems to me to be quite different from others where a trust has already been created and the beneficiary seeks to enforce it.

I come therefore to consider whether the agreement referred to can be enforced at the instance of the plaintiff. In the decision of the Privy Council in *Nawab Khwaja Mahommad Khan v. Nawab*

(1) [1910] 7 I. C. 237 = 32 All. 410 = 37 I. A. 152 (P.C.).

(2) [1913] 20 I. C. 630 = 41 Cal. 137.

(3) [1820] 37 E. R. 456 = 1 J. & W. 494 = 21 R.R. 219.

(4) [1872] 5 H. L. 321 = 42 L. J. Ch. 49 = 27 L. T. 281 = 20 W.R. 907.

Husaini Begam (1) the parents of a bride and bridegroom (who were both minors) entered into an agreement which the bride sought to enforce by suit. The marriage was recited as the cause leading up to the agreement. Their Lordships allowed the suit on the following grounds: "(1) that *Tweddle v. Atkinson* (5) was an action of assumpsit, and that the rule of Common law, on the basis of which it was dismissed, is not applicable to the facts and circumstances of the case." They state, apparently, as the reason why *Tweddle v. Atkinson* (5) did not apply, (2) that the agreement executed by the defendant specifically charged immovable property for the allowance which he bound himself to pay to the plaintiff; (3) that the plaintiff was the only person beneficially interested under it, and from this they draw the conclusion (4) that "although no party to the document, she was clearly entitled to proceed in equity to enforce her claim." After this they remark: (5) "In India and among communities circumstanced as the Mahomedans among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the Common Law doctrine were applied to agreements or agreements entered into in connexion with such contracts." Their Lordships do not refer to S. 23, Specific Relief Act which provides that "where a contract is a settlement on marriage any person beneficially entitled thereunder" may obtain specific performance of the contract.

It seems to me that none of the circumstances on which their Lordships based their decision are present in the case now before us. The facts in *Deb Narain v. Ram Sadan Mandal* (2) are somewhat similar to the facts of the case with which we are dealing; but there were present in that case certain very material circumstances which are not present here: (1) all the parties to the contract sued upon were on the record; (2) the contract was communicated to the plaintiff and he accepted the arrangement; (3) in consideration of such acceptance the plaintiff handed over a patta which had been deposited with him

under the impression that by so depositing it a charge was created on the property in his favour; (4) by the agreement sued upon, the plaintiff's debtors had parted with the whole of their property moveable and immovable, to defendant 5; (5) the sum sued for "was allocated and held by defendant 5 for the benefit of the plaintiff so that in a sense the money was reified and earmarked for this purpose." Sir Lawrence Jenkins, with reference to these facts, states; "We have here then a position in which it would be in accordance with the principles of justice, equity and good conscience, the abiding rule in these Courts, that the plaintiff should be entitled to enforce this claim against defendant 5." Then he states that *Tweddle v. Atkinson* (5) does not bind the Indian Courts because (1) that decision was "on a form of action peculiar to the Common Law Courts in England and was influenced by the fact that no action in assumpsit could be maintained upon a promise unless the consideration moved from the party to whom it was made," whereas under the Contract Act, S. 2 (d), we have a definition of consideration, which is wider than the requirements of English Law; (2) Sir Lawrence Jenkins' second reason is stated in the following terms: "We now have ample authority for saying that the administration of justice in these Courts is not to be in any way hampered by the doctrine laid down in *Tweddle v. Atkinson* (5). That I take to be the result of the decision of the Privy Council in a recent case which is reported as *Nawab Khawaja Muhammad Khan v. Husaini Begam* (1).

In the report of that case in the *Calcutta Weekly Notes* there is an interlocutory remark of Lord Macnaghten which indicates the limits imposed on a Court of Common Law. He there says: "Supposing she (that is the plaintiff) were an English woman, it is true she could not bring an action in the King's Bench Division, but could she not bring a suit in equity?" The answer of the learned counsel was "Yes" The bar then in the way of an action by the person not a direct party to the contract was probably one of procedure and not of substance. In India we are free from these trammels and are guided in matters of procedure by the rule of justice

(5) [1861] 124 610 = 1 B. & S. 893 = 30 L. J. Q. B. 265 = 8 M. & C. 22 = 4 L. T. 468 = 9 W. R. 291 = 121 E. 162.

equity and good conscience." (3) After that Sir Lawrence Jenkins refers to three cases *Gregory v. Williams* (6), *Touche v. Metropolitan Railway Warehousing Company* (7) and *Gandy v. Gandy* (8). And finally he concludes by saying, "There is a valuable exposition of the law by Lord Hatherley The case comes within the authority that where a sum is payable by *AB* for the benefit of *CD*, *CD* can claim under the contract as if it had been made with himself." That appears to me to be a principle which is of distinct use in the consideration of this case."

It was argued before us, mainly on the authority of the ruling to which I have just referred, that the doctrine that a stranger to a contract cannot sue on it was no more applicable in India. With reference to this contention it is necessary to consider some of the remarks in the decision. It must be observed that the statement of Lord Hatherley in *Touche v. Metropolitan Railway Warehousing Company* (7) cited by Sir Lawrence Jenkins cannot be said to have been accepted by the Courts of equity in England as a sufficient exposition of the law: see per Lord Bowen in *Gandy v. Gandy* (8). Sir Frederick Pollock refers to it (Contracts, Edn. 9. p. 202) as having been overruled by the Court of Appeal in England and he cites *In re Rotherham Alum & Chemical Co.* (9). Lindley L. J., says in that case: "An agreement between *A* and *B* that *B* shall pay *C*, gives *C* no right of action against *B*. I cannot see that there is in such a case any difference between equity and Common Law; it is a mere question of contract. It is said that Mr. Peace has no equity against the Company because the company has had the benefit of his labour. What does that mean? If I order a coat and receive it, I get the benefit of the labour of the cloth manufacturer; but does anyone dream that I am under any liability to him? It is a mere fallacy to say that because a person gets the benefit of work done for somebody else he is liable to pay the person who did the work." See

also *In re Empress Engineering Company* (10), per Jessel, M. R., in the course of the arguments and Lindley on Companies, p. 148, cited by Pollock, Op. Cit.

Sir George Jessel says in the case last cited: "I know of no case where when *A* simply contracts with *B* to pay money to *C*, *C* has been held entitled to sue *A* in equity." These decisions also show that this doctrine is not one merely based on the technicalities of Common Law procedure in England, but that it finds a place in the equitable principles which Sir George Jessel, M. R., and other eminent exponents of equity were not reluctant to enforce. This agreement between the rule of Common Law and equity is brought out also in the remarks of Brett, L. J., in *Wilson v. Bury* (Lord) (11), while the point where equity and Common Law differ is indicated by Cotton, L. J., in *Gandy v. Gandy* (8) and by Bowen, L. J., ib., pp. 69-70. The latter points out that if the true intent and effect of a contract is to give to third parties a beneficial right under it, that is to say, to give them a right to have the covenants in the contract performed—and this can only happen [as pointed out by Sir George Jessel in *In re Empress Engineering Co.* (10)] when the parties have no power to coming to a new agreement the next day releasing the old one—then the stranger may be allowed in a Court of equity to enforce his rights under the contract: but that the whole application of this doctrine depends upon its being made out that upon the true construction of the contract such a beneficial right is given. Cotton, L. J., says: "Now, of course, as a general rule a contract cannot be enforced except by a party to the contract, and either of the two persons contracting together can sue the other, if the other is guilty of a breach of or does not perform the obligations of that contract. But a third person—a person who is not a party to the contract—cannot do so. That rule however is subject to this exception: if the contract, although in form it is with *A*, is intended to secure a benefit to *B* so that *B* is entitled to say he has a beneficial right as cestui que trust under that contract, then *B* would in a Court of

(6) 17 R. R. 136=3 Mer. 582=26 E. R. 224.

(7) [1870] 6 Ch. A. 671.

(8) [1885] 30 Ch. D. 57=54 L. J. Ch. 1154=53 L. T. 306=57 W. R. 803.

(9) [1883] 25 Ch. D. 103=53 L. J. Ch. 290=50 L. T. 210=31 W. R. 131.

(10) [1880] 16 Ch. D. 125=43 L. T. 742=29 W. R. 342.

(11) [1880] 5 Q. B. D. 518=50 L. J. Q. B. 90=44 L. T. 454=29 W. R. 259=54 J. P. 420.

equity, be allowed to insist upon and enforce the contract." The distinction between Courts of Equity and Common Law does not exist in India. But the exception referred to by Cotton, L. J., necessarily presupposes that the trust has already been created, that the progress towards being a trustee has been completed, as I have already pointed out.

It would therefore appear that some of Sir Lawrence Jenkins' remarks in *Deb Narain's* case (2) might be misleading if they are not read in connexion with the facts of the particular case.

In connexion with the law as enforced by the Courts of equity in England it may be well to refer to *In re Empress Engineering Co.*(10) which contains the following comment by James, L. J., on *Gregory v. Williams* (6) most nearly approaching to the contention put forward on behalf of the appellant: "In *Gregory v. Williams* (6) the man with whom the contract was made was one of the plaintiffs and the only defence there would have been misjoinder of plaintiffs, and that is a defence which the Court was not likely to view with much favour." In *Deb Narain's* case (2) the original promisee was not a plaintiff, but he was one of the parties to the suit.

The result may therefore be shortly stated that no case has been cited to us in which, unless the contract has been partly or fully performed, so that a trust has been already created, a suit on a contract has, under circumstances similar to those with which we have to deal, been allowed to be maintained without the presence on the record of all the parties to the contract, and no English case has been cited in which one of such parties is not a plaintiff.

It has been pressed upon us however that we are not bound necessarily to follow the law as laid down by the English Courts; that in the absence of legislative provisions the law of our Courts is that indicated by justice, equity and good conscience. One of the circumstances owing to which it has been suggested that the rule that ought to be followed by us must be different from that which prevails in England is that the definition of "consideration" contained in the Contract Act, S. 2(d), does not require that consideration should necessarily move from the party seeking to enforce the contract. This circumstance may not be so relevant to the point under consi-

deration as might at first appear, for the definition of "consideration" in the Contract Act has direct reference in its very terms to the parties to the contract who are referred to in the Act as the promisor and promisee. The effect of S. 2 (d) is that if a promisee wishes to have the contract enforced, his promisor cannot object that the consideration proceeded from a third party, and not from the promisee seeking to enforce the contract. It does not seem to me to be equally clear that the definition can affect the question whether a third party (who is neither the promisor nor the promisee) can enforce the contract. If A and B agree that in consideration of X paying to B Rs. 100, B will repair A's house, it is true that A can enforce the contract against B, who cannot object that he received the money from X and not from A (though, if X does not pay, there may be a failure of consideration and B may be entitled to rescind the contract on that account). On this point the English law does not seem to be different: *Davenport v. Bishopp* (12) and *Gandy v. Gandy* (8). But is the definition of any assistance in considering whether X can sue on a contract by which A promises B that A will pay to X Rs. 100? The definition refers to the third party (X) as the person from whom the consideration moves; not as the person (being neither the promisor nor the promisee) for whose benefit the contract is made. The definition can therefore have only a remote bearing on the totally distinct question whether a person, who benefits by a contract but who is not the promisee, can sue on the contract.

Finally it has been contended that the rule against a stranger to a contract being allowed to sue is one merely of procedure and that we should not hesitate to disregard it in order to do justice. It is indeed described as a rule of procedure by Willes, J., in *Gray v. Pearson* (13), but in terms which are far from implying that therefore the rule is opposed to justice and should be disregarded. He says: "I am of opinion that this action cannot be maintained, and for the simple reason—a reason not applicable to merely the procedure of

(12) [1843] 63 E. R. 201=2 Y & C. C. C. 451=12 L. J. Ch. 492=7 Jur. 1077=1 P. 1. 698=65 R. R. 483.

(13) [1870] 5 C. P. 568=23 L. T. 416.

this country, but one affecting all sound procedure — that the proper person to bring an action is the person whose right has been violated. Though there are certain exceptions to the general rule, for instance, in the case, of agents, auctioneers or factors, these exceptions are in truth more apparent than real."

It was pressed before us however that the Privy Council have definitely stated that *Tweddle v. Atkinson* (5) was not applicable to the facts and circumstances of the case before them, and that serious injustice might result if the Common law doctrine had been applied thereto and this supplied, in the words used in *Deb Narain v. Ram Sadhan Mandal* (2), "ample authority for saying that the administration of justice in these Courts is not to be in any way hampered by the doctrine laid down in *Tweddle v. Atkinson* (5)." It seems to me, with great respect, that this argument is based on a misapprehension of the Privy Council decision. Their Lordships only say that the Common law doctrine did not apply to the facts and circumstances of the case before them, but that doctrine would not, it seems to me, be applicable in England in a case where immovable property is specifically charged for the sole benefit of a third party in consideration of her marriage and where she is a minor whose natural guardian is a party to the contract and when the marriage has already taken place and everything done to complete the creation of the trust. Their Lordships of the Privy Council do not purport to go beyond what the Courts of equity would have done in England; this is expressly stated by them. Assuming however that they intended to say that the law prevailing in England should not be applied in disregard of the circumstances in India — and that would not be any new proposition — it is necessary to bear in mind that in any case a person who is not a party to the contract cannot be permitted to enforce it without being subject to all the equities which would be present between the parties themselves; and this would almost invariably necessitate that all the parties to the contract should be impleaded in the suit: the question whether the contract is revokable at the option of either of the parties or whether it has been altered by mutual consent or been performed in part, whether the parties can

be restored to their original position, and other similar questions would have to be considered and would affect the third party's claim: see *In re Empress Engineering Co.* (10) and the interlocutory remarks of Jessel, M. R., during arguments; and per Grant, M. R., in *Gregory v. Williams* (6).

In all these respects the plaintiff's suit is defective.

I am therefore of opinion that the principle that the proper person to bring an action is the person whose right has been violated: see per Willes, J., in *Gray v. Pearson* (13), a principle recognized both by Common law and equity [see per Lord Lindley *In re, Rotherham Alum and Chemical Co.* (9)], applies in India also no less than in England, and that, except in cases which are not material at present the person who acquires a right to enforce a contract of such a nature as we have to deal with is the promisee and not a stranger to the contract, who may benefit under the contract, and that therefore the lower Courts were right in dismissing the plaintiff's suit.

The appeal will be dismissed with costs.

Ayling, J.—I agree.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Madras 706

WHITE, C. J. AND SANKARAN NAIR, J.

Ramakrishna Mallya—Plaintiff—Appellant.

v.

Baburaya alias Venkatesha Hegade and others—Defendants—Respondents.

Second Appeal No. 1425 of 1910, Decided on 13th November 1912, against decree of Temporary Sub-Judge, South Canara, in Appeal Suit No. 376 of 1908.

(a) **Landlord and Tenant—Ejectment suit based on leases prior to Transfer of Property Act — Landlord's act showing election to take advantage of forfeiture of non-payment of rent is unnecessary.**

In an ejectment suit, based on leases executed prior to the Transfer of Property Act, no act on the part of the landlord, showing that he elects to take advantage of the forfeiture for non-payment of rent, is necessary: 6 I. C. 447, *Foll.*; 31 *Mad.* 403, *Dist.* [P 707 C 1]

(b) **Landlord and Tenant — Whether tenant is entitled to relief against forfeiture depends on particular case.**

Whether a tenant is entitled to relief against forfeiture for non-payment of rent depends upon the circumstances of each case.

[P 708 C 2]

(c) **Landlord and Tenant — Tenant should be relieved against stipulation that value of**

improvements will be lost on failing to pay rent.

A stipulation that the tenant failing to pay rent shall lose the value of his improvements is held merely in terrorem over him, and ought to be relieved against : 6 *Mad.* 159 and 6 *M. H. C. R.* 258, *Foll.* ; 15 *M.L.J.* 210 and 12 *I. C.* 456, *Dist.* [P 708 C 2]

(d) Landlord and Tenant — Tenant pleading but failing to prove payment does not disentitle him to equitable relief.

The fact that tenant pleads payment, which he fails to prove, does not in itself disentitle him to equitable relief. [P 708 C 2]

K. Ramanatha Shenoi—for Appellant.

K. P. Lakshmana Rao — for Respondents.

Judgment.—We agree with the Court below that on the true construction of the lease (Ex. A) the sub-lease by defendant 1's father did not work a forfeiture. The lower appellate Court, in holding that, assuming there was a forfeiture by reason of non-payment of rent, it could not be enforced as the plaintiff had not done any act to show that he intended to avail himself of the forfeiture, would seem to have followed the decision of this Court in *Venkatramana Bhatta v. Gundaraya* (1). In that case however it was not brought to the notice of the Court that the lease in question was prior to the coming into operation of the Transfer of Property Act. The lease in the present case was made in 1871 before the Transfer of Property Act came into operation and this being so, according to the decision in *Padmanabaya v. Ranga* (2), an act on the part of the landlord showing he elects to take advantage of the forfeiture is not a condition precedent to his right to sue in ejectment. There is no finding by the lower appellate Court as to whether, on the construction of the lease, non-payment of rent operated as a forfeiture. We accordingly send back the case to the lower appellate Court for a finding on this question and also, if the Court holds there has been a forfeiture by reason of the non-payment of rent, for a finding as to the terms, if any, on which the defendant is entitled to be relieved against the forfeiture. The findings should be submitted within one month after the re-opening of the Sub-Court, and seven days will be allowed for filing objections.

[In compliance with the order contained in the above judgment, the Subordinate

Judge of South Canara submitted the following :]

Findings.—The two issues on which this Court has been directed to submit its findings are : (1) Whether on the construction of the lease non-payment of rent operated as a forfeiture. (2) If there has been a forfeiture by reason of the non-payment of rent, whether the defendant is entitled to be relieved against it on any and what terms ? The stipulation in question in the suit lease A is to this effect : "I have no cause whatever either or to keep the rent in arrears. In case any small portion of the aforesaid rent is kept in arrears or in case I shall deliver back the said land etc., and all to you without demanding from you the value of the improvements made by me." As observed in *Subbaraya Kamti v. Krishna Kamti* (3), from the circumstance that the stipulation in question is that, if any portion of the rent should fall into arrears, the property should be surrendered with all right to improvements, (i. e.) without claiming the value of improvements, it might be reasonably inferred that such provision was made in order that it might operate as a fear in the mind of the lessee that the rent should be regularly paid and the parties did not seriously intended that it should be acted upon. In a word this stipulation was inserted in terrorem: see also *Kottal Uppi v. Edavalath Thathan Nambudri* (4).

Further, there is this important fact that the lease does not provide for any period of grace in respect of the payment of arrears of rent. It has been settled beyond any doubt or controversy that, when such is the case, the forfeiture arising from non-payment of rent will be one that can be relieved against : vide *Mahalakshmi Amma v. Lakshmi* (5), *Narayana Naicker v. Vasudeva Bhatta* (6), *Narayana Kamti v. Handu Shetty* (7) and *Adiraya Shetty v. Billa Tyampu* (8). Having regard to the intention of the parties, which can be gathered and reasonably inferred from the insertion of such stipulation as the one in question, and also to the circumstance that the lease provides for no period of grace, I

(3) [1883] 6 *Mad.* 159.

(4) 6 *M.H.C.R.* 258.

(5) [1911] 12 *I.C.* 456.

(6) [1905] 28 *Mad.* 889.

(7) [1905] 15 *M.L.J.* 210.

(8) [1910] 6 *I.C.* 498.

(1) [1908] 31 *Mad.* 403.

(2) [1911] 6 *I.C.* 447=34 *Mad.* 161.

should hold that the forfeiture under consideration is one that can be relieved against. The defendants are entitled to have such equitable relief granted to them.

Before the defendants can claim such equity they must be prepared to do equity. It will be incumbent upon them to pay up the arrears of rent due by them. Defendant 2 pleaded discharge. Issue 2 in the case was, "whether the payments of rent and thirva pleaded are true." There was no evidence to prove that issue and it was found in the negative. The rent claimed by the plaintiff is due to him. The defendants not only failed to tender it in Court but also set up a false plea of discharge. The plaintiff will be entitled to get the arrears of rent due to him and that with interest. Having regard to the fact that there was no tender on the part of the defendant even after the suit was brought but he, on the other hand, falsely pleaded payment, it will not be unreasonable or inequitable to allow plaintiff interest at the rate of 12 per cent per annum. Plaintiff will also be entitled to get his full costs of the suit including the costs on the claim for recovery of possession of the suit property: vide *Subbaraya Kamti v. Krishna Kamti* (3) already referred to at p. 167.

For paying up the plaintiff the arrears of rent claimed by him with interest thereon at 12 per cent per annum from the date on which the rent fell due up to the date of payment and also full costs, some reasonable time will have to be allowed to the defendants. Under the circumstances, I am of opinion that it will be sufficient if three weeks' time from the date of disposal of this second appeal in the High Court is allowed to them. There will be no loss or inconvenience to the plaintiff as he gets interest at the aforesaid rate up to the date of payment. If the defendants, with a view to avoid the burden of paying interest, wish to pay up the amount earlier they will be at liberty to pay it to the plaintiff through Court.

For the reasons set forth above I find on these 2 issues that, if the defendants should pay up what is mentioned supra within the time specified therein, they would be entitled to have the forfeiture in question relieved against.

[The second appeal coming on for final hearing after the return of the findings

from the lower appellate Court upon the issues referred by the High Court for trial, the Court delivered the following:]

Judgment.—The question whether a tenant is entitled to relief against forfeiture for non-payment of rent must depend on the facts of the particular case. Here we think on the authority of the decision in *Subbaraya Kamti v. Krishna Kamti* (3), following *Kottal Uppi v. Edavalath Thathan Nambudri* (4), the tenant is entitled to relief. The cases relied on by the plaintiff (the landlord) are distinguishable. In *Narayana Kamti v. Handu Shetty* (7) a long period was allowed, some eight months, after default, before the forfeiture was to take effect and, apparently, there was no stipulation that the tenant should, on default, lose the value of his improvements. In *Mahalakshmi Amma v. Lakshmi* (5) a period of grace was also allowed. There was no doubt a stipulation in that case that the tenant, on default, should lose the value of his improvements, but the effect of this stipulation is not discussed in the judgment.

We do not think the fact that the tenant sets up a plea of payment which he fails to prove, necessarily in itself, disentitles him to equitable relief.

We accept the finding and modify the decree of the lower appellate Court in accordance with the finding. The plaintiff is entitled to his costs throughout.

In default of payment of rent and interest within the time allowed, the plaintiff may recover possession.

S.N./R.K.

Decree modified.

A. I. R. 1914 Madras 708

TYABJI AND SPENCER, JJ.

Chettikulam Prasanna Venkatachala Reddiar—Defendant—Appellant.

v.

Collector of Trichinopoly and another—Plaintiff and Defendant—Respondents.

Civil Appeal No. 263 of 1911, Decided on 30th March 1914, from decree of Sub-Judge, Trichinopoly, in Original Suit No. 2 of 1910.

(a) Civil P. C. (1908), O. 22, Rr. 3 and 11—Fact that one respondent is dead and his representatives not brought on record will not make appeal abate if right survives to appellant.

The mere fact that one of the respondents is dead and that his representative is not brought on the record, will not make the appeal abate if the right survives to the appellant and the

result of the adjudication will not affect the deceased party. [P 709 C 2]

(b) Limitation Act (1908), Arts. 120 and 134—Suit to set aside alienation of trust property is governed by Art. 120 and not Art. 134.

A suit for declaration that the sale of trust property by a trustee is invalid is not a suit for recovery of possession of trust property within the meaning of Art. 134, Lim. Act and is therefore governed by Art. 120 of the Act [P 710 C 2]

(c) Limitation Act (1908), S. 28—Distinction between alienee in good faith for consideration and alienee for consideration but not in good faith stated.

Trust property in the hands of a transferee in good faith for consideration without notice of the trusts cannot be followed by the beneficiary at all, but where a transferee has paid valuable consideration but has not acted in good faith, he acquires good title after the lapse of the period necessary for extinguishing (under S. 28 Lim. Act), the right of the beneficiary to follow the trust property in his hands. [P 710 C 1,2]

(d) Civil P. C. (1908), O. 22, R. 3 (1)—(Per Tyabji, J.)—"Right to sue" meaning of.

Per Tyabji, J.—The words "the right to sue" mean "the right to prosecute by law," to obtain relief by means of legal procedure. [P 709 C 2]

T. Subramania Aiyar and T. M. Krishnaswami Aiyar—for Appellant.

Govt. Pleader—for Respondents.

Tyabji, J.—The Collector of Trichinopoly is the plaintiff. The suit is instituted under Ss. 92 and 93, Civil P. C.

Defendant 1 (now deceased) was the alleged trustee and manager of the charities referred to in the plaint. Defendant 2 was alleged to be a transferee from defendant 1 of a portion of the lands appertaining to the charitable trust.

The prayers against defendant 1 were for removal of defendant 1 from the trusteeship and for accounts. There was a prayer (b) "to declare the sale to defendant 2 of the lands belonging to the charity to be invalid." This is the only relief claimed against defendant 2. There were other prayers for the appointment of a new trustee and for vesting the trust property in the trustee so appointed. The plaintiff obtained all the reliefs asked against both the defendants in the lower Court.

There were appeals against this decree by each of the defendants. But defendant 1 is now dead and her representatives not having been brought on the record, her appeal has abated and has been dismissed by us. The present appeal is by defendant 2.

It was contended before us on behalf of the plaintiff that defendant 2's appeal must also abate, inasmuch as defendant 1

who was originally a respondent to this appeal is now dead and her legal representatives have not been brought on the record as required by O. 22.

In my opinion the appeal does not abate.

The mere fact that one of the respondents is dead and that his representative is not brought on the record, will not make the appeal abate if the right survives to the appellant. In *Gopal Ganesh Abhyankar v. Ramchandra Sadashiv Sahasrabuddhe* (1), it was succinctly stated that when the sections of the Civil Procedure Code which are now replaced by O. 22 have to be applied to appeals, the words "the right to sue" must be construed as meaning "the right to prosecute by law, to obtain relief by means of legal procedure." This is not expressly stated in O. 22, R. 11, which may be styled the interpretation clause of the order. But several rules in the order become meaningless in their application to appeals unless these words are added; and the addition of these words would follow from giving to the expression "a right to sue" a meaning cognate to that which the rule expressly gives to the word "suit." *Gopal v. Ramchandra* (1) was followed in *Paramen Chetty v. Sundararaja Naick* (2).

The relief which defendant 2 claims in appeal is first, that, as he was not a necessary party to the suit, his name should be struck off from the record; and secondly, that if there was any cause of action against him it was barred by limitation; that in either case the suit should be dismissed as against him. If defendant 2 is entitled to claim this relief, he is entitled to do so in his sole right. The only person against whom this relief is claimed is the plaintiff. On the death of defendant 1, defendant 2's right to claim this was not affected. A test for deciding whether the right survives was suggested by the Government Pleader, viz., whether the appellant can succeed, and the decree can be reversed, without bringing the legal representative of the deceased party on the record. This test is satisfied in the present appeal. The question on which adjudication is sought by defendant 2 as appellant before us will not affect the deceased party: see *Renga Srinivasa Chari v.*

(1) [1902] 26 Bom. 597=4 Bom. L. R. 325.

(2) [1903] 26 Mad. 499.

Gnanaprakasa Mudaliar (3). An ingenious argument was put forward on this point, that the lower Court's decree entitled defendant 2 to sue defendant 1 for damages for breach of covenant for title if there was any such covenant that defendant 1 was consequently interested in the appeal of defendant 2. The argument does not seem to require any detailed refutation. I hold therefore that the appeal does not abate.

On the merits, several questions of law were argued before us. It is necessary to deal only with the question of limitation. I am of opinion that the claim, if any against defendant 2 was barred.

I express no opinion on the point whether the plaintiff had any cause of action against defendant 2 but will assume that in the circumstances of this case, though the suit was brought by the Collector under Ss. 92 and 93, Civil P. C., such a declaration as is here sought by prayer (b) can be asked and obtained against a person who claims to be a transferee from the trustee.

It was suggested in the first instance that the Collector's right to obtain this relief (assuming it exists) is not barred, as S. 10, Lim. Act, prevents the right to follow the trust property in defendant 2's hands from being barred by any length of time. Defendant 2 has been found to be an assignee for valuable consideration and that finding has not been attacked before us. But it was argued that it has not been found that defendant 2 is a transferee in good faith and that the mere fact of his being a transferee for consideration will not make the plea of limitation available to him unless he is also a transferee in good faith. This contention cannot be upheld. Trust property in the hands of a transferee in good faith for consideration without notice of the trust cannot be followed by the beneficiary at all: see Trusts Act, S. 64. The right to follow arises only where the transferee has not acted in good faith (1). If such a transferee has paid no consideration he is not an assign for valuable consideration within the terms of the Limitation Act, S. 10, and in his case a suit for the purpose of following trust property is not barred by any length of time. But (2) where the transferee is an assign for valuable consideration (a) if he has acted in good

faith without having notice of the trust he acquires immediate title to the property under S. 64, Trusts Act; or (b) if he has not acted in good faith, but has paid valuable consideration, he acquires good title after the lapse of the period necessary for extinguishing (under S. 28, Lim. Act) the right of the beneficiary to follow the trust property in his hands. This is in accordance with principle. Where there is a valuable consideration for the transfer the original trust property is replaced by the consideration. There is no such substitution where there is no consideration. No question is raised here as to the adequacy of the consideration.

If limitation can be pleaded then the article applicable to the suit is Art. 120. This was conceded. It was argued however by the learned Government Pleader that the time did not begin to run from the date of the execution of the sale of 26th January 1899, which is alleged to have been made in breach of trust and a declaration of the invalidity of which is sought in prayer (b) of the plaint but that it began to run only from the time when the Collector was informed of the facts entitling him to take action under S. 92, Civil P. C. It was strenuously pressed upon us that a public officer has no duty cast upon him to go round and examine public trusts and that suits which he is entitled to institute must not be allowed to be barred though he may have no knowledge of his right to sue. The article must however be construed as it is, and I find myself unable to see how the meaning suggested by the learned Government Pleader can be read into the words 'when the right to sue accrues.' The article must be construed as it is, notwithstanding that Art. 134 prescribes a period of 12 years from the date of the purchase from a trustee when possession is sought for. If the Collector can sue under S. 92, Civil P. C., for a declaration against an alleged transferee in breach of trust (on which point I express no opinion), then the suit must, it seems to me be brought within six years of the sale. Time began to run therefore on 26th January 1899, and the suit was brought more than six years thereafter. It was in my opinion barred by limitation.

The appeal will be allowed and the suit dismissed against defendant 2.

(3) [1907] 30 Mad. 67=2 M. L. T. 36.

The costs of both parties to the appeal in both Courts will be payable out of the trust funds, but the appellant will recover his whole costs first and respondent 1 will recover his costs only out of the balance. We are informed that some costs incurred in the lower Court have been recovered by the Collector from the appellant. These will have to be refunded to the appellant, and under S. 82, Civil P. C. we specify four months from this date for this being done.

Spencer, J.—I agree that the appellant can obtain the relief that he seeks in this appeal without making the legal representatives of respondent 2 parties.

In *Durga Charan Sarkar v. Jotindra Mohan Tagore* (4) the test employed for ascertaining whether a particular defendant was a necessary party to the suit was to see: (1) whether there was a right to some relief against him in respect of the matter involved in the suit; (2) whether his presence was necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. The questions involved in an appeal do not necessarily include all questions involved in the suit to which it is related. If we read "appeal" wherever the word "suit" occurs in the above passage and consider what are the reliefs asked for by the appellant in the present appeal, it will appear that he can obtain all that he wants without the presence of defendant 1 or her legal representatives.

There has been considerable divergence of opinion in the reported decisions of Courts of India as to the scope of S. 539 (corresponding to S. 92 of the Code of 1908) before the present Code became law. Now the question as to the powers of a Court proceeding under S. 539 to remove trustees held to be within the competence of the Court by *Subbayya v. Krishna* (5), *Huseni Begam v. Collector of Moradabad* (6), *Girdhari Lal v. Ram Lal* (7), *Sajedur Raja Chowdhuri v. Gour Mohun Das Baishnav* (8), and held to be without the competence of the Court by *Narasimha v. Ayyan Chetti* (9), *Rangasami Naickan v. Vara-*

dappa Naickan (10), *Budree Das Mukim v. Chooni Lal Johurry* (11), *Budh Singh Dudhuria v. Niradbaran Roy* (12), has been settled by the legislature introducing Cl. (a) in S. 92 (1). It is still a debatable question whether alienees or trespassers on trust property can be joined as parties to suit under this section. It was held in *Ghazaffar Husain v. Yawar Husain* (13) that alienees could be impleaded for the purpose of determining what properties are affected by the trust and in *Sajedur Raja Chowdhuri v. Gour Mohun Das Baishnav* (8) that they could be made parties for the purpose of recovering from them properties improperly alienated; but in *Augustine v. Medlycott* (14), *Strinivasa Ayyangar v. Strinivasa Swami* (15), *Hoseni Begam v. Collector of Moradabad* (6), *Kazi Hussan v. Sagun Balkrishna* (16), *Arunachella Chetti v. Muthu Chettiar* (17), *Budree Das Mukim v. Chooni Lal Johurry* (11) and *Budh Singh Dudhuria v. Niradbaran Roy* (12) it was decided that the section was not applicable to suits against strangers to the trust.

Now assuming, without accepting, that the Government Pleader is correct in his contention that the object of the section, as shown by the addition of Cl. 2, is to protect trusts against multifarious suits, that the words of the section are very wide, that the reliefs (a) to (g) are illustrative and do not limit the grant under (h) of such further or other relief as the nature of the case may require, the plaintiff's suit must still fail as against defendant 2 unless he can show that it is in time.

The relief asked against defendant 2 is a declaration that the sale of the trust properties to him is invalid. This suit can hardly be treated as a suit for recovery of possession of trust properties for which Art. 134 would be appropriate.

It was held in *Ottappurakkal Thazhate Soopi v. Cherichil Pallikkal Uppathumma* (18) that the right to sue for a declaration that an alienation of property

(10) [1894] 17 Mad. 462.

(11) [1906] 33 Cal. 789=10 C. W. N. 581.

(12) [1905] 2 C. L. J. 431.

(13) [1906] 28 All. 112 = (1950) A. W. N. 208 = 2 A. L. J. 591.

(14) [1892] 15 Mad. 241.

(15) [1893] 16 Mad. 31.

(16) [1900] 24 Bom. 170=1 Bom. L. R. 649.

(17) [1912] 17 I. C. 586=28 M. L. J. 347.

(18) [1910] 5 I. C. 698=33 Mad. 31.

(4) [1900] 27 Cal. 493.

(5) [1891] 14 Mad. 186=1 M. L. J. 95.

(6) [1898] 20 All. 46=(1897) A. W. N. 210.

(7) [1899] 21 All. 200=(1892) A. W. N. 82.

(8) [1897] 24 Cal. 418.

(9) [1899] 12 Mad. 157.

is invalid falls under Art. 120, Lim. Act, and accrues at the completion of the document, not when the plaintiff obtains knowledge of the alienation. The second defendant purchased under Ex. B on 26th January 1899, and the plaint is dated 7th October 1909. Art. 120 allows six years from the date of the right to sue accruing. The Sub-Judge finds that the Collector became aware of the alienation when he received the report of the Revenue Inspector, Ex. H, dated 19th February 1905; but it appears that he was aware of some trust properties having been misappropriated and alienated when he passed the proceedings Ex. 1, dated 9th June 1899. I therefore consider that the relief sought against the appellant is in any case time barred, and I agree in dismissing the suit against him with costs to be paid as directed in my learned brother's judgment.

S.N./R.K.

Appeal allowed.

A. I. R. 1914 Madras 712

SADASIVA AIYAR AND SPENCER, JJ.

Karuppana Kownden—Petitioner—Appellant.

v.

Kandasawmi Kownden and others—Respondents.

Letters Patent Appeal No. 102 of 1913, Decided on 4th February 1914, from order of Ayling, J., D/- 26th September 1913.

(a) Criminal P. C. (1898), S. 147—Likelihood of breach of peace—Order under S. 147 can be passed.

A Magistrate has jurisdiction to pass an order under S. 147 if he considers that on the date of the order there is a likelihood of the breach of the peace. [P 712 C 2]

(b) Criminal P. C. (1898), S. 147—Flimsy, not strong, fence—Magistrate may deal with it under S. 147 and need not treat it as public nuisance under Criminal P. C. (1898), S. 133.

Where what is constructed is a mere flimsy fence and not a strong one, a Magistrate has jurisdiction to deal with it under S. 147, and not to treat it as public nuisance under S. 133: 4 *Mad.* 121 and 1 *Weir* 143, *Dist.*

[P 712 C 2 ; P 713 C 1]

(c) Criminal P. C. (1898), S. 147—Order can be passed even when right to private path is claimed.

An order under S. 147 can be made even when the right claimed is a right to a private path. [P 713 C 1]

T. V. Muthukrishna Aiyer—for Appellant.

T. Natesa Aiyer—for Respondents.

Order.—The contention of the appellant (see the 3rd ground in the appeal

memorandum), is that because on 20th November 1912 an order had been passed by a Second Class Magistrate under S. 144, Criminal P. C., prohibiting the other party from going through the old pathway in the appellant's land there was no likelihood of a breach of the peace on 25th November 1912 and hence the proceedings of the Sub-Divisional Magistrate taken under S. 147 (the proceedings having been begun on 25th November 1912) were without jurisdiction.

But if the Sub-Divisional Magistrate really thought that, notwithstanding the order under S. 144, Criminal P. C. (passed within a week before his taking steps under S. 147, Criminal P. C.) the likelihood of a breach of the peace still existed, we do not think that it could be argued that the Magistrate was legally incompetent to entertain such a thought and hence was legally incompetent to take action under S. 147. No doubt we, as a Court of revision, might interfere if we considered that his apprehension was quite unreasonable, but we are not satisfied that it was so unreasonable.

The next contention is that as the appellant had obstructed the pathway by a fence, the Magistrate had no jurisdiction under S. 147, Criminal P. C., to order the appellant "not to obstruct" the pathway which order is tantamount to a direction that the appellant shall pull down the fence. The case of *In the matter of Alfred Lindsay* (1) and the case reported as *In re Lutchmiah Maistry* (2) are relied on for the above contention. In *In the matter of Alfred Lindsay* (1) it was held that, where the obstruction to the path was a permanent one consisting of a wire fence, a trench and a wall, and the order of the Magistrate was passed ex parte without due inquiry, such an order was not a proper order to be passed under the old S. 532 (corresponding to S. 147). The learned Judges held that the proper course was to take action under the sections relating to public nuisances (Chap. 10 of the present Code). That case might be distinguished on the ground that the obstruction in this case was a flimsy fence, but whether it is so distinguishable or not we are not prepared to follow it if it was intended to decide therein that the fact, that S. 138, Criminal P. C., expressly provides, for an order by the

(1) [1882] 4 *Mad.* 121=2 *Weir* 113.(2) 1 *Weir* 143.

Magistrate directing the removal of obstruction to pathways, necessarily implies that a similar order cannot be passed in proceedings taken under S. 147, Criminal P. C. The same remark applies to the similar obiter dictum in *In re Lutchmiah Maistry* (2).

We do not think that the doubts, entertained in some cases whether S. 147, Criminal P. C., can be applied when the right of way claimed is a right to a public path and not a private path, have any substantial foundation. The terms of the section are wide enough to cover such disputes also.

Finally we might state that revision under Ss. 435 and 439, Criminal P. C., is a matter of discretion (that is this Court is not bound to interfere even if the Magistrate's order sought to be revised was an illegal order) and it would require a very strong case for a Letters Patent Appeal to succeed against the decision of a single Judge of this Court refusing to interfere in revision.

We therefore dismiss this appeal.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Madras 713

MILLER AND BAKEWELL, JJ.

Giri Appaya and others — Plaintiffs—Appellants.

v.

Giri Kristamma and others — Defendants—Respondents.

Second Appeal No. 1105 of 1912, Decided on 24th April 1914, against decree of Dist. Judge, Vizagapatam, in Appeal Suit No. 425 of 1911.

(a) **Adverse Possession** — Where possession can be referred to legal right, title cannot be acquired by prescription.

Where possession can be referred to a legal right, there is no acquisition of title by prescription. [P 713 C 2]

(b) **Adverse Possession—Heirs of deceased succeed as tenants-in-common—Mere possession of property by one cannot be adverse against other heir unless latter has knowledge of exclusion from enjoyment.**

Where the heirs of a deceased person succeed as tenants-in-common mere possession of the property by one of the heirs of the deceased cannot be adverse against the other, unless there has been exclusion of the latter from enjoyment to his knowledge. [P 713 C 2]

B. N. Sarma—for Appellants.

V. Ramesam—for Respondents.

Judgment. — The plaintiffs alleged that Latchiah, their grandfather, died eight years before their suit. This was found by the District Munsif to be false,

and his finding was not contested in the District Court. This false allegation, we think, may have led the District Munsif to make the issue of limitation depend only on the question of the length of time during which defendant 1 held possession of the property. But taking the District Judge to be right in holding that Latchiah's sons took his property as tenants-in-common, the possession of defendant 1 is referable to his title as one of the tenants-in-common and is not of itself proof that the plaintiff was excluded or that defendant 1's possession was adverse to the plaintiffs, and we have been shown no other facts; and no other facts are referred to by the District Judge, from which it could be found that the possession was adverse. In these circumstances we think it is desirable to allow further evidence on the question of the nature of defendant 1's possession and we will ask the District Judge for a fresh finding on issue 2 having regard to these observations, taking such further evidence as may be adduced.

The finding should be submitted in two months; seven days will be allowed for filing objections.

[In compliance with the order contained in the above judgment the District Judge of Vizagapatam submitted the following:]

Finding.—I am asked to submit a fresh finding on issue 2, viz. Is the suit barred by limitation? in the light of the observations contained in the judgment of the High Court, after recording such further evidence as the parties may adduce. The defendants have examined one witness, viz., defendant 2, and the plaintiffs have examined none. The evidence of defendant 2 is that on the death of Latchiah, defendant 1 got possession of the land and that since then defendants 1-4 have paid the kist due thereon to the Bobbili Maharaja, that the plaintiffs' land is close to the suit land and that defendants 1-4 never gave plaintiffs a share in the produce of the suit land.

The evidence of defendant 2 really adds nothing to the evidence on record. All it amounts to is that defendants 1-4 have been in exclusive possession of the suit land since the death of Latchiah. The High Court had already held in the judgment that such possession is not of

itself proof that plaintiffs were excluded or that the possession of defendants 1-4 was adverse to plaintiffs in the circumstances of the case. I must therefore hold that the possession of defendants 1-4 was not adverse to plaintiffs and consequently that the suit is not barred by limitation.

[This second appeal coming on for hearing this day after the return of the finding of the lower appellate Court on the issue referred to it for trial the Court delivered the following:]

Judgment. — We accept the finding and reverse the decrees of the Courts below. We make a preliminary decree for partition of the plaintiffs' one-third share in the suit lands as prayed in the plaint and direct the District Munsif to effect the partition and make such inquiry as may be necessary to determine the mesne profits due to the plaintiffs from the date of the plaint to the date of delivery or for three years from this date, and to make the final decree.

The defendants must pay the plaintiffs' costs in all Courts.

S.N./R.K.

Decree reversed.

A. I. R. 1914 Madras 714

SADASIVA AIYAR AND TYABJI, JJ.

Phatmabi—Plaintiff—Appellant.

v.

Abdulla Musa Sait—Defendant—Respondent.

Second Appeals Nos. 1470 and 1471 of 1911, Decided on 2nd September 1913, from decrees of Sub-Judge, Kistna, in Appeals Suits Nos. 227 and 300 of 1910.

Mahomedan Law—Wakf—Coincidence of three ancestors being muttawalli does not create hereditary right unless recognized by dedication.

Where a female claims the office of muttawalli of a mosque as a hereditary right on the mere ground that there have been three successive muttawallis from the family to which she belongs, that alone is not sufficient to give her a hereditary right.

There must also be evidence to show that such a hereditary right was either intended by or recognized in the original dedication :
(*Case law discussed.*) [P 716 C 2]

P. Narayanamurthi—for Appellant.

V. Rama Doss—for Respondent.

Tyabji, J.—The plaintiff claims mesne profits in respect of certain wakf properties. The real questions involved in the suit and appeal were the subject of some discussion before us ; but the issues settled by the District Munsif

show that the contention of the plaintiff was that she succeeded to the office of muttawalli of the wakf properties by hereditary devolution, and that she claimed possession of them on that footing as against the defendant ; that the defendant, on the other hand, set up his own title as muttawalli on the strength of an appointment by a person calling himself the Qazi, and also by the members of his community. The real question therefore to be decided by us is whether the plaintiff has made out that she was the actual and rightful muttawalli of the wakf properties for three years succeeding 6th August 1905, and not whether the plaintiff has proved some circumstances which would entitle her claims to be considered, were the Court asked to appoint a muttawalli of the wakf properties. The relative qualifications of the plaintiff and the defendant to be appointed muttawalli need not be considered by us, notwithstanding that as a defence to the plaintiff's claim, the defendant claims to be entitled to hold the office of muttawallis himself as a defence to the plaintiff's claim. It may be that the defendant is not the rightful muttawalli but that would not necessarily entitle the plaintiff to succeed in her suit. The modes in which a person may come to hold the office of muttawalli seem to be laid down in Baillie's Digest of Mohamedan Law (which, it need hardly be said, is a translation merely of the *Fatawa-i-Alamgiri*) on p. 693 of the edition of 1865, corresponding to pp. 603 and 604 of the edition of 1875. It would seem that there are three sources from which a person may trace his right to be a muttawalli :

(1) Appointment by the wakif, that is, the original author of the wakf or by some person expressly authorized by the wakif to appoint ; and in the absence of any person so authorized ;

(2) appointment by the executor of the wakif and in the absence of such appointment,

(3) appointment by the Court.

If the statement given above correctly represents the text of the *Fatawa-i-Alamgiri* then any title to be a muttawalli must be derived from one of two main sources, namely either the wakif himself or the Court.

The authority vested in the wakif to appoint muttawalli may be exercised

either by himself directly or through another person ; he may delegate his authority in any manner provided for by him at the time when the property is dedicated by way of wakf ; in other words, at the time of the dedication, he may lay down who shall have the power of appointing muttawallis in future, and what way the power to appoint must be exercised.

The terms of the dedication, including the provisions relating to the objects of the wakf, and to the management of the property belonging to it need not be reduced to writing, so that there need not be a wakfnama containing the terms on which the dedication to wakf is made. Where however the terms of dedications are formally reduced to writing in the shape of a wakfnama, it is usual to include therein provisions relating to the appointment of successive muttawallis. Hence, it is generally assumed that there must be some such provisions laid down by the wakif even where the original dedication is not in writing, or at any rate no document containing the terms of the dedication is produced. As a consequence of these assumptions, where there has been a series of appointments of muttawallis, it is generally assumed that the appointments have been valid, which implies that such appointments have been made in accordance with the terms of the original dedication relating to the mode in which the successive appointments have to be made. Thus, from the history of previous appointments, the directions contained in the original dedication, with reference to the mode in which the successive muttawallis are to be appointed, may be inferred. This inference, it is obvious, is based on what in a great number of cases must be recognized to be mere fictions, namely that the original dedication, even though it be oral and informal, contained specific provisions relating to the mode of appointment; and secondly, that the appointments in the past have been valid and in strict accordance with the provisions so assumed to be laid down at the time of the original dedication. It must frequently happen that, at the time when the dedication is made, there are no provisions laid down with reference to the appointment of successive muttawallis. Again, it is quite in accordance with common know-

ledge that, on the death of a person holding an office of such a character as the muttawalliship of a wakf, his descendants or relations should slide into the office without anyone being concerned to question their right to do so and without any pretence on the part of the new office-holder that his succession is in accordance with the terms of the original wakfnama, or the expressed or implied desires of the wakif. On such successive acts of usurpation, it is easy to found a claim that the office is hereditary, a claim which, however difficult it may be to resist in Court, may be quite opposed to the real intentions of the wakif.

Similarly, a claim to be a muttawalli may be based on the fact that the last muttawalli purports to appoint the claimant as his successor. The recognition of a claim based on such an appointment equally proceeds on the assumption that the terms of the dedication of the wakif empowered each muttawalli to nominate his successor. The law does not directly empower the muttawalli of every wakf to appoint his successor but if in regard to any particular wakf, it is proved that the muttawallis have been in the practice of nominating their successors, it is assumed that the practice had a lawful origin and was founded on some provisions contained in the wakfnama or some oral directions given by the wakif empowering the muttawallis to nominate their successors. Provisions in the wakfnama empowering the muttawallis to nominate their successors are so usual that it would perhaps be representing the present state of authorities more nearly if it were said that the Courts assume the existence of such a provision in the dedication unless the contrary is proved.

It will be seen therefore that a claim based on the allegation, either that the office is hereditary or that the muttawalli nominated the claimant as his successor must ultimately have reference to the actual or the presumed directions of the wakif at the time when the dedication was made.

The claim made by the plaintiff in this case must, if at all, be supported on considerations which must be brought under one of the various heads to which I have alluded.

Much reliance was placed by the pleader for the respondent on the observations in the case of *Sayad Abdula Edrus v. Sayad Zain Sayad Hasan Edrus* (1), where it was said that where a custom is alleged "that the eldest son succeeds by virtue of inheritance, that custom, being opposed to the general law, must be supported by strict proof." It may, no doubt, be conceded, on the other hand, that where the object of the wakf in question is not to support a public charity, but to provide for the maintenance of a family, the Courts might be satisfied with less strict proof in order to hold that the management of the property devolves hereditarily on members of the family of the beneficiaries. To this consideration must be added the fact [which was also alluded to in *Sayad Abdula Edrus v. Sayad Zain Sayad Hasan Edrus* (1)] that the law favours the claim of the members of the wakif's family to be muttawallis and "in the Usul, it is stated that the Judge cannot appoint a stranger to the office of administrator so long as there are any of the house of the appropriator fit for the office, and if he should not find a fit person among them, and should nominate a stranger, but should, subsequently find one who is qualified, he ought to transfer the appointment to him:" See Baillie's Digest (1865), pp. 593 to 594; (1875), p. 604.

The result of these rules of law, so far at present material, would seem to be that the question in a case like the present is not merely whether the succession to the office of mattawalli has for some time been devolving hereditarily but whether there are sufficient grounds for holding that the original dedication by way of wakf contained a provision to the effect that the office is to devolve hereditarily. I have already stated that in my opinion, what may be considered sufficient grounds in the case of a wakf of one class may not be sufficient in the case of a wakf of another class.

In the present case, there is no allegation, still less any proof, that the wakf is of a nature which would in the ordinary course be expected to be administered by a succession of hereditary muttawallis chosen from one family. Hence there is no reason to consider the evidence in this case from an attitude more

favourable to the plaintiff than is implied in the decision to which I have referred, and it is not alleged or proved that the plaintiff has been nominated to be muttawalli by the last office-bearer. Under these circumstances, the facts on which the plaintiff relies, namely that there have been from some time previous to 1874 three successive muttawallis from the family to which the plaintiff belongs seems to me to be totally insufficient for supporting the allegation that in accordance with the terms of the original dedication, the muttawalliship of the wakf ought to devolve hereditarily. I do not allude more fully to the various facts in this case, on which the respondent relies, as tending to throw doubt on the allegation that the three successive muttawallis in question rightfully succeeded to that office, for it seems that, for the purpose of the present appeal, it may be conceded that they were rightful holders of the office, and yet there is nothing to show that they proposed to succeed to the office not through some appointment or nomination, but as of right. Even if it were assumed that they purported to succeed by right of inheritance there is nothing from which a rule of succession can be deduced sufficiently precise or definite for presuming that such a rule was contained in the wakf-nama or the terms of the dedication. Unless all these facts are alleged and proved I am unable to see how the plaintiff can succeed in her claim as it has been framed. These reasons for holding that the decision appealed from ought not to be disturbed seem to me to apply with greater force when it is borne in mind that we are sitting in second appeal and that it is not easy to class some of the questions to which I have alluded as questions purely of law.

I am therefore of opinion that the appeal should be dismissed with costs.

Sadasiva Aiyar, J.—I entirely agree, and I shall only add that a claim to succeed by hereditary right to a trustee's office, or to a religious office, or to any other office should be looked upon with strong disfavour by Courts, whether the office was created by a Hindu or a Mahomedan or an adherent of any other creed. The holding of any office should depend upon necessary qualifications, and, while heredity might raise a feeble presumption of fitness to be considered by a Court

(1) [1889] 13 Bom. 555.

in arriving at a decision on the question of the successorship to the office, it should not be raised to the dignity of a principle which creates a right of succession to any office, unless the terms of the original foundation of the office constrain the Courts to treat heredity as the factor to be considered in deciding on the right to the office or unless there has been such a precise and uniform course of descent (by heredity almost irrespective of any consideration as to the personal fitness for the office) as to raise an irresistible inference as to the intention of the original creator of the office.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Madras 717

WHITE, C. J., AND OLDFIELD, J.

Sowcar Bapu Saib Yussuf Saib & Co.
—Appellants.

v.

Isoct Ismail & Co.—Respondents.

Original Side Appeal No. 82 of 1912, Decided on 31st March 1914, from judgment and order of Wallis, J., D/- 17th September 1912, in Original Civil Suit No. 262 of 1910.

(a) Limitation Act (1908), Art. 85—What constitutes mutual, open and current account, stated.

In order that an account should, under Art. 85, constitute "mutual, open and current account" not only must it be mutual, open and current, but there should also be reciprocal demands between the parties. [P 718 C 2]

(b) Limitation Act (1908), Art. 85—Contract creating right to demand account of plaintiff's dealings as defendant's agent, and right in plaintiff to demand delivery of goods every month—Account was held to be mutual, open and current.

Where a contract creates a right in the defendant to demand an account of the plaintiff's dealings as the defendant's agent, and a right in the plaintiff to demand from the defendant delivery of goods to a specified amount every month, there is a mutual, open and current account within the meaning of Art. 85, Sch. 1, Lim. Act, though there are no reciprocal credits and debits: 8 I.C. 141, *Dist.*; *Catling v. Skoulding*, 101 E.R. 504, *Foll.* [P 718 C 2]

(c) Limitation Act (1908), Art. 85—(Per *White, C. J.*)—Party making advance to another enabling him to carry on business—Execution of pro-note by latter for advanced amount does not make it cease to be item of debit—(Per *Oldfield, J.*, contra).

Per *White, C. J.*—Where one party makes an advance to another to enable him to carry on business with him, the fact that the latter executes to him a promissory note for the amount advanced does not make it cease to be an item of debit as against him in the mutual, open and current account: (Per *Oldfield, J.*, dissenting). [P 719 C 1]

G. Krishnasami Aiyar and *P. C. Desikachariar*—for Appellants.

C. P. Ramasami Aiyar—for Respondents.

White, C. J.—In this case the plaintiff sues on the balance of an account in connexion with the sale of skins by him as the agent of the defendant. The defendant pleaded to the jurisdiction and he also pleaded limitation. At the trial before Wallis, J., he sought to show that the initials to a document on which the plaintiff relied, which purported to be the initials of the defendant, were forged.

As regards the question of jurisdiction, on the facts as found by the learned Judge—and I am not prepared to dissent from his findings of fact—I agree that this Court has jurisdiction.

As regards the suggested forgery, the Judge believed the plaintiff and disbelieved the defendant and I am certainly not prepared to differ.

As regards the question of limitation, the plaintiff's case is that the balance for which he sues is a "balance due on a mutual, open and current account where there have been reciprocal demands between the parties" within the meaning of Art. 85, Sch. 1, Lim. Act. The suit was instituted on 28th September 1910. The last item in the account on which the plaintiff sues is dated 3rd March 1908.

In July 1907 the plaintiff made an advance of Rs. 10,000 to the defendant in order to enable the defendant to carry on business with the plaintiff. This Rs. 10,000 was made up of four amounts, the last advance (Rs. 1,500) having been made on 23rd July 1907. On this date the defendant executed a promissory note in favour of the plaintiff for Rs. 10,000 with interest at 12 per cent. The promissory note was filled up from a book of forms and on the counter foil of the note there was an endorsement which was initialed by the defendant. The translation of this endorsement adopted by the learned Judge was "Having in consideration of your selling for us the dressed skins, which we shall send from this day, agreed (to pay) commission at Rs. 2-8-0 per Rs. 100, to send more, than but not less than Rs. 15,000 of goods per mensem and to make good and pay commission at Rs. 2-8-0 per Rs. 100 if the goods so fall short of Rs. 15,000 (we) have as advance from you received:

	Rs.
On 16th July 1907 ...	5,000
„ 19th „ ...	1,000
„ 20th „ ...	2,500
„ 23rd „ ...	1,500
<hr/>	
Total ...	10,000

The parties began to do business at once. There are three accounts in the form of pattis, which were delivered to the defendant. The first entry in the first account bears date 25th July 1907. In these pattis the defendant is not credited with Rs. 10,000, the amount mentioned in the promissory note, nor with the several amounts which went to make up the Rs. 10,000. The defendant contended that even if the items of account mentioned in the pattis constituted a mutual, open and current account (the defendant contended they did not), the amount mentioned in the note represented an independent transaction, and that any claim based on the note was time-barred.

The course of business, as shown in the pattis, was for the plaintiff to sell skins sent to him by the defendant on the defendant's behalf, to credit the defendant with the sale proceeds less the plaintiff's commission of two and a half per cent., and from time to time to make payments in round sums to the defendant on account of skins supplied. So far as the pattis go, none of these payments was credited to the defendant in respect of his liability for the Rs. 10,000 under the promissory note, or in respect of the sums advanced partly prior to the execution of the note which made up the Rs. 10,000. There is however a reference in one of the pattis to this advance of Rs. 10,000.

It has been contended on behalf of the defendant that excluding the Rs. 10,000, the account does not show independent obligations on both sides and consequently that Art. 85 does not apply. The decision of this Court in *Shive Gowda v. Fernandes* (1) was relied upon. I am of opinion that the present case is distinguishable on the facts from *Shive Gowda v. Fernandez* (1). In that case, the contract, though no doubt similar to the contract in the present case, was held to be a contract under which the plaintiff financed the defendant and the defendant kept the plaintiff secured in respect

of advances made by the plaintiff on the defendant's behalf by consigning to the plaintiff goods of a value equal to the amount of the defendant's indebtedness to the plaintiff. In the present case the plaintiff as the agent for the sale of the defendant's goods was liable to account to the defendant and the defendant was liable to supply the plaintiff with goods up to a specified amount per month. In my opinion the account as shown in the pattis was an account to which the article applies.

The question remains: Is the plaintiff entitled to include in the account the Rs. 10,000? This is a question of some little difficulty. The advance of the sum of Rs. 10,000 is debited against the defendant in the plaintiff's books, and I do not think he is precluded from showing that the items in respect of the Rs. 10,000 formed part of the account on which he sues by reason of the fact that the items do not appear in the pattis sent to the defendant. The plaintiff's claim for the repayment of the Rs. 10,000 is a debit item in his account against the defendant, as it seems to me, notwithstanding that the defendant was not to be liable to repay this amount so long as the parties continued to carry on business. The learned Judge held that the parties contemplated the opening of a mutual, open and current account which should include the defendant's indebtedness in respect of the advance of Rs. 10,000. I am not prepared to differ. The article, no doubt, requires that, not only must the account be mutual, open and current, but that there should have been reciprocal demands between the parties. In the present case, under the contract we have a right in the defendant to demand an account of the plaintiff's dealings as the defendant's agent and a right in the plaintiff to demand from the defendant the delivery of skins to the value of Rs. 15,000 a month, and in the event of his failing so to deliver, the payment of the plaintiff's commission in the same way as if the defendant had in fact delivered.

Assuming that there was no obligation on the part of the defendant to repay the Rs. 10,000 (either as due under the note or as due for the advances which made up this Rs. 10,000), so long as the parties carried on business this does not

(1) [1911] 8 I.C. 141=34 Mad. 513.

prevent the account, including the Rs. 10,000, from being an account to which the article applies.

Before the learned Judge the defendant asked that an account should be taken. The learned Judge directed the taking of an account in chambers, but there was no direction as to the footing on which the account was to be taken up. It is not altogether easy to say what the contract between the parties was. Reading the contract literally it might be said that the plaintiff was entitled to claim damages for non-delivery of the skins of the value of Rs. 15,000 a month without limit as to time. I do not think that the plaintiff can claim repayment of the Rs. 10,000, on the footing that the contract has come to an end, and continuing damages for non-delivery of skins on the footing that the contract still subsists. I should have been disposed to hold that the plaintiff was entitled to claim damages up to the institution of the suit, when by claiming repayment of Rs. 10,000, he intimated to the defendant that he treated the contract as at an end. The plaintiff however does not claim damages after May 1909, when he says he gave up business. It has been contended for the defendant that he is only liable in damages up to May 1908, when he ceased to supply the plaintiff with goods. Assuming that under the contract it was open to the defendant to put an end to the contract at any time, I do not think that the contract can be said to have been terminated merely by reason of the fact that the defendant ceased to supply the plaintiff with goods.

The accounts were taken and the final decree given on the footing that the defendant was liable in damages up to May 1909. The defendant did not object to the final decree as given to the plaintiff. Assuming that, notwithstanding this it is open to the defendant in the appeal before us (which is an appeal from the preliminary decree) to ask that a new account should be taken, I am not prepared to hold that the account already taken was taken on a wrong footing and that damages up to May 1909 ought not to have been given. I would dismiss this appeal with costs.

The result is the appeal is dismissed with costs.

Oldfield, J.—I agree with the learned

Chief Justice except as regards the plaintiffs' claim to recover Rs. 10,000, and therefore confine my judgment to the question of limitation connected with it. The claim is within time if it can be held that the Rs. 10,000 are part of the balance due on an open, mutual and current account within the meaning of Art. 85 Lim. Act. I assume for the present purpose that there was, as the learned Chief Justice has found an account of that nature between the parties which included the other items claimed.

Shive Gowda v. Fernandes (1) and the other cases cited do not seem to me in point, for they deal with the question whether an account is covered by the article, not whether, when the existence of an account covered by it has been established, a particular item can be treated as included in it.

It cannot I think be contended that because such an account has existed between parties every liability between them, whatever its nature and whenever it arose, can be included in it by the plaintiffs in order to secure the application of an extended period of limitation. That would entail the revival of liability for a balance, otherwise irrecoverable, in any case in which the plaintiffs succeeded by purchase of a later debt or otherwise in becoming the creditor of the defendants, and it would be inconsistent with the basis on which the favourable treatment accorded to suits on accounts is explained in *Catling v. Skoulding* (2) "that every new item and credit in an account given by one party to the other is an admission of there being some unsettled account between them, the amount of which is afterwards to be ascertained." Art. 85 deals with accounts in which there have been reciprocal demands between the parties that is, not merely accounts including items in respect of which there have been actual demands, but also those including or composed of items in respect of which according to the intention of the parties demands might actually have been made. Such an intention may no doubt ordinarily be presumed. But that presumption may be displaced by proof of the intention of the parties, expressed or implied.

The intention of the parties to this appeal with reference to the Rs. 10,000 now in dispute must, I think, be inferred

(2) 6 Term. Rep. 189=101 E.R. 504.

from Ex. B series, the pattis sent by the plaintiffs to the defendants, not from Exs. D, E, F, plaintiffs' ledgers, because the latter which contain an entry of the defendants' debt were never communicated to them, whilst the former, which contain none, were. Ex. B series in fact refer to the Rs. 10,000, not as due, but only in Ex. B-2 in the description of the agreement under which commission at 2½ per cent. was chargeable and in connexion with an entry of it. Amounts realized were credited to defendant, in these pattis and commission and advances were debited against them, a balance being struck. But when there was money to their credit, it was not applied to the reduction of the Rs. 10,000 debt nor was that debt taken into account in striking the balances.

The Rs. 10,000 were advanced by the plaintiff in the circumstances stated by the learned Chief Justice. The plaintiffs pleaded that so long as it remained unclosed (that is, outstanding) by mutual consent they were to be entitled to 2½ per cent. per month on Rs. 15,000, that being the amount up to which the defendants undertook to send skins to them for sale, whether skins to that value were actually sent or not. I understand this as meaning that either might at any time terminate the advance of the rupees 10,000, the defendants by repaying it, the plaintiffs by demanding its repayment the only way in which the skin transactions would be affected being that the defendants' liability for commission on a fixed amount and their obligation to continue the trade would cease. One material fact is then that the Rs. 10,000 were not under the agreement to be repaid by any application of the realization in the plaintiffs' hands and there was, therefore, no necessity for their inclusion in an account relating to those realizations. Another material fact is that the debt was repayable on demand. That does not follow only from its embodiment in a promissory note, Ex. 3, it rests also on the absence of any evidence that a term was fixed after which repayment

might be demanded. It is no doubt probable that the parties intended that the Rs. 10,000 should not be repaid until the trade was closed, defendants being thus enabled to buy skins with it and plaintiffs to put pressure on them to do so. But that is not proved to have been part of the contract, and I agree with the learned Judge that it cannot be read into it. Lastly the Rs. 10,000 were as Ex. 3 shows, advanced at 12 per cent interest and there is no reason for accepting the plaintiffs failure to claim that interest as justifying their assertions (otherwise unsupported) in argument that no payment of interest was ever intended. When substantial interest was accumulating, the failure to realize the principal debt at the earliest opportunity by credits acquires additional significance.

The result is that nothing in the agreement between the parties involved the inclusion of the Rs. 10,000 in the account between them and that they were due and could have been included in the accounts, Ex. B series, from the beginning; but that the plaintiffs did not include them, though owing to the running of interest it would have been advantageous to the defendants if they had done so, their own advantage on this score perhaps accounting for their omission. In these circumstances there is sufficient to rebut any presumption that the parties intended to include the Rs. 10,000 in the account between them. The plaintiffs' exclusion of it would in fact appear to have been deliberate.

I am therefore constrained to differ from the learned Chief Justice and to hold that the Rs. 10,000 are not recoverable as part of a balance covered by Art. 85. The suit in respect of them should therefore, in my opinion have been dismissed and the appeal should be allowed. I agree that the appeal should be dismissed in other respects.

By the Court.—The result is the appeal is dismissed with costs.

S.N./R.K.

Appeal dismissed.

equity, be allowed to insist upon and enforce the contract." The distinction between Courts of Equity and Common Law does not exist in India. But the exception referred to by Cotton, L. J., necessarily presupposes that the trust has already been created, that the progress towards being a trustee has been completed, as I have already pointed out.

It would therefore appear that some of Sir Lawrence Jenkins' remarks in *Deb Narain's* case (2) might be misleading if they are not read in connexion with the facts of the particular case.

In connexion with the law as enforced by the Courts of equity in England it may be well to refer to *In re Empress Engineering Co.*(10) which contains the following comment by James, L. J., on *Gregory v. Williams* (6) most nearly approaching to the contention put forward on behalf of the appellant: "In *Gregory v. Williams* (6) the man with whom the contract was made was one of the plaintiffs and the only defence there would have been misjoinder of plaintiffs, and that is a defence which the Court was not likely to view with much favour." In *Deb Narain's* case (2) the original promisee was not a plaintiff, but he was one of the parties to the suit.

The result may therefore be shortly stated that no case has been cited to us in which, unless the contract has been partly or fully performed, so that a trust has been already created, a suit on a contract has, under circumstances similar to those with which we have to deal, been allowed to be maintained without the presence on the record of all the parties to the contract, and no English case has been cited in which one of such parties is not a plaintiff.

It has been pressed upon us however that we are not bound necessarily to follow the law as laid down by the English Courts; that in the absence of legislative provisions the law of our Courts is that indicated by justice, equity and good conscience. One of the circumstances owing to which it has been suggested that the rule that ought to be followed by us must be different from that which prevails in England is that the definition of "consideration" contained in the Contract Act, S. 2(d), does not require that consideration should necessarily move from the party seeking to enforce the contract. This circumstance may not be so relevant to the point under consi-

deration as might at first appear, for the definition of "consideration" in the Contract Act has direct reference in its very terms to the parties to the contract who are referred to in the Act as the promisor and promisee. The effect of S. 2 (d) is that if a promisee wishes to have the contract enforced, his promisor cannot object that the consideration proceeded from a third party, and not from the promisee seeking to enforce the contract. It does not seem to me to be equally clear that the definition can affect the question whether a third party (who is neither the promisor nor the promisee) can enforce the contract. If A and B agree that in consideration of X paying to B Rs. 100, B will repair A's house, it is true that A can enforce the contract against B, who cannot object that he received the money from X and not from A (though, if X does not pay, there may be a failure of consideration and B may be entitled to rescind the contract on that account). On this point the English law does not seem to be different: *Davenport v. Bishopp* (12) and *Gandy v. Gandy* (8). But is the definition of any assistance in considering whether X can sue on a contract by which A promises B that A will pay to X Rs. 100? The definition refers to the third party (X) as the person from whom the consideration moves; not as the person (being neither the promisor nor the promisee) for whose benefit the contract is made. The definition can therefore have only a remote bearing on the totally distinct question whether a person, who benefits by a contract but who is not the promisee, can sue on the contract.

Finally it has been contended that the rule against a stranger to a contract being allowed to sue is one merely of procedure and that we should not hesitate to disregard it in order to do justice. It is indeed described as a rule of procedure by Willes, J., in *Gray v. Pearson* (13), but in terms which are far from implying that therefore the rule is opposed to justice and should be disregarded. He says: "I am of opinion that this action cannot be maintained, and for the simple reason—a reason not applicable to merely the procedure of

(12) [1843] 63 E. R. 201=2 Y & C. C. C. 451=12 L. J. Ch. 492=7 Jur. 1077=1 P. L. 698=65 R. R. 488.

(13) [1870] 5 C. P. 568=28 L. T. 416.

this country, but one affecting all sound procedure — that the proper person to bring an action is the person whose right has been violated. Though there are certain exceptions to the general rule, for instance, in the case, of agents, auctioneers or factors, these exceptions are in truth more apparent than real."

It was pressed before us however that the Privy Council have definitely stated that *Tweddle v. Atkinson* (5) was not applicable to the facts and circumstances of the case before them, and that serious injustice might result if the Common law doctrine had been applied thereto and this supplied, in the words used in *Deb Narain v. Ram Sadhan Mandal* (2), "ample authority for saying that the administration of justice in these Courts is not to be in any way hampered by the doctrine laid down in *Tweddle v. Atkinson* (5)." It seems to me, with great respect, that this argument is based on a misapprehension of the Privy Council decision. Their Lordships only say that the Common law doctrine did not apply to the facts and circumstances of the case before them, but that doctrine would not, it seems to me, be applicable in England in a case where immovable property is specifically charged for the sole benefit of a third party in consideration of her marriage and where she is a minor whose natural guardian is a party to the contract and when the marriage has already taken place and everything done to complete the creation of the trust. Their Lordships of the Privy Council do not purport to go beyond what the Courts of equity would have done in England; this is expressly stated by them. Assuming however that they intended to say that the law prevailing in England should not be applied in disregard of the circumstances in India — and that would not be any new proposition — it is necessary to bear in mind that in any case a person who is not a party to the contract cannot be permitted to enforce it without being subject to all the equities which would be present between the parties themselves; and this would almost invariably necessitate that all the parties to the contract should be impleaded in the suit: the question whether the contract is revokable at the option of either of the parties or whether it has been altered by mutual consent or been performed in part, whether the parties can

be restored to their original position, and other similar questions would have to be considered and would affect the third party's claim: see *In re Empress Engineering Co.* (10) and the interlocutory remarks of Jessel, M. R., during arguments; and per Grant, M. R., in *Gregory v. Williams* (6).

In all these respects the plaintiff's suit is defective.

I am therefore of opinion that the principle that the proper person to bring an action is the person whose right has been violated: see per Willes, J., in *Gray v. Pearson* (13), a principle recognized both by Common law and equity [see per Lord Lindley *In re Rotherham Alum and Chemical Co.* (9)], applies in India also no less than in England, and that, except in cases which are not material at present the person who acquires a right to enforce a contract of such a nature as we have to deal with is the promisee and not a stranger to the contract, who may benefit under the contract, and that therefore the lower Courts were right in dismissing the plaintiff's suit.

The appeal will be dismissed with costs.

Ayling, J.—I agree.

S.N./R.K.

Appeal dismissed.

A. I. R. 1914 Madras 706

WHITE, C. J. AND SANKARAN NAIR, J.
Ramakrishna Mallya—Plaintiff—Appellant.

v.

Baburaya alias *Venkatesha Hegade* and others—Defendants—Respondents.

Second Appeal No. 1425 of 1910, Decided on 13th November 1912, against decree of Temporary Sub-Judge, South Canara, in Appeal Suit No. 376 of 1908.

(a) Landlord and Tenant—Ejectment suit based on leases prior to Transfer of Property Act — Landlord's act showing election to take advantage of forfeiture of non-payment of rent is unnecessary.

In an ejectment suit, based on leases executed prior to the Transfer of Property Act, no act on the part of the landlord, showing that he elects to take advantage of the forfeiture for non-payment of rent, is necessary: 6 I. C. 447, Foll.; 31 Mad. 403, Dist. [P 707 C 1]

(b) Landlord and Tenant — Whether tenant is entitled to relief against forfeiture depends on particular case.

Whether a tenant is entitled to relief against forfeiture for non-payment of rent depends upon the circumstances of each case.

[P 708 C 2]

(c) Landlord and Tenant — Tenant should be relieved against stipulation that value of

improvements will be lost on failing to pay rent.

A stipulation that the tenant failing to pay rent shall lose the value of his improvements is held merely in terrorem over him, and ought to be relieved against: 6 *Mad.* 159 and 6 *M. H. C. R.* 258, *Foll.*; 15 *M.L.J.* 210 and 12 *I. C.* 456, *Dist.* [P 708 C 2]

(d) **Landlord and Tenant** — Tenant pleading but failing to prove payment does not disentitle him to equitable relief.

The fact that tenant pleads payment, which he fails to prove, does not in itself disentitle him to equitable relief. [P 708 C 2]

K. Ramanatha Shenoi—for Appellant.

K. P. Lakshmana Rao — for Respondents.

Judgment.—We agree with the Court below that on the true construction of the lease (Ex. A) the sub-lease by defendant 1's father did not work a forfeiture. The lower appellate Court, in holding that, assuming there was a forfeiture by reason of non-payment of rent, it could not be enforced as the plaintiff had not done any act to show that he intended to avail himself of the forfeiture, would seem to have followed the decision of this Court in *Venkatramana Bhatta v. Gundaraya* (1). In that case however it was not brought to the notice of the Court that the lease in question was prior to the coming into operation of the Transfer of Property Act. The lease in the present case was made in 1871 before the Transfer of Property Act came into operation and this being so, according to the decision in *Padmanabaya v. Ranga* (2), an act on the part of the landlord showing he elects to take advantage of the forfeiture is not a condition precedent to his right to sue in ejectment. There is no finding by the lower appellate Court as to whether, on the construction of the lease, non-payment of rent operated as a forfeiture. We accordingly send back the case to the lower appellate Court for a finding on this question and also, if the Court holds there has been a forfeiture by reason of the non-payment of rent, for a finding as to the terms, if any, on which the defendant is entitled to be relieved against the forfeiture. The findings should be submitted within one month after the re-opening of the Sub-Court, and seven days will be allowed for filing objections.

[In compliance with the order contained in the above judgment, the Subordinate

Judge of South Canara submitted the following:]

Findings.—The two issues on which this Court has been directed to submit its findings are: (1) Whether on the construction of the lease non-payment of rent operated as a forfeiture. (2) If there has been a forfeiture by reason of the non-payment of rent, whether the defendant is entitled to be relieved against it on any and what terms? The stipulation in question in the suit lease A is to this effect: "I have no cause whatever either or to keep the rent in arrears. In case any small portion of the aforesaid rent is kept in arrears or in case I shall deliver back the said land etc., and all to you without demanding from you the value of the improvements made by me." As observed in *Subbaraya Kamti v. Krishna Kamti* (3), from the circumstance that the stipulation in question is that, if any portion of the rent should fall into arrears, the property should be surrendered with all right to improvements, (i. e.) without claiming the value of improvements, it might be reasonably inferred that such provision was made in order that it might operate as a fear in the mind of the lessee that the rent should be regularly paid and the parties did not seriously intended that it should be acted upon. In a word this stipulation was inserted in terrorem: see also *Kottal Uppi v. Edavalath Thathan Nambudri* (4).

Further, there is this important fact that the lease does not provide for any period of grace in respect of the payment of arrears of rent. It has been settled beyond any doubt or controversy that, when such is the case, the forfeiture arising from non-payment of rent will be one that can be relieved against: vide *Mahalakshmi Amma v. Lakshmi* (5), *Narayana Naicker v. Vasudeva Bhatta* (6), *Narayana Kamti v. Handu Shetty* (7) and *Adiraya Shetty v. Billa Tyampu* (8). Having regard to the intention of the parties, which can be gathered and reasonably inferred from the insertion of such stipulation as the one in question, and also to the circumstance that the lease provides for no period of grace, I

(3) [1883] 6 *Mad.* 159.

(4) 6 *M.H.C.R.* 258.

(5) [1911] 12 *I.C.* 456.

(6) [1905] 28 *Mad.* 389.

(7) [1905] 15 *M.L.J.* 210.

(8) [1910] 6 *I.C.* 498.

(1) [1903] 31 *Mad.* 403.

(2) [1911] 6 *I.C.* 447=34 *Mad.* 161.

should hold that the forfeiture under consideration is one that can be relieved against. The defendants are entitled to have such equitable relief granted to them.

Before the defendants can claim such equity they must be prepared to do equity. It will be incumbent upon them to pay up the arrears of rent due by them. Defendant 2 pleaded discharge. Issue 2 in the case was, "whether the payments of rent and thirva pleaded are true." There was no evidence to prove that issue and it was found in the negative. The rent claimed by the plaintiff is due to him. The defendants not only failed to tender it in Court but also set up a false plea of discharge. The plaintiff will be entitled to get the arrears of rent due to him and that with interest. Having regard to the fact that there was no tender on the part of the defendant even after the suit was brought but he, on the other hand, falsely pleaded payment, it will not be unreasonable or inequitable to allow plaintiff interest at the rate of 12 per cent per annum. Plaintiff will also be entitled to get his full costs of the suit including the costs on the claim for recovery of possession of the suit property: vide *Subbaraya Kamti v. Krishna Kamti* (3) already referred to at p. 167.

For paying up the plaintiff the arrears of rent claimed by him with interest thereon at 12 per cent per annum from the date on which the rent fell due up to the date of payment and also full costs, some reasonable time will have to be allowed to the defendants. Under the circumstances, I am of opinion that it will be sufficient if three weeks' time from the date of disposal of this second appeal in the High Court is allowed to them. There will be no loss or inconvenience to the plaintiff as he gets interest at the aforesaid rate up to the date of payment. If the defendants, with a view to avoid the burden of paying interest, wish to pay up the amount earlier they will be at liberty to pay it to the plaintiff through Court.

For the reasons set forth above I find on these 2 issues that, if the defendants should pay up what is mentioned supra within the time specified therein, they would be entitled to have the forfeiture in question relieved against.

[The second appeal coming on for final hearing after the return of the findings

from the lower appellate Court upon the issues referred by the High Court for trial, the Court delivered the following:]

Judgment.—The question whether a tenant is entitled to relief against forfeiture for non-payment of rent must depend on the facts of the particular case. Here we think on the authority of the decision in *Subbaraya Kamti v. Krishna Kamti* (3), following *Kottal Uppi v. Edavalath Thathan Nambudri* (4), the tenant is entitled to relief. The cases relied on by the plaintiff (the landlord) are distinguishable. In *Narayana Kamti v. Handu Shetty* (7) a long period was allowed, some eight months, after default, before the forfeiture was to take effect and, apparently, there was no stipulation that the tenant should, on default, lose the value of his improvements. In *Mahalakshmi Amma v. Lakshmi* (5) a period of grace was also allowed. There was no doubt a stipulation in that case that the tenant, on default, should lose the value of his improvements, but the effect of this stipulation is not discussed in the judgment.

We do not think the fact that the tenant sets up a plea of payment which he fails to prove, necessarily in itself, disentitles him to equitable relief.

We accept the finding and modify the decree of the lower appellate Court in accordance with the finding. The plaintiff is entitled to his costs throughout.

In default of payment of rent and interest within the time allowed, the plaintiff may recover possession.

S.N./R.K.

Decree modified.

A. I. R. 1914 Madras 708

TYABJI AND SPENCER, JJ.

Chettikulam Prasanna Venkatachala Reddiar—Defendant—Appellant.

v.

Collector of Trichinopoly and another—Plaintiff and Defendant—Respondents.

Civil Appeal No. 263 of 1911, Decided on 30th March 1914, from decree of Sub-Judge, Trichinopoly, in Original Suit No. 2 of 1910.

(a) Civil P. C. (1908), O. 22, Rr. 3 and 11—Fact that one respondent is dead and his representatives not brought on record will not make appeal abate if right survives to appellant.

The mere fact that one of the respondents is dead and that his representative is not brought on the record, will not make the appeal abate if the right survives to the appellant and the

result of the adjudication will not affect the deceased party. [P 709 C 2]

(b) Limitation Act (1908), Arts. 120 and 134—Suit to set aside alienation of trust property is governed by Art. 120 and not Art. 134.

A suit for declaration that the sale of trust property by a trustee is invalid is not a suit for recovery of possession of trust property within the meaning of Art. 134, Lim. Act and is therefore governed by Art. 120 of the Act. [P 710 C 2]

(c) Limitation Act (1908), S. 28—Distinction between alienee in good faith for consideration and alienee for consideration but not in good faith stated.

Trust property in the hands of a transferee in good faith for consideration without notice of the trusts cannot be followed by the beneficiary at all, but where a transferee has paid valuable consideration but has not acted in good faith, he acquires good title after the lapse of the period necessary for extinguishing (under S. 28 Lim. Act), the right of the beneficiary to follow the trust property in his hands. [P 710 C 1,2]

(d) Civil P. C. (1908), O. 22, R. 3 (1)—(Per Tyabji, J.)—"Right to sue" meaning of.

Per Tyabji, J.—The words "the right to sue" mean "the right to prosecute by law," to obtain relief by means of legal procedure. [P 709 C 2]

T. Subramania Aiyar and T. M. Krishnaswami Aiyar—for Appellant.

Govt. Pleader—for Respondents.

Tyabji, J.—The Collector of Trichinopoly is the plaintiff. The suit is instituted under Ss. 92 and 93, Civil P. C.

Defendant 1 (now deceased) was the alleged trustee and manager of the charities referred to in the plaint. Defendant 2 was alleged to be a transferee from defendant 1 of a portion of the lands appertaining to the charitable trust.

The prayers against defendant 1 were for removal of defendant 1 from the trusteeship and for accounts. There was a prayer (b) "to declare the sale to defendant 2 of the lands belonging to the charity to be invalid." This is the only relief claimed against defendant 2. There were other prayers for the appointment of a new trustee and for vesting the trust property in the trustee so appointed. The plaintiff obtained all the reliefs asked against both the defendants in the lower Court.

There were appeals against this decree by each of the defendants. But defendant 1 is now dead and her representatives not having been brought on the record, her appeal has abated and has been dismissed by us. The present appeal is by defendant 2.

It was contended before us on behalf of the plaintiff that defendant 2's appeal must also abate, inasmuch as defendant 1

who was originally a respondent to this appeal is now dead and her legal representatives have not been brought on the record as required by O. 22.

In my opinion the appeal does not abate.

The mere fact that one of the respondents is dead and that his representative is not brought on the record, will not make the appeal abate if the right survives to the appellant. In *Gopal Ganesh Abhyankar v. Ramchandra Sadashiv Sahasrabuddhe* (1), it was succinctly stated that when the sections of the Civil Procedure Code which are now replaced by O. 22 have to be applied to appeals, the words "the right to sue" must be construed as meaning "the right to prosecute by law, to obtain relief by means of legal procedure." This is not expressly stated in O. 22, R. 11, which may be styled the interpretation clause of the order. But several rules in the order become meaningless in their application to appeals unless these words are added; and the addition of these words would follow from giving to the expression "a right to sue" a meaning cognate to that which the rule expressly gives to the word "suit." *Gopal v. Ramchandra* (1) was followed in *Paramen Chetty v. Sundararaja Naick* (2).

The relief which defendant 2 claims in appeal is first, that, as he was not a necessary party to the suit, his name should be struck off from the record; and secondly, that if there was any cause of action against him it was barred by limitation; that in either case the suit should be dismissed as against him. If defendant 2 is entitled to claim this relief, he is entitled to do so in his sole right. The only person against whom this relief is claimed is the plaintiff. On the death of defendant 1, defendant 2's right to claim this was not affected. A test for deciding whether the right survives was suggested by the Government Pleader, viz., whether the appellant can succeed, and the decree can be reversed, without bringing the legal representative of the deceased party on the record. This test is satisfied in the present appeal. The question on which adjudication is sought by defendant 2 as appellant before us will not affect the deceased party: see *Renga Srinivasa Chari v.*

(1) [1902] 26 Bom. 597=4 Bom. L. R. 325.

(2) [1903] 26 Mad. 499.

Gnanaprakasa Mudaliar (3). An ingenious argument was put forward on this point, that the lower Court's decree entitled defendant 2 to sue defendant 1 for damages for breach of covenant for title if there was any such covenant that defendant 1 was consequently interested in the appeal of defendant 2. The argument does not seem to require any detailed refutation. I hold therefore that the appeal does not abate.

On the merits, several questions of law were argued before us. It is necessary to deal only with the question of limitation. I am of opinion that the claim, if any against defendant 2 was barred.

I express no opinion on the point whether the plaintiff had any cause of action against defendant 2 but will assume that in the circumstances of this case, though the suit was brought by the Collector under Ss. 92 and 93, Civil P. C., such a declaration as is here sought by prayer (b) can be asked and obtained against a person who claims to be a transferee from the trustee.

It was suggested in the first instance that the Collector's right to obtain this relief (assuming it exists) is not barred, as S. 10, Lim. Act, prevents the right to follow the trust property in defendant 2's hands from being barred by any length of time. Defendant 2 has been found to be an assignee for valuable consideration and that finding has not been attacked before us. But it was argued that it has not been found that defendant 2 is a transferee in good faith and that the mere fact of his being a transferee for consideration will not make the plea of limitation available to him unless he is also a transferee in good faith. This contention cannot be upheld. Trust property in the hands of a transferee in good faith for consideration without notice of the trust cannot be followed by the beneficiary at all: see Trusts Act, S. 64. The right to follow arises only where the transferee has not acted in good faith (1). If such a transferee has paid no consideration he is not an assign for valuable consideration within the terms of the Limitation Act, S. 10, and in his case a suit for the purpose of following trust property is not barred by any length of time. But (2) where the transferee is an assign for valuable consideration (a) if he has acted in good

faith without having notice of the trust he acquires immediate title to the property under S. 64, Trusts Act; or (b) if he has not acted in good faith, but has paid valuable consideration, he acquires good title after the lapse of the period necessary for extinguishing (under S. 28, Lim. Act) the right of the beneficiary to follow the trust property in his hands. This is in accordance with principle. Where there is a valuable consideration for the transfer the original trust property is replaced by the consideration. There is no such substitution where there is no consideration. No question is raised here as to the adequacy of the consideration.

If limitation can be pleaded then the article applicable to the suit is Art. 120. This was conceded. It was argued however by the learned Government Pleader that the time did not begin to run from the date of the execution of the sale of 26th January 1899, which is alleged to have been made in breach of trust and a declaration of the invalidity of which is sought in prayer (b) of the plaint but that it began to run only from the time when the Collector was informed of the facts entitling him to take action under S. 92, Civil P. C. It was strenuously pressed upon us that a public officer has no duty cast upon him to go round and examine public trusts and that suits which he is entitled to institute must not be allowed to be barred though he may have no knowledge of his right to sue. The article must however be construed as it is, and I find myself unable to see how the meaning suggested by the learned Government Pleader can be read into the words 'when the right to sue accrues.' The article must be construed as it is, notwithstanding that Art. 134 prescribes a period of 12 years from the date of the purchase from a trustee when possession is sought for. If the Collector can sue under S. 92, Civil P. C., for a declaration against an alleged transferee in breach of trust (on which point I express no opinion), then the suit must, it seems to me be brought within six years of the sale. Time began to run therefore on 26th January 1899, and the suit was brought more than six years thereafter. It was in my opinion barred by limitation.

The appeal will be allowed and the suit dismissed against defendant 2.

(3) [1907] 30 Mad. 67=2 M. L. T. 36.

The costs of both parties to the appeal in both Courts will be payable out of the trust funds, but the appellant will recover his whole costs first and respondent 1 will recover his costs only out of the balance. We are informed that some costs incurred in the lower Court have been recovered by the Collector from the appellant. These will have to be refunded to the appellant, and under S. 82, Civil P. C. we specify four months from this date for this being done.

Spencer, J.—I agree that the appellant can obtain the relief that he seeks in this appeal without making the legal representatives of respondent 2 parties.

In *Durga Charan Sarkar v. Jotindra Mohan Tagore* (4) the test employed for ascertaining whether a particular defendant was a necessary party to the suit was to see: (1) whether there was a right to some relief against him in respect of the matter involved in the suit; (2) whether his presence was necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. The questions involved in an appeal do not necessarily include all questions involved in the suit to which it is related. If we read "appeal" wherever the word "suit" occurs in the above passage and consider what are the reliefs asked for by the appellant in the present appeal, it will appear that he can obtain all that he wants without the presence of defendant 1 or her legal representatives.

There has been considerable divergence of opinion in the reported decisions of Courts of India as to the scope of S. 539 (corresponding to S. 92 of the Code of 1908) before the present Code became law. Now the question as to the powers of a Court proceeding under S. 539 to remove trustees held to be within the competence of the Court by *Subbayya v. Krishna* (5), *Huseni Begam v. Collector of Moradabad* (6), *Girdhari Lal v. Ram Lal* (7), *Sajedur Raja Chowdhuri v. Gour Mohun Das Baishnav* (8), and held to be without the competence of the Court by *Narasimha v. Ayyan Chetti* (9), *Rangasami Naickan v. Vara-*

dappa Naickan (10), *Budree Das Mukim v. Chooni Lal Johurry* (11), *Budh Singh Dudhuria v. Niradbaran Roy* (12), has been settled by the legislature introducing Cl. (a) in S. 92 (1). It is still a debatable question whether alienees or trespassers on trust property can be joined as parties to suit under this section. It was held in *Ghazaffar Husain v. Yawar Husain* (13) that alienees could be impleaded for the purpose of determining what properties are affected by the trust and in *Sajedur Raja Chowdhuri v. Gour Mohun Das Baishnav* (8) that they could be made parties for the purpose of recovering from them properties improperly alienated; but in *Augustine v. Medlycott* (14), *Strinivasa Ayyangar v. Strinivasa Swami* (15), *Hoseni Begam v. Collector of Moradabad* (6), *Kazi Hussan v. Sagun Balkrishna* (16), *Arunachella Chetti v. Muthu Chettiar* (17), *Budree Das Mukim v. Chooni Lal Johurry* (11) and *Budh Singh Dudhuria v. Niradbaran Roy* (12) it was decided that the section was not applicable to suits against strangers to the trust.

Now assuming, without accepting, that the Government Pleader is correct in his contention that the object of the section, as shown by the addition of Cl. 2, is to protect trusts against multifarious suits, that the words of the section are very wide, that the reliefs (a) to (g) are illustrative and do not limit the grant under (h) of such further or other relief as the nature of the case may require, the plaintiff's suit must still fail as against defendant 2 unless he can show that it is in time.

The relief asked against defendant 2 is a declaration that the sale of the trust properties to him is invalid. This suit can hardly be treated as a suit for recovery of possession of trust properties for which Art. 134 would be appropriate.

It was held in *Ottappurakkal Thazhate Soopi v. Cherichil Pallikkal Uppathumma* (18) that the right to sue for a declaration that an alienation of property

(10) [1894] 17 Mad. 462.

(11) [1906] 33 Cal. 789=10 C. W. N. 581.

(12) [1905] 2 C. L. J. 431.

(13) [1906] 28 All. 112 = (1950) A. W. N. 208 = 2 A. L. J. 591.

(14) [1892] 15 Mad. 241.

(15) [1893] 16 Mad. 31.

(16) [1900] 24 Bom. 170=1 Bom. L. R. 649.

(17) [1912] 17 I. C. 586=23 M. L. J. 347.

(18) [1910] 5 I. C. 698=33 Mad. 31.

(4) [1900] 27 Cal. 493.

(5) [1891] 14 Mad. 186=1 M. L. J. 95.

(6) [1898] 20 All. 46=(1897) A. W. N. 210.

(7) [1899] 21 All. 200=(1892) A. W. N. 32.

(8) [1897] 24 Cal. 418.

(9) [1899] 12 Mad. 157.

is invalid falls under Art. 120, Lim. Act, and accrues at the completion of the document, not when the plaintiff obtains knowledge of the alienation. The second defendant purchased under Ex. B on 26th January 1899, and the plaint is dated 7th October 1909. Art. 120 allows six years from the date of the right to sue accruing. The Sub-Judge finds that the Collector became aware of the alienation when he received the report of the Revenue Inspector, Ex. H, dated 19th February 1905; but it appears that he was aware of some trust properties having been misappropriated and alienated when he passed the proceedings Ex. 1, dated 9th June 1899. I therefore consider that the relief sought against the appellant is in any case time barred, and I agree in dismissing the suit against him with costs to be paid as directed in my learned brother's judgment.

S.N./R.K.

Appeal allowed.

A. I. R. 1914 Madras 712

SADASIVA AIYAR AND SPENCER, JJ.

Karuppana Kownden—Petitioner—Appellant.

v.

Kandasawmi Kownden and others—Respondents.

Letters Patent Appeal No. 102 of 1913, Decided on 4th February 1914, from order of Ayling, J., D/- 26th September 1913.

(a) Criminal P. C. (1898), S. 147—Likelihood of breach of peace—Order under S. 147 can be passed.

A Magistrate has jurisdiction to pass an order under S. 147 if he considers that on the date of the order there is a likelihood of the breach of the peace. [P 712 C 2]

(b) Criminal P. C. (1898), S. 147—Flimsy, not strong, fence—Magistrate may deal with it under S. 147 and need not treat it as public nuisance under Criminal P. C. (1898), S. 133.

Where what is constructed is a mere flimsy fence and not a strong one, a Magistrate has jurisdiction to deal with it under S. 147, and not to treat it as public nuisance under S. 133: 4 *Mad.* 121 and 1 *Weir* 143, *Dist.*

[P 712 C 2 ; P 713 C 1]

(c) Criminal P. C. (1898), S. 147—Order can be passed even when right to private path is claimed.

An order under S. 147 can be made even when the right claimed is a right to a private path. [P 713 C 1]

T. V. Muthukrishna Aiyer—for Appellant.

T. Natesa Aiyer—for Respondents.

Order.—The contention of the appellant (see the 3rd ground in the appeal

memorandum), is that because on 20th November 1912 an order had been passed by a Second Class Magistrate under S. 144, Criminal P. C., prohibiting the other party from going through the old pathway in the appellant's land there was no likelihood of a breach of the peace on 25th November 1912 and hence the proceedings of the Sub-Divisional Magistrate taken under S. 147 (the proceedings having been begun on 25th November 1912) were without jurisdiction.

But if the Sub-Divisional Magistrate really thought that, notwithstanding the order under S. 144, Criminal P. C. (passed within a week before his taking steps under S. 147, Criminal P. C.) the likelihood of a breach of the peace still existed, we do not think that it could be argued that the Magistrate was legally incompetent to entertain such a thought and hence was legally incompetent to take action under S. 147. No doubt we, as a Court of revision, might interfere if we considered that his apprehension was quite unreasonable, but we are not satisfied that it was so unreasonable.

The next contention is that, as the appellant had obstructed the pathway by a fence, the Magistrate had no jurisdiction under S. 147, Criminal P. C., to order the appellant "not to obstruct" the pathway which order is tantamount to a direction that the appellant shall pull down the fence. The case of *In the matter of Alfred Lindsay* (1) and the case reported as *In re Lutchmiah Maistry* (2) are relied on for the above contention. In *In the matter of Alfred Lindsay* (1) it was held that, where the obstruction to the path was a permanent one consisting of a wire fence, a trench and a wall, and the order of the Magistrate was passed ex parte without due inquiry, such an order was not a proper order to be passed under the old S. 532 (corresponding to S. 147). The learned Judges held that the proper course was to take action under the sections relating to public nuisances (Chap. 10 of the present Code). That case might be distinguished on the ground that the obstruction in this case was a flimsy fence, but whether it is so distinguishable or not we are not prepared to follow it if it was intended to decide therein that the fact, that S. 138, Criminal P. C., expressly provides, for an order by the

(1) [1882] 4 *Mad.* 121=2 *Weir* 113.(2) 1 *Weir* 143.

Magistrate directing the removal of obstruction to pathways, necessarily implies that a similar order cannot be passed in proceedings taken under S. 147, Criminal P. C. The same remark applies to the similar obiter dictum in *In re Lutchmiah Maistry* (2).

We do not think that the doubts, entertained in some cases whether S. 147, Criminal P. C., can be applied when the right of way claimed is a right to a public path and not a private path, have any substantial foundation. The terms of the section are wide enough to cover such disputes also.

Finally we might state that revision under Ss. 435 and 439, Criminal P. C., is a matter of discretion (that is this Court is not bound to interfere even if the Magistrate's order sought to be revised was an illegal order) and it would require a very strong case for a Letters Patent Appeal to succeed against the decision of a single Judge of this Court refusing to interfere in revision.

We therefore dismiss this appeal.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Madras 713

MILLER AND BAKEWELL, JJ.

Giri Appaya and others — Plaintiffs—Appellants.

v.

Giri Kristamma and others — Defendants—Respondents.

Second Appeal No. 1105 of 1912, Decided on 24th April 1914, against decree of Dist. Judge, Vizagapatam, in Appeal Suit No. 425 of 1911.

(a) **Adverse Possession** — Where possession can be referred to legal right, title cannot be acquired by prescription.

Where possession can be referred to a legal right, there is no acquisition of title by prescription. [P 713 C 2]

(b) **Adverse Possession—Heirs of deceased succeed as tenants-in-common—Mere possession of property by one cannot be adverse against other heir unless latter has knowledge of exclusion from enjoyment.**

Where the heirs of a deceased person succeed as tenants-in-common mere possession of the property by one of the heirs of the deceased cannot be adverse against the other, unless there has been exclusion of the latter from enjoyment to his knowledge. [P 713 C 2]

B. N. Sarma—for Appellants.

V. Ramesam—for Respondents.

Judgment. — The plaintiffs alleged that Latchiah, their grandfather, died eight years before their suit. This was found by the District Munsif to be false,

and his finding was not contested in the District Court. This false allegation, we think, may have led the District Munsif to make the issue of limitation depend only on the question of the length of time during which defendant 1 held possession of the property. But taking the District Judge to be right in holding that Latchiah's sons took his property as tenants-in-common, the possession of defendant 1 is referable to his title as one of the tenants-in-common and is not of itself proof that the plaintiff was excluded or that defendant 1's possession was adverse to the plaintiffs, and we have been shown no other facts; and no other facts are referred to by the District Judge, from which it could be found that the possession was adverse. In these circumstances we think it is desirable to allow further evidence on the question of the nature of defendant 1's possession and we will ask the District Judge for a fresh finding on issue 2 having regard to these observations, taking such further evidence as may be adduced.

The finding should be submitted in two months; seven days will be allowed for filing objections.

[In compliance with the order contained in the above judgment the District Judge of Vizagapatam submitted the following:]

Finding.—I am asked to submit a fresh finding on issue 2, viz. Is the suit barred by limitation? in the light of the observations contained in the judgment of the High Court, after recording such further evidence as the parties may adduce. The defendants have examined one witness, viz., defendant 2, and the plaintiffs have examined none. The evidence of defendant 2 is that on the death of Latchiah, defendant 1 got possession of the land and that since then defendants 1-4 have paid the kist due thereon to the Bobbili Maharaja, that the plaintiffs' land is close to the suit land and that defendants 1-4 never gave plaintiffs a share in the produce of the suit land.

The evidence of defendant 2 really adds nothing to the evidence on record. All it amounts to is that defendants 1-4 have been in exclusive possession of the suit land since the death of Latchiah. The High Court had already held in the judgment that such possession is not of

itself proof that plaintiffs were excluded or that the possession of defendants 1-4 was adverse to plaintiffs in the circumstances of the case. I must therefore hold that the possession of defendants 1-4 was not adverse to plaintiffs and consequently that the suit is not barred by limitation.

[This second appeal coming on for hearing this day after the return of the finding of the lower appellate Court on the issue referred to it for trial the Court delivered the following:]

Judgment. — We accept the finding and reverse the decrees of the Courts below. We make a preliminary decree for partition of the plaintiffs' one-third share in the suit lands as prayed in the plaint and direct the District Munsif to effect the partition and make such inquiry as may be necessary to determine the mesne profits due to the plaintiffs from the date of the plaint to the date of delivery or for three years from this date, and to make the final decree.

The defendants must pay the plaintiffs' costs in all Courts.

S.N./R.K.

Decree reversed.

A. I. R. 1914 Madras 714

SADASIVA AIYAR AND TYABJI, JJ.

Phatmabi—Plaintiff—Appellant.

v.

Abdulla Musa Sait—Defendant—Respondent.

Second Appeals Nos. 1470 and 1471 of 1911, Decided on 2nd September 1913, from decrees of Sub-Judge, Kistna, in Appeals Suits Nos. 227 and 300 of 1910.

Mahomedan Law—Wakf—Coincidence of three ancestors being muttawalli does not create hereditary right unless recognized by dedication.

Where a female claims the office of muttawalli of a mosque as a hereditary right on the mere ground that there have been three successive muttawallis from the family to which she belongs, that alone is not sufficient to give her a hereditary right.

There must also be evidence to show that such a hereditary right was either intended by or recognized in the original dedication: *(Case law discussed.)* [P 716 C 2]

P. Narayanamurthi—for Appellant.

V. Rama Doss—for Respondent.

Tyabji, J.—The plaintiff claims mesne profits in respect of certain wakf properties. The real questions involved in the suit and appeal were the subject of some discussion before us; but the issues settled by the District Munsif

show that the contention of the plaintiff was that she succeeded to the office of muttawalli of the wakf properties by hereditary devolution, and that she claimed possession of them on that footing as against the defendant; that the defendant, on the other hand, set up his own title as muttawalli on the strength of an appointment by a person calling himself the Qazi, and also by the members of his community. The real question therefore to be decided by us is whether the plaintiff has made out that she was the actual and rightful muttawalli of the wakf properties for three years succeeding 6th August 1905, and not whether the plaintiff has proved some circumstances which would entitle her claims to be considered, were the Court asked to appoint a muttawalli of the wakf properties. The relative qualifications of the plaintiff and the defendant to be appointed muttawalli need not be considered by us, notwithstanding that as a defence to the plaintiff's claim, the defendant claims to be entitled to hold the office of muttawallis himself as a defence to the plaintiff's claim. It may be that the defendant is not the rightful muttawalli but that would not necessarily entitle the plaintiff to succeed in her suit. The modes in which a person may come to hold the office of muttawalli seem to be laid down in Baillie's Digest of Mohamedan Law (which, it need hardly be said, is a translation merely of the Fatawa-i-Alamgiri) on p. 693 of the edition of 1865, corresponding to pp. 603 and 604 of the edition of 1875. It would seem that there are three sources from which a person may trace his right to be a muttawalli:

(1) Appointment by the wakif, that is, the original author of the wakf or by some person expressly authorized by the wakif to appoint; and in the absence of any person so authorized;

(2) appointment by the executor of the wakif and in the absence of such appointment,

(3) appointment by the Court.

If the statement given above correctly represents the text of the Fatawa-i-Alamgiri then any title to be a muttawalli must be derived from one of two main sources, namely either the wakif himself or the Court.

The authority vested in the wakif to appoint muttawalli may be exercised

either by himself directly or through another person ; he may delegate his authority in any manner provided for by him at the time when the property is dedicated by way of wakf ; in other words, at the time of the dedication, he may lay down who shall have the power of appointing muttawallis in future, and what way the power to appoint must be exercised.

The terms of the dedication, including the provisions relating to the objects of the wakf, and to the management of the property belonging to it need not be reduced to writing, so that there need not be a wakfnama containing the terms on which the dedication to wakf is made. Where however the terms of dedications are formally reduced to writing in the shape of a wakfnama, it is usual to include therein provisions relating to the appointment of successive muttawallis. Hence, it is generally assumed that there must be some such provisions laid down by the wakif even where the original dedication is not in writing, or at any rate no document containing the terms of the dedication is produced. As a consequence of these assumptions, where there has been a series of appointments of muttawallis, it is generally assumed that the appointments have been valid, which implies that such appointments have been made in accordance with the terms of the original dedication relating to the mode in which the successive appointments have to be made. Thus, from the history of previous appointments, the directions contained in the original dedication, with reference to the mode in which the successive muttawallis are to be appointed, may be inferred. This inference, it is obvious, is based on what in a great number of cases must be recognized to be mere fictions, namely that the original dedication, even though it be oral and informal, contained specific provisions relating to the mode of appointment; and secondly, that the appointments in the past have been valid and in strict accordance with the provisions so assumed to be laid down at the time of the original dedication. It must frequently happen that, at the time when the dedication is made, there are no provisions laid down with reference to the appointment of successive muttawallis. Again, it is quite in accordance with common know-

ledge that, on the death of a person holding an office of such a character as the muttawalliship of a wakf, his descendants or relations should slide into the office without anyone being concerned to question their right to do so and without any pretence on the part of the new office-holder that his succession is in accordance with the terms of the original wakfnama, or the expressed or implied desires of the wakif. On such successive acts of usurpation, it is easy to found a claim that the office is hereditary, a claim which, however difficult it may be to resist in Court, may be quite opposed to the real intentions of the wakif.

Similarly, a claim to be a muttawalli may be based on the fact that the last muttawalli purports to appoint the claimant as his successor. The recognition of a claim based on such an appointment equally proceeds on the assumption that the terms of the dedication of the wakif empowered each muttawalli to nominate his successor. The law does not directly empower the muttawalli of every wakf to appoint his successor but if in regard to any particular wakf, it is proved that the muttawallis have been in the practice of nominating their successors, it is assumed that the practice had a lawful origin and was founded on some provisions contained in the wakfnama or some oral directions given by the wakif empowering the muttawallis to nominate their successors. Provisions in the wakfnama empowering the muttawallis to nominate their successors are so usual that it would perhaps be representing the present state of authorities more nearly if it were said that the Courts assume the existence of such a provision in the dedication unless the contrary is proved.

It will be seen therefore that a claim based on the allegation, either that the office is hereditary or that the muttawalli nominated the claimant as his successor must ultimately have reference to the actual or the presumed directions of the wakif at the time when the dedication was made.

The claim made by the plaintiff in this case must, if at all, be supported on considerations which must be brought under one of the various heads to which I have alluded.

Much reliance was placed by the pleader for the respondent on the observations in the case of *Sayad Abdula Edrus v. Sayad Zain Sayad Hasan Edrus* (1), where it was said that where a custom is alleged "that the eldest son succeeds by virtue of inheritance, that custom, being opposed to the general law, must be supported by strict proof." It may, no doubt, be conceded, on the other hand, that where the object of the wakf in question is not to support a public charity, but to provide for the maintenance of a family, the Courts might be satisfied with less strict proof in order to hold that the management of the property devolves hereditarily on members of the family of the beneficiaries. To this consideration must be added the fact [which was also alluded to in *Sayad Abdula Edrus v. Sayad Zain Sayad Hasan Edrus* (1)] that the law favours the claim of the members of the wakif's family to be muttawallis and "in the Usul, it is stated that the Judge cannot appoint a stranger to the office of administrator so long as there are any of the house of the appropriator fit for the office, and if he should not find a fit person among them, and should nominate a stranger, but should, subsequently find one who is qualified, he ought to transfer the appointment to him." See Baillie's Digest (1865), pp. 593 to 594 ; (1875), p. 604.

The result of these rules of law, so far at present material, would seem to be that the question in a case like the present is not merely whether the succession to the office of mattawalli has for some time been devolving hereditarily but whether there are sufficient grounds for holding that the original dedication by way of wakf contained a provision to the effect that the office is to devolve hereditarily. I have already stated that in my opinion, what may be considered sufficient grounds in the case of a wakf of one class may not be sufficient in the case of a wakf of another class.

In the present case, there is no allegation, still less any proof, that the wakf is of a nature which would in the ordinary course be expected to be administered by a succession of hereditary muttawallis chosen from one family. Hence there is no reason to consider the evidence in this case from an attitude more

favourable to the plaintiff than is implied in the decision to which I have referred, and it is not alleged or proved that the plaintiff has been nominated to be muttawalli by the last office-bearer. Under these circumstances, the facts on which the plaintiff relies, namely that there have been from some time previous to 1874 three successive muttawallis from the family to which the plaintiff belongs seems to me to be totally insufficient for supporting the allegation that in accordance with the terms of the original dedication, the muttawalliship of the wakf ought to devolve hereditarily. I do not allude more fully to the various facts in this case, on which the respondent relies, as tending to throw doubt on the allegation that the three successive muttawallis in question rightfully succeeded to that office, for it seems that, for the purpose of the present appeal, it may be conceded that they were rightful holders of the office, and yet there is nothing to show that they proposed to succeed to the office not through some appointment or nomination, but as of right. Even if it were assumed that they purported to succeed by right of inheritance there is nothing from which a rule of succession can be deduced sufficiently precise or definite for presuming that such a rule was contained in the wakf-nama or the terms of the dedication. Unless all these facts are alleged and proved I am unable to see how the plaintiff can succeed in her claim as it has been framed. These reasons for holding that the decision appealed from ought not to be disturbed seem to me to apply with greater force when it is borne in mind that we are sitting in second appeal and that it is not easy to class some of the questions to which I have alluded as questions purely of law.

I am therefore of opinion that the appeal should be dismissed with costs.

Sadasiva Aiyar, J.—I entirely agree, and I shall only add that a claim to succeed by hereditary right to a trustee's office, or to a religious office, or to any other office should be looked upon with strong disfavour by Courts, whether the office was created by a Hindu or a Mahomedan or an adherent of any other creed. The holding of any office should depend upon necessary qualifications, and, while heredity might raise a feeble presumption of fitness to be considered by a Court

(1) [1889] 13 Bom. 555.

in arriving at a decision on the question of the successorship to the office, it should not be raised to the dignity of a principle which creates a right of succession to any office, unless the terms of the original foundation of the office constrain the Courts to treat heredity as the factor to be considered in deciding on the right to the office or unless there has been such a precise and uniform course of descent (by heredity almost irrespective of any consideration as to the personal fitness for the office) as to raise an irresistible inference as to the intention of the original creator of the office.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1914 Madras 717

WHITE, C. J., AND OLDFIELD, J.

Sowcar Bapu Saib Yussuf Saib & Co.
—Appellants.

v.

Isoct Ismail & Co.—Respondents.

Original Side Appeal No. 82 of 1912, Decided on 31st March 1914, from judgment and order of Wallis, J., D/- 17th September 1912, in Original Civil Suit No. 262 of 1910.

(a) Limitation Act (1908), Art. 85—What constitutes mutual, open and current account, stated.

In order that an account should, under Art. 85, constitute "mutual, open and current account" not only must it be mutual, open and current, but there should also be reciprocal demands between the parties. [P 718 C 2]

(b) Limitation Act (1908), Art. 85—Contract creating right to demand account of plaintiff's dealings as defendant's agent, and right in plaintiff to demand delivery of goods every month—Account was held to be mutual, open and current.

Where a contract creates a right in the defendant to demand an account of the plaintiff's dealings as the defendant's agent, and a right in the plaintiff to demand from the defendant delivery of goods to a specified amount every month, there is a mutual, open and current account within the meaning of Art. 85, Sch. 1, Lim. Act, though there are no reciprocal credits and debits: 8 I.C. 141, Dist.; *Catling v. Skoulding*, 101 E.R. 504, Foll. [P 718 C 2]

(c) Limitation Act (1908), Art. 85—(Per White, C. J.)—Party making advance to another enabling him to carry on business—Execution of pro-note by latter for advanced amount does not make it cease to be item of debit—(Per Oldfield, J., contra).

Per White, C. J.—Where one party makes an advance to another to enable him to carry on business with him, the fact that the latter executes to him a promissory note for the amount advanced does not make it cease to be an item of debit as against him in the mutual, open and current account: (Per Oldfield, J., dissenting). [P 719 C 1]

G. Krishnasami Aiyar and *P. C. Desikachariar*—for Appellants.

C. P. Ramasami Aiyar—for Respondents.

White, C. J.—In this case the plaintiff sues on the balance of an account in connexion with the sale of skins by him as the agent of the defendant. The defendant pleaded to the jurisdiction and he also pleaded limitation. At the trial before Wallis, J., he sought to show that the initials to a document on which the plaintiff relied, which purported to be the initials of the defendant, were forged.

As regards the question of jurisdiction, on the facts as found by the learned Judge—and I am not prepared to dissent from his findings of fact—I agree that this Court has jurisdiction.

As regards the suggested forgery, the Judge believed the plaintiff and disbelieved the defendant and I am certainly not prepared to differ.

As regards the question of limitation, the plaintiff's case is that the balance for which he sues is a "balance due on a mutual, open and current account where there have been reciprocal demands between the parties" within the meaning of Art. 85, Sch. 1, Lim. Act. The suit was instituted on 28th September 1910. The last item in the account on which the plaintiff sues is dated 3rd March 1908.

In July 1907 the plaintiff made an advance of Rs. 10,000 to the defendant in order to enable the defendant to carry on business with the plaintiff. This Rs. 10,000 was made up of four amounts, the last advance (Rs. 1,500) having been made on 23rd July 1907. On this date the defendant executed a promissory note in favour of the plaintiff for Rs. 10,000 with interest at 12 per cent. The promissory note was filled up from a book of forms and on the counter foil of the note there was an endorsement which was initialed by the defendant. The translation of this endorsement adopted by the learned Judge was "Having in consideration of your selling for us the dressed skins, which we shall send from this day, agreed (to pay) commission at Rs. 2-8-0 per Rs. 100, to send more, than but not less than Rs. 15,000 of goods per mensem and to make good and pay commission at Rs. 2-8-0 per Rs. 100 if the goods so fall short of Rs. 15,000 (we) have as advance from you received:

	Rs.
On 16th July 1907	... 5,000
„ 19th „	... 1,000
„ 20th „	... 2,500
„ 23rd „	... 1,500

Total ... 10,000

The parties began to do business at once. There are three accounts in the form of pattis, which were delivered to the defendant. The first entry in the first account bears date 25th July 1907. In these pattis the defendant is not credited with Rs. 10,000, the amount mentioned in the promissory note, nor with the several amounts which went to make up the Rs. 10,000. The defendant contended that even if the items of account mentioned in the pattis constituted a mutual, open and current account (the defendant contended they did not), the amount mentioned in the note represented an independent transaction, and that any claim based on the note was time-barred.

The course of business, as shown in the pattis, was for the plaintiff to sell skins sent to him by the defendant on the defendant's behalf, to credit the defendant with the sale proceeds less the plaintiff's commission of two and a half per cent., and from time to time to make payments in round sums to the defendant on account of skins supplied. So far as the pattis go, none of these payments was credited to the defendant in respect of his liability for the Rs. 10,000 under the promissory note, or in respect of the sums advanced partly prior to the execution of the note which made up the Rs. 10,000. There is however a reference in one of the pattis to this advance of Rs. 10,000.

It has been contended on behalf of the defendant that excluding the Rs. 10,000, the account does not show independent obligations on both sides and consequently that Art. 85 does not apply. The decision of this Court in *Shive Gowda v. Fernandes* (1) was relied upon. I am of opinion that the present case is distinguishable on the facts from *Shive Gowda v. Fernandez* (1). In that case, the contract, though no doubt similar to the contract in the present case, was held to be a contract under which the plaintiff financed the defendant and the defendant kept the plaintiff secured in respect

of advances made by the plaintiff on the defendant's behalf by consigning to the plaintiff goods of a value equal to the amount of the defendant's indebtedness to the plaintiff. In the present case the plaintiff as the agent for the sale of the defendant's goods was liable to account to the defendant and the defendant was liable to supply the plaintiff with goods up to a specified amount per month. In my opinion the account as shown in the pattis was an account to which the article applies.

The question remains: Is the plaintiff entitled to include in the account the Rs. 10,000? This is a question of some little difficulty. The advance of the sum of Rs. 10,000 is debited against the defendant in the plaintiff's books, and I do not think he is precluded from showing that the items in respect of the Rs. 10,000 formed part of the account on which he sues by reason of the fact that the items do not appear in the pattis sent to the defendant. The plaintiff's claim for the repayment of the Rs. 10,000 is a debit item in his account against the defendant, as it seems to me, notwithstanding that the defendant was not to be liable to repay this amount so long as the parties continued to carry on business. The learned Judge held that the parties contemplated the opening of a mutual, open and current account which should include the defendant's indebtedness in respect of the advance of Rs. 10,000. I am not prepared to differ. The article, no doubt, requires that, not only must the account be mutual, open and current, but that there should have been reciprocal demands between the parties. In the present case, under the contract we have a right in the defendant to demand an account of the plaintiff's dealings as the defendant's agent and a right in the plaintiff to demand from the defendant the delivery of skins to the value of Rs. 15,000 a month, and in the event of his failing so to deliver, the payment of the plaintiff's commission in the same way as if the defendant had in fact delivered.

Assuming that there was no obligation on the part of the defendant to repay the Rs. 10,000 (either as due under the note or as due for the advances which made up this Rs. 10,000), so long as the parties carried on business this does not

(1) [1911] S.I.C. 141=34 Mad. 513.

prevent the account, including the Rs. 10,000, from being an account to which the article applies.

Before the learned Judge the defendant asked that an account should be taken. The learned Judge directed the taking of an account in chambers, but there was no direction as to the footing on which the account was to be taken up. It is not altogether easy to say what the contract between the parties was. Reading the contract literally it might be said that the plaintiff was entitled to claim damages for non-delivery of the skins of the value of Rs. 15,000 a month without limit as to time. I do not think that the plaintiff can claim repayment of the Rs. 10,000, on the footing that the contract has come to an end, and continuing damages for non-delivery of skins on the footing that the contract still subsists. I should have been disposed to hold that the plaintiff was entitled to claim damages up to the institution of the suit, when by claiming repayment of Rs. 10,000, he intimated to the defendant that he treated the contract as at an end. The plaintiff however does not claim damages after May 1909, when he says he gave up business. It has been contended for the defendant that he is only liable in damages up to May 1908, when he ceased to supply the plaintiff with goods. Assuming that under the contract it was open to the defendant to put an end to the contract at any time, I do not think that the contract can be said to have been terminated merely by reason of the fact that the defendant ceased to supply the plaintiff with goods.

The accounts were taken and the final decree given on the footing that the defendant was liable in damages up to May 1909. The defendant did not object to the final decree as given to the plaintiff. Assuming that, notwithstanding this it is open to the defendant in the appeal before us (which is an appeal from the preliminary decree) to ask that a new account should be taken, I am not prepared to hold that the account already taken was taken on a wrong footing and that damages up to May 1909 ought not to have been given. I would dismiss this appeal with costs.

The result is the appeal is dismissed with costs.

Oldfield, J.—I agree with the learned

Chief Justice except as regards the plaintiffs' claim to recover Rs. 10,000, and therefore confine my judgment to the question of limitation connected with it. The claim is within time if it can be held that the Rs. 10,000 are part of the balance due on an open, mutual and current account within the meaning of Art. 85 Lim. Act. I assume for the present purpose that there was, as the learned Chief Justice has found an account of that nature between the parties which included the other items claimed.

Shive Gowda v. Fernandes (1) and the other cases cited do not seem to me in point, for they deal with the question whether an account is covered by the article, not whether, when the existence of an account covered by it has been established, a particular item can be treated as included in it.

It cannot I think be contended that because such an account has existed between parties every liability between them, whatever its nature and whenever it arose, can be included in it by the plaintiffs in order to secure the application of an extended period of limitation. That would entail the revival of liability for a balance, otherwise irrecoverable, in any case in which the plaintiffs succeeded by purchase of a later debt or otherwise in becoming the creditor of the defendants, and it would be inconsistent with the basis on which the favourable treatment accorded to suits on accounts is explained in *Catling v. Skoulding* (2) "that every new item and credit in an account given by one party to the other is an admission of there being some unsettled account between them, the amount of which is afterwards to be ascertained." Art. 85 deals with accounts in which there have been reciprocal demands between the parties that is, not merely accounts including items in respect of which there have been actual demands, but also those including or composed of items in respect of which according to the intention of the parties demands might actually have been made. Such an intention may no doubt ordinarily be presumed. But that presumption may be displaced by proof of the intention of the parties, expressed or implied.

The intention of the parties to this appeal with reference to the Rs. 10,000 now in dispute must, I think, be inferred

(2) 6 Term. Rep. 189=101 E.R. 504.

from Ex. B series, the pattis sent by the plaintiffs to the defendants, not from Exs. D, E, F, plaintiffs' ledgers, because the latter which contain an entry of the defendants' debt were never communicated to them, whilst the former, which contain none, were. Ex. B series in fact refer to the Rs. 10,000, not as due, but only in Ex. B-2 in the description of the agreement under which commission at 2½ per cent. was chargeable and in connexion with an entry of it. Amounts realized were credited to defendant, in these pattis and commission and advances were debited against them, a balance being struck. But when there was money to their credit, it was not applied to the reduction of the Rs. 10,000 debt nor was that debt taken into account in striking the balances.

The Rs. 10,000 were advanced by the plaintiff in the circumstances stated by the learned Chief Justice. The plaintiffs pleaded that so long as it remained unclosed (that is, outstanding) by mutual consent they were to be entitled to 2½ per cent. per month on Rs. 15,000, that being the amount up to which the defendants undertook to send skins to them for sale, whether skins to that value were actually sent or not. I understand this as meaning that either might at any time terminate the advance of the rupees 10,000, the defendants by repaying it, the plaintiffs by demanding its repayment the only way in which the skin transactions would be affected being that the defendants' liability for commission on a fixed amount and their obligation to continue the trade would cease. One material fact is then that the Rs. 10,000 were not under the agreement to be repaid by any application of the realization in the plaintiffs' hands and there was, therefore, no necessity for their inclusion in an account relating to those realizations. Another material fact is that the debt was repayable on demand. That does not follow only from its embodiment in a promissory note, Ex. 3, it rests also on the absence of any evidence that a term was fixed after which repayment

might be demanded. It is no doubt probable that the parties intended that the Rs. 10,000 should not be repaid until the trade was closed, defendants being thus enabled to buy skins with it and plaintiffs to put pressure on them to do so. But that is not proved to have been part of the contract, and I agree with the learned Judge that it cannot be read into it. Lastly the Rs. 10,000 were as Ex. 3 shows, advanced at 12 per cent interest and there is no reason for accepting the plaintiffs failure to claim that interest as justifying their assertions (otherwise unsupported) in argument that no payment of interest was ever intended. When substantial interest was accumulating, the failure to realize the principal debt at the earliest opportunity by credits acquires additional significance.

The result is that nothing in the agreement between the parties involved the inclusion of the Rs. 10,000 in the account between them and that they were due and could have been included in the accounts, Ex. B series, from the beginning; but that the plaintiffs did not include them, though owing to the running of interest it would have been advantageous to the defendants if they had done so, their own advantage on this score perhaps accounting for their omission. In these circumstances there is sufficient to rebut any presumption that the parties intended to include the Rs. 10,000 in the account between them. The plaintiffs' exclusion of it would in fact appear to have been deliberate.

I am therefore constrained to differ from the learned Chief Justice and to hold that the Rs. 10,000 are not recoverable as part of a balance covered by Art. 85. The suit in respect of them should therefore, in my opinion have been dismissed and the appeal should be allowed. I agree that the appeal should be dismissed in other respects.

By the Court.—The result is the appeal is dismissed with costs.

S.N./R.K.

Appeal dismissed.

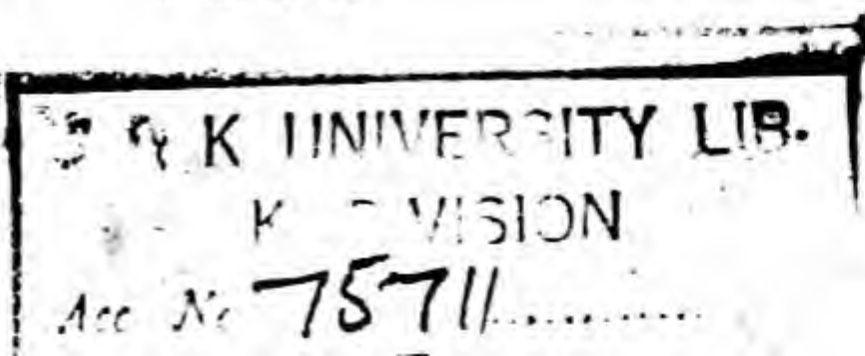
END

S. N. Das

Advocate High Court

Jammu & Kashmir

Srinagar



G. N. D.
Adv. & P. O. Secy.
Jammu & Kashmir.
Srinagar.

S. N. Dar
Adv. Court
Jammu Kashmir
Srinagar.

S. N. DAR, B. A., LL. B.
Vakil High Court & Revenue Agent,
Jammu & Kashmir.